Notes for Civil Procedure 9/5/2013

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* *Federal Rule 11* is only applicable in Federal Court
	+ It requires every paper, motion, etc; be signed, it won’t be filed if it’s not.
	+ Person who signs asserts that a number of things are true – anybody who submits it, advocates for it as well.
* Each signer is representing:
* 1. It doesn’t have a bad purpose
* 2. The legal contentions are not frivolous

3. The factual allegations have evidentiary support or will after investigation/discovery

4. The denials shave evidentiary support

* Murphy v. Cuomo
	+ Northern District of NY
	+ Does Murphy satisfy *Twiqbal*? It’s possible—he is certainly very specific with his factual allegations.
	+ Indicates that *Twombly* and *Iqbal* are only as good as Rule 11 because Murphy could have satisfied the *Twiqbal* standard with his complaint and very detailed allegations.
	+ If you are crazy and willing to lie, you can easily satisfy the Twiqbal standard.
	+ Another example of how you cannot tell from a complaint alone if the plaintiff has evidence.
	+ Green: Does the Twiqbal standard have any effect or is it useless?
		- Argument that it is useless
			* If a person does not care about R 11, he can satisfy the Twiqbal standard
			* Twiqbal is only as good as the willingness to abide by R 11
			* But if someone is willing to abide by R 11, Twiqbal is unnecessary
		- But Twiqbal is not useless – Pleaders are more scared about violating Rule 11 if they have to be specific, under Twiqbal
			* Rule 11 is easier to enforce under the Twiqbal standard because it will be clearer that the party has violated Rule 11.
		- Green: Twiqbal has its costs. Rule 11 gets directly at the problem of cases without evidentiary support. Twiqbal is trying to weed out cases on the bases of a more indirect consideration—specificity in a complaint

Since Twiqbal the numbers of dismissals have gone up, but the number of cases dismissed with prejudice have not gone up

Green suggests that SCt was acting unconstitutionally in interpreting 8(a) the way it did in Twiqbal

But even if that’s so, there is no remedy - the Supreme Court has final authority when interpreting Federal Rules of Civil Procedure, it would take an act of Congress to change it.

* + Zarc moves for summary judgment, which is granted because there was no shred of evidence that the alleged conspiracy existed
	+ Zarc also alleged that Murphy and attorney violated Rule 11(b)(3) in that their factual contentions lacked evidentiary support and they failed to withdraw their arguments even after it became clear that evidence was not materializing.
	+ Even if they subsequently found evidentiary support in the discovery process, Murphy’s lawyer would still have violated R 11 because he did not have evidentiary support at the time of the signing the complaint and filing
		- Could they have relied upon the notion that at the time of filing the factual allegations were “likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery”?
		- No – did not *specifically identify* factual allegations as lacking evidentiary support but likely to have it after discovery
		- Also – even if they had specifically identified the factual allegations, it was not reasonable to believe that there would be evidentiary support
	+ Regarding Rule 11(b)(2)- if they prefaced the invocation of the drug statute by the following:
		- “We would like the law to be extended such that a private right of action should be read into this statute.”
			* This would not satisfy Rule 11 if there wasn’t a non-frivolous argument for the drug statute’s having a private right of action.
		- Note that this provision is not used as much as (b)(3) and (b)(4) – we do not wish to punish ‘creative argumentation’
			* Also the costs of frivolous legal arguments are less than the costs of frivolous factual allegations
			* Courts can generally sniff out the frivolous legal arguments on the basis of what they know about the law
			* It is much harder to identify frivolous factual allegations
		- What happens if the there is a non-frivolous argument for the drug statute’s having a private right of action, but it is never employed by the plaintiff.
			* Was R11(b)(2) violate?
				+ It is not important that you actually mention the argument if you had it from the beginning
	+ **Hypo**: Assume that murphy has a letter from a Zarc employee stating that he heard Zarc’s CEO and Mario Cuomo agree to test the pepper spray on innocents
		- The content of the letter is, however, hearsay and so inadmissible at trial
		- Has R 11(b)(3) been satisfied?
			* Yes, it does not have to be admissible at trial. Counts as evidentiary support under Rule 11
			* They just expect something. It does not have to be much
	+ **Hypo:** Assume that 60% of those who were sprayed were subsequently acquitted of the charges against them, a number that is much higher that the normal percentage of those arrested who are acquitted.
		- This is evidence that NY officials wished to test the pepper spray on innocents. It is not, however, sufficient evidence to withstand a motion for summary judgment
		- Is there sufficient evidentiary support for the allegations against NY officials for R11(b)(3) to be satisfied?
			* Yes there is probably enough evidentiary support. The evidentiary support does not have to be sufficient to withstand a motion for summary judgment or a directed verdict – it does not have to be enough such that a reasonable jury could find in favor of the pleader
	+ The Rule 11 standard is so ambiguous (and generous to the pleader) the court is unlikely to sanction attorneys
	+ Perhaps the best thing to do is what Congress imposed for certain securities action – a mandatory hearing during the pleading stage (that is, before discovery) to see whether the plaintiff has sufficient evidentiary support to proceed –
	+ Superior to current Rule 11 approach
		- 1) because the proceeding will happen before discovery (usually R 11 proceedings are brought only after discovery)
		- and 2) because the result of failure is usually not sanctions, but simply dismissing the action (usually without prejudice)
			* courts are less inclined to sanction attorneys than to dismiss
		- 1) and 2) make the approach like Twiqbal
	+ Superior to Twiqbal because
		- The standard used for dismissal is directed at the actual problem – is there enough evidence to justify going forward into discovery
		- Twiqbal, in contrast, approaches the issue formalistically, on the basis of the words in the plaintiff’s complaint
* Who can be sanctioned under Rule 11?
	+ The primary violator is the signer and the advocator of the pleading – that is the person who makes the representation that was false
	+ This is the attorney or, if the party is litigates pro se, the party
	+ the law firm can be sanctioned for the R 11 violations of a member of the firm
	+ in addition, anyone else “responsible” for the violation can also be sanctioned – can include the client
	+ **Hypo:** Murphy told Ballan that Zarc had participated in the study to test the effect of the pepper spray on innocent people.
		- May Ballan be sanctioned under Rule 11?
			* If it was reasonable and the client is a witness, Ballan should not be sanctioned.
			* If it is unreasonable to believe the client and Ballan drafts the complaint anyway, he can be sanctioned
		- If Ballan may be sanctioned, may Murphy be sanctioned too under R.11?
			* Yes he can – responsible for the violations
	+ **Hypo:** Murphy gives Ballan a fabricated document that looks like evidence that Zarc participated in a study to test the pepper spray on innocents.
		- **May Ballan be sanctioned under Rule 11?**
			* No, he had a reasonable belief that the document was legitimate and there was a cause of action
		- **May Murphy be sanctioned under Rule 11?**
			* No, he cannot be sanctioned under Rule 11 because there was no violation of Rule 11 by Ballan – so not responsible for a violation
			* BUT courts have inherent powers to sanction outside R 11 – that would be used against Murphy
	+ **Hypo**: Murphy came up with the drug statute argument, can he be required to pay for the other side’s costs in responding?
		- A court must not impose a monetary sanction against a represented party for violating Rule 11(b)(2)
		- Idea is that lawyer is the one who should be held responsible for legal arguments
* Types of sanctions under Rule 11
	+ Sometimes the money goes to the court
	+ Usually the money goes to the other party and is just enough to satisfy the cost that the other side incurred in responding, BUT it can be more as a reason to dissuade behavior
	+ Sanctions do not have to be monetary
* Motions for Sanctions
	+ 21 day safe harbor period
		- You first serve the party with a motion for sanctions and they have 21 days to withdraw the claim, defense, contention, or denial
		- The courts might have done this to keep these issues out of the courts and make parties deal with this themselves.
		- Scalia dissented on this rule saying that it gives parties one bite out of the apple and they can say anything and retract if need be
	+ Courts can bring up R 11 sua sponte
		- “On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)”
		- In this case, there will be no 21 day safe harbor
		- The court cannot impose monetary sanctions if, before the show cause order, there was “voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.”