**Lect 6**

**RULE 11**

**Murphy v. Cuomo**

R11 – what provision was violated?

(b)(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;

- evid support can be weak – need not be admissible

- not being asked to prove case before discovery

why can’t Murphy claim that he thought they were likely to have evid support after opp. for further discovery?

1. didn’t specify identify allegation as not yet having evid support

even if he had specified it, still a problem

* Could not “certify[y] that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that it was “likely have evidentiary support after a reasonable opportunity for further investigation or discovery”
* Not reasonable to think there would be such support (objective standard)
	+ Question is not whether there is a good faith belief

Balancing mentioned before

- want to allow cases where D has the evidence of his wrongdoing in his possession to proceed to discovery

- don’t want to allow fishing expeditions

Can a plaintiff (or his lawyer) lose at summary judgment and nevertheless have satisfied R 11(b)(3) at the pleading stage?

Yes – reasonably believed that there would be evidentiary support, but it does not arise

Can a plaintiff (or his lawyer) defeat a motion for summary judgment and nevertheless have violated R 11(b)(3) at the pleading stage?

Yes – had no evid support and could not reasonably believe that it would arise in discovery, but it did anyway

Q - **There was another violation of Rule 11 mentioned**

- claim under a federal drug statute that created no private right of action

 - some federal civil laws are enforced only through federal governmental action

 - individuals cannot sue someone for violating those laws

What was the violation of Rule 11?

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

What if Murphy had specified:

 “We would like the law to be extended such that a private right of action should be read into this statute.”

* still not reasonable
* no non-frivolous argument

notice that it still a generous standard, due to worries about chilling creative advocacy

* at time Brown v. Bd. Of Educ. was argued, Plessy v Ferguson was on the books
	+ - so argument that succeeded in Brown was arguably contrary to established law
* don’t want it to be subject to R 11 sanctions

What if there was an argument for the drug statute having a private right of action, but you didn’t present it to the court until R 11 sanctions came up?

* seems OK
* question is only whether you have a nonfrivolous argument – not whether you presented it
* in that sense it is analogous to (b)(3) – the question is whether you have evidentiary support – not whether you presented it

**who can be sanctioned**

- who was the offending party under Rule 11 (who was the signer?)

-

- his lawyer, Ballan

- who could be sanctioned

 violator (person who certified improperly by signing, advocating etc)

 law firm can be held jointly responsible

* and anyone “responsible” for the violation

- can Murphy be sanctioned

 - only if responsible

* Assume 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 R. 11?
	+ Arguably yes – not reasonable
* May Murphy be sanctioned under R. 11?
	+ yes because he is responsible for Ballan’s violation

=

* Murphy gives Ballan a fabricated document that credibly looks like evidence that Zarc participated in a study to test the pepper spray on innocents.
* May Ballan be sanctioned under R. 11?
	+ Not - if he reasonably believed it was evidentiary support
* May Murphy be sanctioned under R. 11?

Doesn’t look like Murphy cannot be sanctioned because there was no violation (no improper certification) for which he was responsible

* BUT courts have inherent power to sanction independently of R 11
	+ That would arguably be the way Murphy could be sanctioned in this scenario

- say Murphy came up with the drug statute claim, can he be required to pay for the other side’s costs in responding?

-

11(c)(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:
(A) against a represented party for violating Rule 11(b)(2)…

What kind of sanctions?

Money to court

Money to defendant

Public apology

* Often is only compensation to the other side for costs dealing with frivolous action

But goal is deterrence:

11(c)(4)
A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation.

How is it brought?

11(c)(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.

Does 211-day safe harbor eviscerate R 11?

* Arguably yes because there is no disincentive to behave frivolously
* Give it a try and if other side objects you have 21 days to cure

Unless...court brings it up sua sponte

Which is possible: R 11(c)(3)

What does this provision mean…?

R 11(c)(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction…
(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

Idea is that if you voluntarily dismiss (that is drop case) or settle before court brings up R 11 sua sponte, the court cannot monetarily sanction you

* Otherwise it can

Can a R 11 motion be sanctioned under R 11

 - YES – Rule 11 motion could itself violate R 11(b)

Under federal rules you can have alternative – even inconsistent - pleading

R 8(d)(2) Alternative Statements of a Claim or Defense.
A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

But they must satisfy R 11

**How can alternative pleading satisfy R 11?**

P sues D alleging that D borrowed P’s vase and returned it cracked.
D answers alleging that D never borrowed vase, that vase was cracked when D borrowed it, and that D returned vase uncracked.
OK?

Can these allegations all satisfy R 11

* only if you have evidentiary support for each

**Now service – start with constitutional restrictions**

* Service generates notice
* To what extent do you havea right to notice?

- P sues D in Oregon state court for negligence, asking for $100,000
- P serves D by putting a copy of the summons and complaint down a sewer drain
- this is acceptable service under Oregon law
- D does not find out about the suit
- P gets a default judgment of $100,000 against D
- the Oregon court attaches property owned by D in Oregon worth $100,000 and transfers it to P

Here 14th Amendment due process was violated

(if the court had been federal, it would have been 5th Amendment)

* Do you have a due process right to *actual* notice?

**No**

**Otherwise the plaintiff might not be able to get relief in cases in which the D could not be found**