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.

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 cases.

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

-Punish the D (vindictive P)

- P is unaware that it is frivolous

-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

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 objective standard rather than a good faith 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.

What is certified:

(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 Non- frivolous is objective.

But is generous to lawyers so they can feel free to offer novel arguments for changes or reinterpretation of law, even if they are ultimately rejected

Brown v. Board.

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

No - Arguments come out later in response to R 11 motion – same for evidentiary support – the support does not have to be mentioned in the pleading./motion

* Just mentioned in response to R 11 mpotion

(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 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. S

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.

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 but you didn’t. 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/Iqbal satisfy R 11(b)(3)?

Had circumstantial evidence with the baby bell’s parallel behavior. Is this sufficient evidence to satisfy R 11 even if it is not enough to satisfy Twiqbal?

 Unclear

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 could find in your favor. Doesn’t have to be admissible evidence.

sanctions?

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.