Rule 11

There to keep frivolous pleadings/actions/defenses from proceeding. Frivolous because: legally frivolous (legal arguments are unreasonable), improper motive, or insufficient evidentiary support (most important for us). Twiqbal has started to weed out that last one during the pleading phase because rule 11 wasn’t doing its job. Twiqbal sets a threshold before allowing you to proceed, “safer” because it’s not declaring the lawyer did something WRONG. But dangerously looking for the evidentiary support in the allegations. (Best solution would be a preliminary hearing).

Are frivolous actions a problem…?

Congress, American Medical Association would have you think so. But medical malpractice suits and amounts are going down (and not just because of tort reform).

Frivolous doesn’t mean it’s going to LOSE. Could be sufficient evidentiary support to go forward, so it’s hard to tell if there actually are many frivolous causes.

Why bring a frivolous case with a very low probability of success.

 - Lawyer makes money even if it loses? (contingency fee agreements are great for preventing that)

- Not a low probability of success - jury giving verdicts they shouldn’t

-Punish the D (vindictive P)

-Unmeritorious P mimics legitimate P against D and tries to get settlement

- Strike suit: brought and settled for less than the cost of litigation to the other side – both sides could know it’s frivolous but it is cheaper for the D to settle than litigating and winning

 (Can you void a settlement if it was frivolous? Not really, it’s a contract, and it’s going on outside the court)

11(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney’s name — or by a party personally if the party is unrepresented. The paper must state the signer’s address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney’s or party’s attention.

Court won’t look at anything without a signature. Be careful what you sign: you assert it’s true to the best of your knowledge after an inquiry reasonable under the circumstances…

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

objective standard - Rule 11 is a negligence standard rather than an intentional standard – does not matter that you truly believed that it wasn’t frivolous

continuing duty

Back to 11(b). Every time you are signing, filing, submitting, or later advocating you are making the Rule 11 certification - if it’s not true later and you’re advocating it you’re violating rule 11. Be careful. Usually the allegations you’re making (let’s say in a complaint) are constantly being advocated in the course of the lawsuit as you ask for relief. If the certification is suddenly not true anymore, you’re in trouble.

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

Improper purpose

(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;

Not GOOD FAITH, it’s Non-Frivolous! Book is wrong! Some courts put it this way but that’s misleading. Non- frivolous is objective.

(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; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Evidentiary support provision is important here for us. Balancing act justifying when a suit can go forward (sometimes D has the evidence of wrongdoing). Must be reasonable that evidence will arise late (may need evidence of probable evidence).

Denials: (this ain’t criminal law where you can force the gov’t to prove its case even if you know you are guilty

 Denials require evidentiary support and satisfy rule 11. This is most likely most violated by frivolous denials/answers.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37. Slide 17

Separate rule for discovery. Still can’t be as frivolous as you want. We’ll get to that.

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.

Scalia dissented to this 21-day safe harbor rule. Serve on other party before bringing to the court to give them time to cure. This was introduced to try to reduce litigation about rule 11.

Assume each allegation in a complaint was prefaced with the following statement:

 “The following allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery”

Would R 11(b)(3) be satisfied?

No. Still violates if it’s not reasonable. You’re certifying that it’s likely to have evidentiary support. You have to specifically identify that the allegation doesn’t have evidentiary support with this language, so rarely used.

can a plaintiff lose at summary judgment and nevertheless have satisfied R11(b)(3) at the pleading stage?

Reasonable to THINK you had or would get evidentiary support for example. So yes.

can a plaintiff defeat a motion for summary judgment and nevertheless have violated R11(b)(3) at the pleading stage?

You have sufficient evidentiary support because you got it in discovery even though it was not reasonable to think you would (this is less likely but can happen) from say a fishing expedition and got lucky. Yes.

did the complaint in Twombly satisfy R 11(b)(3)?

Had circumstantial evidence with the baby bell’s parallel behavior. Is this proto-evidence (that more will come up in discover)? SCOTUS didn’t think so. But it’s entirely possible that it is enough on its own to justify going forward.

what kind of evidentiary support satisfies 11(b)(3)?

Does not have to be enough (at that point) to defeat summary judgment. Doesn’t have to be enough that a reasonable juror would believe you. Doesn’t have to be admissible evidence.

(“Plausible” is a term of art SCOTUS made up in Twiqbal. Reasonable is more objective. Nobody knows what the plausibility standard is through the lens of Twiqbal)

Hays v. Sony Corp. of America (7th Cir. 1988)

Mostly about the evidentiary support provision.

two teachers make a manual for word processor

then school gave to Sony to use with Sony’s word processors – Sony basically borrowed big portions - and used for school

teachers sued under common law and statutory copyright

asked for compensatory and punitive damages

accounting of profits

injunction

dismissed for failure to state a claim

- - Sony brought motion for R 11 sanctions – granted

- standard of review?

Curious that it wasn’t in the opinion: standard of review hadn’t been decided yet at the time of that decision. Should it be deferential (abuse of review for example) or de novo (app court goes through same reasoning as trial court). SCT later decided that it’s abuse of discretion.

what part of the complaint violated 11(b)(3)?

No evidentiary support that teachers manual used anywhere else or generated (any!) “large profits”

Claim for statutory damages (% of Sony’s profits) was predicated on the idea that Sony sold the manual elsewhere but no evidence they had

Actual damages required they tried to sell it and couldn’t because people were buying Sony’s instead (but they hadn’t). Very claim for relief was all predicated on facts with no evidentiary support. Would have been EASY to just ask Sony if they had sold it. But if they had asked and Sony hadn’t responded, then they’d maybe have satisfied 11(b)(3). But D not giving you info isn’t necessarily sufficient to allege anything you want, D is often not cooperative.

what part of the complaint violated 11(b)(2)?

Claimed Sony violated common law copyright but that had been unavailable for years. Alleged wrongdoing had happened after.

Punitive: Posner couldn’t find anything on if punitive damages would be allowed under copyright law

Assume the common law copyright claim was prefaced by the following:
 “We would like the law to be changed such that a common law copyright should be available.”

Does this satisfy R 11(b)(2)? No – not reasonable – no nonfrivolous argument that the court could decide that common law copyright is now available

But there are cases where you can offer nonfrivolous arguments for change in the law - Yes Brown v. Board.

do you have to mention the non-frivolous argument for a legal contention when the contention is made?

Arguments come out later in response to R 11 motion – same for evidentiary support

sanctions?

Affirmed. $14,895 against P counsel. Generous because only a portion of Sony’s costs. Lots of sanctions are possible. Tend to be monetary, and tend to go to the other side that had to respond, compensatory (even though intention is deterrence)

11(c)(4) Nature of a Sanction. 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.

What threshold does A have for filing for 11 sanctions against B? How do you set evidentiary standard? Can be sanctioned for frivolous rule 11 filings…

Who can be sanctioned under R 11?

Hayes and MacDonald?

Hays and MacDonald (Ps) didn’t make any certification, but…

11(c)(1) In General.
If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

can be sanctioned if responsible for the violation

* Hayes told Guyon that Sony had large profits.
* May Hayes be sanctioned under R. 11?
	+ yes because responsible for Guyon’s violation
* May Guyon be sanctioned under R. 11?
	+ yes because violated through improper certification – not reasonable to think there was evidentiary support

Law firm as a whole is jointly responsible.

Pro se, then sure, you could be sanctioned for violating certification

say Hayes came up with the common law copyright argument, can he be required to pay for the other side’s costs in responding?

NO

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)…

11b2 is frivolous legal contention. Lawyers should be responsible for the legal arguments.

Hunter v. Earthgrains Co. Bakery (4th Cir. 2002)

class action by former employees against Earthgrains for violating Title VII

Earthgrains removes

denies allegations and moves for summary judgment

bound to arbitrate under their collective bargaining agreement

- - ct grants summary judgment and then sua sponte brings R 11 motion

reason

argued that it “must contain specific language ro mandate arbitration of a federal discrimination claim”

directly contrary to 4th Cir. case

Austin

- but other circuits had decided otherwise

she appealed to a SCt case Alexander whereas other circuits appealed to GilmerWould only fall under specific arbitration agreement if saying Title VII. Fourth circuit rejects (Austin decision), BUT all other circuits that addressed it said otherwise. So district court issued sanctions after they brought it up sua sponte.

can a court bring up R 11 sanctions sua sponte?

Yep.

11(c)(3)
On the Court’s Initiative. 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).

If you voluntarily withdraw it before they brought it up ct cannot sanction monetarily though.

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.

why did the district court think she violated 11(b)(2)? she said that the arbitration agreement covered Title VII claims only if they were clearly identified – this was directly contrary to 4th circuit precedent.

BUT – there were nonfrivolous arguments for her position – indeed other circuits had taken her position and the SCt later adopted it

But that does not mean she could not have violated R 11(b)(2) in arguing for her position – she could have said that 4th Cir. law was on her side – no non-frivolous argument for that