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Civil Procedure - Rule 11 Sanctions Revisited: Townsend v. Holman Consulting Corporation

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CIVIL PROCEDURE

RULE 11 SANCTIONS REVISITED: *TOWNSEND V. HOLMAN CONSULTING CORPORATION*

I. INTRODUCTION

In *Townsend v. Holman Consulting Corp.*¹ the Ninth Circuit held that a frivolous motion, even though contained within the same document as a non-frivolous motion, would nonetheless be subject to sanctions under Federal Rule of Civil Procedure 11 (“Rule 11”).²

1. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991) (per Fletcher, J., with whom joined Goodwin, C.J., Wallace, J., Tang, J., Poole, J., Nelson, J., Noonan, J., O’Scannlain, J. and Trott, J.; Canby, J., with whom joined Pregerson, J., concurring.) The en banc court overruled a two-year old decision, *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir. 1988), which held that “Rule 11 permits sanctions only when the pleading *as a whole* is frivolous or of a harassing nature, not when one of the allegations or arguments in the pleading may be so characterized.” (Emphasis added).

2. *Townsend*, 929 F.2d at 1367. Rule 11, as amended in 1983, reads as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name whose address shall be stated. A party who is not represented by an attorney shall sign the party’s pleading, motion, or other paper and state the party’s address. Except when otherwise specifically provided by rule or statute, the pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief formed *after reasonable inquiry* it is well grounded in fact and is *warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in

In interpreting the application of Rule 11 sanctions imposed upon attorneys, the court overruled its prior holdings which imposed sanctions only upon documents which were frivolous as a whole. The court stated that earlier holdings provided an unnecessary and undesirable "safe harbor" for pleadings and other papers which included "improper or unwarranted allegations."³

This article examines the *Townsend* decision and its interpretation and application of Rule 11 sanctions. It further examines the development of Rule 11 sanctions in light of the liberal pleading standards introduced with the advent of the Federal Rules in 1938. Finally, the article reviews the criticisms and comments leveled at Rule 11, and speculates on its future and its impact on federal court litigation.

II. FACTS

Patrick Townsend and his family ("Townsend") initiated suit in state court to force his employer's Employee Benefit Plan ("The Plan") to pay for expenses incurred in excess of the \$15,000 maximum allowed under the Plan's mental health provisions when his daughter was hospitalized for psychiatric care.⁴ The Plan retained the law partnership of Wilson & Reitman ("Wilson") to handle the state court litigation; attorney Fred Wright represented Townsend.⁵ Townsend, still represented by Wright, brought a federal suit after a majority of his state court claims were dismissed.⁶ In his federal court complaint, Townsend sued a number of defendants, including Wilson.⁷

violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee (emphasis added).

3. *Townsend*, 929 F.2d at 1363.

4. *Townsend v. Holman Consulting Corp.*, 862 F.2d 318 (9th Cir. 1988) (Nos. 87-5825 and 87-6154, Nov. 8, 1988).

5. *Townsend*, 929 F.2d at 1361.

6. *Id.* at 1361. The state court claims included breach of fiduciary duty, conspiracy to defraud, breach of contract and violation of the California Insurance Code. *Townsend*, 862 F.2d 318 (9th Cir. 1988) (Nos. 87-5825 and 87-6154, Nov. 8, 1988). Demurrers to all claims except violation of the California Insurance Code were sustained. *Townsend*, 862 F.2d 318 (9th Cir. 1988) (Nos. 87-5825 and 87-6154, Nov. 8, 1988).

7. *Townsend*, 929 F.2d at 1361. The complaint alleged three counts against Wilson: (1) that Wilson counseled the Plan to adopt the provisions which Townsend challenged; (2) that Wilson had advised the Plan to withhold certain payments allegedly owed Townsend; and (3) that Wilson improperly obstructed Townsend's state court challenges. *Id.*

Wilson moved for dismissal and sanctions and filed affidavits in support of the motion from one of the Wilson & Reitman attorneys and the Plan's employer.⁸ The affidavits stated that Wilson played no role in the adoption or administration of the Plan and was unaware of the Plan's existence until retained for purposes of the *Townsend* litigation.⁹ The judge dismissed the complaint, after which Townsend filed an amended complaint,¹⁰ still naming Wilson as a defendant.¹¹

Wilson again moved for dismissal and sanctions; the district court granted both motions.¹² The court imposed \$3,000 in sanctions against attorney Wright, but Townsend was again granted leave to amend his complaint against all defendants except Wilson.¹³ Wright filed a notice of appeal,¹⁴ and then filed a motion in district court requesting reconsideration of the sanction order or, in the alternative, for a stay pending appeal.¹⁵ The district court denied Wright's motions and ordered him to pay an additional \$500 in sanctions.¹⁶ In its order imposing the additional sanction, the court held that the motion for reconsideration was frivolous since it was filed during the pendency of an appeal,¹⁷ thus stripping the district court of jurisdiction to consider the matter.¹⁸ The court further found that Wright's alternate motion was frivolous¹⁹ because it did not comply with Fed. R. Civ. P. 62(d).²⁰ Wright subsequently filed a notice

8. *Id.*

9. *Id.* Townsend did not challenge the affidavits. In fact, the court expressly held that "[i]t is undisputed that Wilson played no role in the actions of the Plan which gave rise to the claims against the other defendants." *Id.*

10. *Id.*

11. *Id.* The amended complaint charged Wilson with the second and third counts contained in Townsend's initial complaint and omitted only that portion of his charge which accused Wilson of advising the Plan to adopt the specific provisions challenged by Townsend. *Id.*

12. *Id.* In granting the motion for sanctions, the district court found that the claims against Wilson were brought "without reasonable investigation, without adequate basis in law or fact, and for purposes of harassment." *Id.*

13. *Id.*

14. The merits of the *Townsend* litigation were considered on separate appeal following the resolution of their action in district court. The court's disposition of that appeal was rendered in an unpublished decision, cited as *Townsend v. Holman Consulting Corp.*, 862 F.2d 318 (9th Cir. 1988) (Nos. 87-5825 and 87-6154, Nov. 8, 1988).

15. *Townsend*, 929 F.2d at 1361.

16. *Id.*

17. *Id.*

18. *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979) (motions filed in the district court during the pendency of a timely notice of appeal have no effect).

19. *Townsend*, 929 F.2d at 1361.

20. Fed. R. Civ. P. 62(d) provides in pertinent part:

When an appeal is taken the appellant, *by giving a supersedeas bond*, may obtain a stay The bond may be

of appeal from the second order imposing the \$500 sanctions; the Ninth Circuit consolidated both appeals.²¹

The original three-judge panel²² which considered this matter reviewed the holdings of *Golden Eagle Distrib. Corp. v. Burroughs*²³ and *Stewart v. American Int'l Oil & Gas Co.*²⁴ and reversed both sanction orders.²⁵ Holding that a pleading could be sanctioned as frivolous only if it could be found to be frivolous in its entirety, the court found the first amended complaint was not frivolous because it contained legitimate claims against some of the named parties.²⁶ Further, the court found that the post-judgment motion for a stay pending appeal, alternatively pleaded with the motion for reconsideration, likewise had some merit.²⁷

given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court. (Emphasis added).

Wright apparently failed to post the required bond upon the filing of his motion for a stay pending appeal.

21. *Townsend*, 929 F.2d at 1361.

22. Circuit Judges Pregerson, Reinhardt and Noonan. *Townsend v. Holman Consulting Corp.*, 881 F.2d 318 (9th Cir. 1988), *en banc reh'g granted*, 888 F.2d 646 (9th Cir. 1989), *vacated*, 914 F.2d 1136 (9th Cir. 1990), *amended and superseded by* 929 F.2d 1358 (9th Cir. 1991).

23. 801 F.2d 1531 (9th Cir. 1986), *dissent from denial of en banc reh'g*, 809 F.2d 584 (1987). In *Golden Eagle*, the Ninth Circuit reversed sanctions imposed by the district court against an attorney who failed to distinguish his arguments as being " 'good faith argument(s) for the extension, modification, or reversal of existing law,' rather than implying that its position was 'warranted by existing law.'" *Golden Eagle*, 801 F.2d at 1534. The attorney had further failed to cite contrary authority as required by the ABA's Model Rules of Professional Conduct; the district court cited this as an additional reason for the imposition of sanctions. *Id.*

24. 845 F.2d 196, 201 (9th Cir. 1988). In *Stewart*, sanctions were imposed after the named defendant in a securities fraud action filed a third-party complaint which failed to meet the minimum requirements for an interpleader action under Fed. R. Civ. P. 14, and, in addition, failed to state any basis in law under which relief could be granted. *Id.* at 198. The appellate court, in affirming the award of attorneys fees, found that sanctions had been properly imposed under Rule 11 both because the document was frivolous and because it was filed for an improper purpose. *Id.* "With frivolousness, the key question is whether a pleading states an arguable claim." *Id.* at 200. In discussing Rule 11 and its potential "chilling" effect, the court said, "[w]e are prepared . . . to draw the line between creative lawyering and abuse of the judicial process. Here, the process was abused." *Id.* at 201.

The defendant in this instance had challenged venue and service of the original complaint, had attempted to transfer from district court in California to district court in Oklahoma, and had filed a nearly identical original complaint in district court in Oklahoma prior to filing its third-party complaint in California. *Id.* at 199.

25. *Townsend*, 929 F.2d at 1361.

26. *Id.*, see also *Townsend v. Holman Consulting Corp.*, 881 F.2d 788 (9th Cir. 1989), *en banc reh'g granted*, 888 F.2d 646 (9th Cir. 1989), *vacated*, 914 F.2d 1136 (9th Cir. 1990), *amended and superseded by* 929 F.2d 1358 (9th Cir. 1991).

27. *Townsend*, 881 F.2d at 795.

The Ninth Circuit decided to hear the case *en banc*²⁸ to reconsider cases regarding Rule 11 sanctions for particularly frivolous pleadings.²⁹

III. BACKGROUND

Until the adoption of the amended rule in 1983, Rule 11 remained unchanged since the promulgation of the Federal Rules of Civil Procedure in 1938³⁰ and was rarely invoked³¹ to

28. *Townsend v. Holman Consulting Corp.*, 888 F.2d 646 (9th Cir. 1989) (ordering rehearing en banc).

29. *Townsend*, 929 F.2d at 1361.

30. Fed. R. Civ. P. 11 originally read as follows:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he had 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. If a pleading is not signed, or is signed with intent to defeat the purpose of this rule it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Fed. R. Civ. P. 11 (1938) (reprinted in 1 F.R.D. lxxv (1940). See *supra* note 2 for complete text of amended Rule 11.

31. Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L. J. 1313, 1315 n. 18 (1986). "Renewed use of the Rule in recent years suggests that . . . prevalent ideas about the propriety of sanctions against lawyers . . . caused it to be ignored for so long." *Id.* at 1316, citing D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

At the time of Risinger's article, some seven years before the Rule was revised, he found only 19 reported cases in which genuine adversary Rule 11 motions took place. *Id.* at 35. Of these, violations were found in only nine instances. *Id.* at 36. In two other cases the court *sua sponte* found Rule 11 violations. *Id.* In four instances, the courts disposed of the matters on other grounds; disciplinary actions were initiated against counsel in two cases and alternative sanctions were imposed upon attorneys in three other cases. *Id.* at 36-37. One instance of striking the pleading as sham and false was upheld on appeal. *Id.* (citations omitted).

One possible explanation for the rarity with which Rule 11 sanctions were invoked prior to its revision could be the perception that "not only [did] the Rule fail to delineate different sanctions for the various types of violations, but those sanctions that [were] expressly provided [were] both confused and confusing." *Id.* at 14.

impose sanctions upon attorneys who were thought to be abusing the litigation process.³² The original rule, which was modeled upon the old Equity Rule 24,³³ was intended to deter frivolous or groundless motions and pleadings.³⁴ It provided two separate and distinct provisions for the imposition of sanctions:³⁵ the striking of a pleading “as a sham and false”³⁶ and a broad provision calling for appropriate disciplinary action for attorneys who wilfully violate the Rule’s provisions.³⁷ The rule did not expressly provide for the award of attorneys fees and costs as sanctions³⁸ rather, the only penalty it specified was that a pleading found to be false could be stricken and litigation could proceed as if it had never been served.³⁹ Thus, although the Rule was designed to discourage attorney dishonesty, its enforcement provisions were aimed at clients, not attorneys.⁴⁰

32. Marsha Grim, Comment, *The Horizon of Rule 11: Toward a Guided Approach to Sanctions*, 26 HOUS. L. REV. 535, 542 (1989) “A . . . flaw in the original Rule 11 was the discretionary nature of sanctions. Even if a judge . . . interpreted a lawyer’s conduct as indicative of bad faith, the rule permitted the judge discretion to overlook the infraction.” *Id.* See also Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 303 (1986). “Litigants rarely sought sanctions under former Rule 11 because proving subjective bad faith was too great a burden, and even if the burden was satisfied, sanctions were discretionary.” *Id.* at 313-14.

33. Michael J. Mazurczak, Note, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 MARQ. L. REV. 91, 94 (1988). Equity Rule 24, adopted in 1842, attempted to eliminate matters in pleadings which were “scandalous or impertinent.” Responding to Justice Story’s treatise on equity pleadings, Equity Rule 24 required the attorney’s signature on pleadings as an “affirmation” of “good grounds” to support the substance of the pleading, not just its form. For a thorough discussion on the history and evolution of Rule 11, see Risinger, *supra* note 31. Equity Rule 24 read:

Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

D. Michael Risinger, 61 MINN. L. REV. 1, 13, n.26 (1976).

34. Robert L. Carter, *The History and Purpose of Rule 11, Remarks of Robert L. Carter*, 54 FORDHAM L. REV. 4, 4 (1985). Although the purpose of deterring unwarranted litigation was behind the 1938 version of Rule 11, “[t]he new 1983 amendment was designed to put teeth into the old rule.” *Id.* It proposed to make the deterrence more effective by (1) making explicit the standard to be met by the attorney or party signing the motion, pleading or other paper; and (2) “granting to the trial judges clear authority to impose sanctions for violations of the Rule.” *Id.* at 7.

35. Mazurczak, *supra* note 33, at 95.

36. Fed. R. Civ. P. 11 (1938); see also 72 MARQ. L. REV. at 95.

37. Fed. R. Civ. P. 11 (1938).

38. Grim, 26 HOUS. L. REV. at 541.

39. Fed. R. Civ. P. 11 (1938); see also 72 MARQ. L. REV. at 95.

40. Nelken, 74 GEO. L. J. at 1315. The client was thus penalized for the attorney’s misconduct. Only rarely did the penalty extend to disciplinary action being taken against the attorney. *Id.*

The broad wording of the Rule, as originally promulgated, created widespread confusion among federal courts.⁴¹ The courts were reluctant to strike pleadings⁴² because it harmed the parties and did not punish their attorneys.⁴³ The courts were similarly reluctant to impose disciplinary actions on attorneys and attorneys themselves were reluctant to invoke the rule through motions.⁴⁴ Thus the courts, when faced with improper pleadings or pleadings introduced for an improper purpose, eventually settled upon a subjective standard of good faith as a means of gauging when the imposition of sanctions would be appropriate.⁴⁵ This led to what is commonly referred to as the “pure heart but empty head” defense.⁴⁶ This defense allowed attorneys, who honestly believed the truth of the facts or law contained in pleadings, immunity from the imposition of sanctions, despite the existence of contradictory case law or

41. Advisory Committee Notes to Amendments of Federal Rule of Civil Procedure 11, reprinted at 97 F.R.D. 165, 198. “There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions.” *Id.* (citing R. Rodes, K. Ripple and C. Mooney, *Sanctions Imposable For Violations of the Federal Rules of Civil Procedure*, (64-65) (1981)).

42. Mazurczak, 72 MARQ. L. REV. at 96. One study conducted revealed only twenty-three instances in which an attempt was made to strike a pleading as “sham” under Rule 11 between 1938 and 1976. *Id.* at 96, n.29.

43. Nelken, 74 GEO. L. J. at 1315 n. 15. “Although the language of the rule was directed primarily at lawyer honesty, the provision striking as sham historically required both a determination of the dishonesty of the pleader and the falsity of the pleading” (citing Risinger, *Honesty in Pleading and its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976) (thorough history of Rule 11 and its application prior to the 1983 amendments)). See also Grim, 26 HOUS. L. REV. 535, 541 (1989). The original rule was aimed at deterring dishonest lawyers; courts were reluctant to severely penalize innocent parties whose only fault lie in their choice of legal representation.

44. Cooter & Gell v. Hartmarx Corp., ____ U.S. ____, 110 S. Ct. 2447, 2454 (1990) (“Courts . . . reluctant to impose disciplinary measures on attorneys”); see also Michael E. Solimine, *Rule 11 Litigation in the Sixth Circuit*, 21 U. TOL. L. REV. 425 (1990) “[M]ost attorneys probably thought it unseemly to accuse another attorney of willfully violating the Rule.” *Id.* at 429.

45. Carter, 54 FORDHAM L. REV. at 6. “Eventually, the courts came to settle on the subjective and rather nebulous standard of good faith.” *Id.* See also Westmoreland v. C.B.S., 770 F.2d 1168, 1177 (D.C. Cir. 1985) (“pre-1983 amendment Rule 11 . . . required a showing of subjective bad faith”).

46. Arthur W. Andrews, *Rule 11 and the Nondeductibility of Monetary Sanctions Imposed Upon Attorneys*, 32 ARIZ. L. REV. 279, 284 (1990) (“‘pure heart but empty head’ no longer a defense”); see also Zuniga v. United Can Co., 812 F.2d 443, 452 (9th Cir. 1987). “[C]ounsel can no longer avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head.” *Id.* In re Ronco, 105 F.R.D. 493, 496 (1985), vacated and remanded on other grounds, 838 F.2d 212 (7th Cir. 1988). Courts were reluctant “to impose sanctions against the ‘empty head, pure heart’ lawyer.” *Id.*

contrary evidence.⁴⁷ Because of the highly subjective standard imposed by the courts in deciding whether attorneys could properly be sanctioned, the rule remained rarely invoked prior to the 1983 amendments.⁴⁸ Those amendments sprang from the perception that increasing abuses of the litigation process were overwhelming an already heavily burdened court system.⁴⁹

The new Rule, as part of an integrated package of amended rules,⁵⁰ attempted to clarify the sanctions process⁵¹ and

47. Robin J. Collins, Note, *Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity*, 76 KY. L.J. 891, 895 (1987-88); see also 32 AZ. L. REV. at 284 (old subjective standard has been replaced by an objective standard; it is expected that the Rule will be triggered more often using the new standard).

48. See Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, supra note 31 and accompanying text.

49. Nelken, 74 GEO. L. J. at 1316. "1983 amendments were adopted after more than a decade of mounting concern about misuse and overuse of the litigation process, and an increasing federal caseload," citing Address by Chief Justice Warren Burger, *Agenda for 2000 A.D. - Need for Systematic Anticipation*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976) (conference commemorating Roscoe Pound's address to American Bar Association 1906 Annual Meeting), reprinted in 70 F.R.D. 79, 91 (1976). In his remarks, Burger said, "Correct or not, there is also a widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense." *Address by Chief Justice Warren Burger*, 70 F.R.D. at 91.

50. Nelken, 74 GEO. L. J. at 1317. "The 1983 Amendments to Rules 7, 11, 16 and 26 have been described as an 'integrated package' designed to make lawyers more accountable for their actions, increase judicial management of cases, improve the discovery process and encourage use of sanctions where appropriate." *Id.*

Rule 7 sets forth the forms of pleadings allowed and the standards for motions. By expressly incorporating Rule 11 by reference, it ensures that the standards set forth in Rule 11 shall apply to all pleadings, motions, and papers filed in the court. Fed. R. Civ. P. 11; Advisory Committee Notes, 97 F.R.D. at 191.

Rule 16 is concerned with pretrial conferences, scheduling, and management of cases in the district courts. The revisions drafted in 1983 were made to "insure closer and more effective judicial scheduling, management and control of litigation as a means of avoiding unnecessary delay and expense." Advisory Committee Notes, 97 F.R.D. at 190.

Rule 26, which governs discovery, was amended to "protect against excessive discovery and evasion of reasonable discovery demands." *Id.* In addition Rule 26, like Rule 11, imposes upon each party or attorney an affirmative duty to "make a reasonable inquiry and to certify that certain standards have been met." *Id.* Like Rule 11, violation of the discovery rule can result in the imposition of sanctions. Fed. R. Civ. P. 26(g).

The Advisory Committee promoted the integrated features of the proposed amendments to the rules during their promulgation. "These proposals are designed to reduce discovery abuse and the abuse of process, to reform the procedures for the conduct of pretrial conferences and for the scheduling and management of litigation by district judges . . .". Advisory Committee Notes, 97 F.R.D. at 189.

51. *Cooter & Gell v. Hartmarx Corp.*, _____ U.S. _____, 110 S. Ct. 2447, 2454 (1990). "To ameliorate these problems ['of confusion regarding when a pleading should be struck, what standard of conduct would make an attorney liable to sanctions, and what sanctions were available'] the rule was amended in 1983."

expand the role of trial judges as case managers⁵² by both encompassing all “pleadings, motions, or other papers”⁵³ and by attempting to create an objective standard to determine whether sanctions would be appropriate.⁵⁴ The new Rule, like its predecessor,⁵⁵ offers two grounds as the basis for the imposition of sanctions.⁵⁶ First, the Rule requires that the pleading, motion or other paper be “well grounded in fact and . . . law”⁵⁷ and that the attorney conduct a “reasonable inquiry” prior to signing the paper.⁵⁸ Second, the attorney or party signing the paper must not serve that pleading, motion or other paper for some improper purpose.⁵⁹ A violation of either or both of these rules may serve as the basis for sanctions.⁶⁰ The amended Rule further attempted to clarify the sanctions issue by articulating that appropriate sanctions may include reasonable expenses incurred because of the inappropriate filings, including attorneys’ fees.⁶¹ In addition, in light of increased litigation and crowded dockets, the new Rule imposes the same standards upon *pro se* parties as well as attorneys.⁶² The Rule

52. Advisory Committee Notes, 97 F.R.D. at 190; *see also* 72 Marq. L. Rev. at 100.

53. Fed. R. Civ. P. 11.

54. The new version of the Rule replaced the former subjective “bad faith” standard with an objective standard of “reasonableness under the circumstances.” Advisory Committee Note, 97 F.R.D. at 198. The Committee went on to say, “[t]his standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.” *Id.* at 198-99. *See also infra*, note 58.

55. Fed. R. Civ. P. 11 (1938).

56. Mazurczak, 72 MARQ. L. REV. at 100.

57. Fed. R. Civ. P. 11 (1983). “The new language stresses the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule.” 28 U.S.C.A., Fed. R. Civ. P.’s, Rules 1 to 11, 1991 Supplementary Pamphlet at 441 (West 1991).

58. 1991 Supp. Pamphlet at 441. [W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar. *Id.* at 441-42.

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

60. Mazurczak, 72 MARQ. L. REV. at 100.

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

62. *Id.* The Rule as amended applies to anyone who signs a pleading, motion, or other paper. “Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations.” Advisory Committee Notes at 442.

Recent decisions by the Ninth Circuit strictly interpret the language of the Rule. It applies only to signers, and sanctions for violations of the Rule may not be imposed against lead counsel whose names appear on the pleadings but who did not actually sign the document for which sanctions have been sought. *Giebelhaus v. Spindrift Yachts*, 938 F.2d 962 (9th Cir. 1991).

expressly provides for sanctions to be imposed upon represented parties, their counsel, or both, if warranted.⁶³

Amended Rule 11 has spawned vocal and widespread criticism⁶⁴ and has been the subject of diverse constructions and applications in the various circuits.⁶⁵ Because of this, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("the Committee") issued a call, in August, 1990, for comments on Rule 11 and related rules from members of the bar, the bench, and the general public, to study the "operation and effect"⁶⁶ of Rule 11.⁶⁷

But see Higbee v. Sullivan, 935 F.2d 1038, 1041 (9th Cir. 1991) "This court also has an 'obligation where the petitioner is pro se . . . to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.'" (quoting Bretz v. Kelman, 773 F.2d 1026, 1027 (9th Cir. 1984).

63. Mazurczak, 72 MARQ. L. REV. at 99-100. "A violation of any one of the affirmative duties embodied in Rule 11 will result in *mandatory* sanctions on the attorney, the client or both." (Emphasis in original.)

64. See, e.g., Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 309-310 (1990) "Rule 11 . . . generates wasteful 'satellite' litigation; chills both creativity and opposition to the status quo; and poisons the relationship between opposing counsel." See also Gregory P. Joseph, *The Trouble With Rule 11: Uncertain Standards and Mandatory Sanctions*, 73 A.B.A. J. 87, 89 (Aug, 1987). "Practicing under Rule 11 is like negotiating a minefield. You know there will be an explosion if you step on a mine. The trouble is, you don't know where the mines are." *Id.* Paul D. Freeman, *The Rule 11 Ruckus*, CAL. LAW., May 1991, at 17 "Disagreements about rule 11 . . . are becoming increasingly more strident." *Id.*

65. See, e.g., Lyle v. Charlie Brown Flying Club, Inc., 112 F.R.D. 392, 398 (N.D. Ga. 1986), *rev'd and remanded without opinion*, 822 F.2d 64 (11th Cir. 1987). Rule 11 imposes a duty of candor that requires counsel to cite contrary authority. See also *Eastway Construction Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986) "Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless." *Id.* at 575.

66. Call for Comments: Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 335, 338 (August, 1990)

67. *Id.* at 344. In its call for comments, the Committee said:

There is now a substantial and growing body of experience with these amendments. Over 1000 reported federal decisions have applied or construed the 1983 amendments. There have been several empirical studies of the operation of the rules, and others are now in progress. There is a substantial literature on the subject, as revealed in the bibliography appended to this Call. In addition, the Civil Rules Committee has received a wide variety of comments, some commending the 1983 amendments, others critical of them, and some proposing further revisions of the amended rules. In light of all the comment, the Committee has resolved to invite written public comments on the operation of the sanctions rules.

It is within the context of an evolving Rule 11 that the Ninth Circuit approached its analysis of Rule 11 sanctions in the *Townsend v. Holman Consulting Corp.* appeal.⁶⁸

IV. THE COURT'S ANALYSIS

A. THE MAJORITY

1. *The Interpretation of Rule 11 in the Ninth Circuit*

In interpreting the plain language of Rule 11⁶⁹ previous Ninth Circuit cases have mandated that "sanctions . . . be imposed on the signer of a paper if either a) the paper is filed for an improper purpose, or b) the paper is 'frivolous.'"⁷⁰ This interpretation of the Rule thus provides two distinct and *independent* grounds for which sanctions can be imposed.⁷¹

However, when both grounds are cited as a justification for the imposition of sanctions, the appellate court, in reviewing the sanctions award, must consider both grounds on appeal, because whether the paper violated one or both parts of the two-prong test affects both the type and amount of the sanctions.⁷²

68. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991).

69. In analyzing Rule 11, the Supreme Court has stated that the language must be interpreted "according to its plain meaning." *Cooter & Gell*, 110 S.Ct. 2447, 2453 (1990). If the language of the rule is unambiguous, "judicial inquiry is complete." *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989).

70. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991), citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986). The [Rule] is addressed to two separate problems, . . . frivolous filings and . . . misusing judicial procedures as a weapon for . . . harassment. *Zaldivar* at 830.

Prior to the 1983 amendments, the only undue purpose which could be sanctioned under the rule was "unjust delay." Fed. R. Civ. P. 11 (1938) (*supra*, note 30). The amended version of the Rule encompasses all types of improper purpose. Since the amended Rule was adopted, courts have imposed sanctions for many types of undue purpose.

"The word 'frivolous' does not appear anywhere in the text of the Rule; rather, it is a shorthand that this court has used to denote a filing that is both baseless and made without a reasonable and competent inquiry." *Townsend*, 929 F.2d at 1362.

Black's Law Dictionary defines frivolous as "[o]f little weight or importance. A pleading is 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent." BLACK'S LAW DICTIONARY 601 (5th ed. 1979).

71. *Westlake North Property Owners v. Thousand Oaks*, 915 F.2d 1301, 1305 (9th Cir. 1990) (Emphasis added); see *Zaldivar*, 780 F.2d 823, 830-32.

72. *Townsend*, 929 F.2d at 1362. "[W]hether the paper is only frivolous or both harassing and frivolous could affect the nature of the sanction or the amount of damages awarded as a result of the sanction." *Id.*

The standard to be used when considering sanctions under either ground is an objective one.⁷³ In determining whether Rule 11 sanctions are appropriate, the court must consider all circumstances.⁷⁴ If the court finds that Rule 11 has been violated, it has discretionary power to fashion a sanction which is appropriate to the violation.⁷⁵

2. *The Standard of Appellate Review*

Appellate courts give great deference to district courts in reviewing the appropriateness of sanctions under Rule 11.⁷⁶ The Supreme Court has charged appellate courts with applying an abuse-of-discretion standard when reviewing a district court's determinations regarding Rule 11 sanctions.⁷⁷ "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."⁷⁸

3. *Rule 11 Jurisprudence - The Frivolous Prong*

Prior to the *Townsend* decision, the Ninth Circuit held, in *Golden Eagle Distrib. Corp. v. Burroughs Corp.*⁷⁹ that sanctions

73. *Id.* at 1362. See also *Zaldivar*, 780 F.2d at 829. Sanctions should not be imposed if a sound basis, in both law and fact, can be objectively determined at the time of the pleading, motion, or other paper. *Golden Eagle*, 801 F.2d 1531, 1538; see also *Zaldivar*, 780 F.2d at 829. "The new text represents an abandonment of the subjective focus of the Rule in favor of an objective one." *Id.*

In making such a determination, the district court must consider three types of issues. *Cooter & Gell*, 110 S. Ct. at 2457. First, the court must consider questions of fact, including the nature and scope of the inquiry conducted by the signer prior to filing the document and the factual basis of the document. *Id.* Next, the court must consider questions of law in determining whether existing law warrants the position adopted in the document or whether the signer has made a valid good faith argument that the law should be changed. *Id.* Finally, the court must evaluate the credibility of the signer. *Id.*

74. *Cooter & Gell*, _____ U.S. _____, 110 S. Ct. at 2457.

75. *Id.* at 2457.

76. *Cooter & Gell*, 110 S. Ct. at 2459. "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." *Id.* The court went on to say, "[d]eference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." *Id.* at 2460.

77. *Id.* at 2460-61.

78. *Id.* at 2461.

79. 801 F.2d 1531 (9th Cir. 1986), *dissent from denial of en banc hearing*, 809 F.2d 584 (1987).

could not be imposed “if a particular argument or ground for relief” were found to be frivolous in an otherwise non-frivolous motion.⁸⁰ The Ninth Circuit followed the reasoning of *Golden Eagle* in *Murphy v. Business Cards Tomorrow, Inc.*⁸¹ and several subsequent decisions⁸² and held that sanctions likewise could not be imposed if a particular claim or allegation were frivolous unless the document as a whole was frivolous.⁸³ Further, these cases held that a signer cannot be sanctioned under Rule 11 if the signer relies on a non-supportable legal theory in support of a claim if a supportable theory exists as well.⁸⁴ Given the holding of *Murphy*, the three-judge panel which originally considered the *Townsend* matter⁸⁵ did not impose sanctions because the initial complaint contained meritorious, as well as frivolous, causes of action.⁸⁶

The court granted *en banc* reconsideration of that decision in order to reassess the position of the Ninth Circuit on the appropriateness of Rule 11 sanctions for the filing of frivolous

80. The court went on to say:

Nothing in the language of the Rule or the Advisory Committee Notes supports the view that the Rule empowers the district court to impose sanctions on lawyers simply because a particular argument or *ground for relief* contained in a non-frivolous motion is found by the district court to be unjustified.

Golden Eagle, 801 F.2d at 1540-41 (emphasis added).

The court in *Golden Eagle* was considering the appropriateness of sanctions in two areas: “a lawyer’s failure to identify a legal argument as an argument for the ‘extension’ of existing law rather than as one for the application of existing law;” and “a lawyer’s failure to cite contrary authority in violation of the American Bar Association ethical rules.” *Townsend*, 929 F.2d at 1363. The *Golden Eagle* court held that Rule 11 is not automatically violated by a violation of the American Bar Association’s ethical rules. *Golden Eagle*, 801 F.2d at 1542.

81. 854 F.2d 1202, 1205 (9th Cir. 1988), *overruled by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991).

82. *Community Electric Serv. of Los Angeles, Inc. v. National Electrical Contractors Ass’n, Inc.*, 869 F.2d 1235, 1242-43 (9th Cir. 1989), *cert. denied*, 493 U.S. 891 (1990), *overruled by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991); *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir. 1989), *overruled by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991).

83. *Murphy*, 854 F.2d at 1205. *Murphy* adopted the *Golden Eagle* interpretation without “discussion or elaboration.” *Townsend*, 929 F.2d at 1363.

84. *Townsend*, 929 F.2d at 1363.

85. The *en banc* court published an earlier decision, reported as *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990). The *Townsend* decision cited at 929 F.2d 1358 vacates the decision reported by the original three-judge panel (reported at 881 F.2d 788) and amends and supersedes the earlier *en banc* decision (reported at 914 F.2d 1136).

86. *Townsend*, 929 F.2d at 1363.

claims and allegations.⁸⁷ In examining its past holdings and reevaluating them in light of *Cooter & Gell v. Hartmarx Corp.* the Ninth Circuit reasoned that it would be senseless to allow a party with one non-frivolous claim to “pile on frivolous allegations without a significant fear of sanctions.”⁸⁸ This reasoning resulted in the overruling of *Murphy*.⁸⁹

4. *The Townsend Complaint*

The Ninth Circuit has held that complaints must be found to be frivolous before they can be found to have been filed for an improper purpose.⁹⁰ An overlapping standard for each of the independent grounds of inquiry is applied to complaints to ensure recourse within the judicial system for all legitimate causes of action.⁹¹ This is true even if the motives of the individual in seeking that recourse are less than pure.⁹²

In *Townsend*, the district court imposed sanctions upon Wright because it found the complaint naming Wilson⁹³ both to be frivolous and to have been filed for an improper purpose.⁹⁴

Attorney Wright was sanctioned only after, given an opportunity to amend his complaint in light of uncontroverted evidence to the contrary, he continued to knowingly pursue false claims.⁹⁵ The Ninth Circuit found that, in light of these

87. *Id.* The *en banc* court first examined the recent pronouncement in *Cooter & Gell v. Hartmarx Corp.* that the purpose of Rule 11 sanctions is to improve the efficiency of the district courts. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2454 (1990). “It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rules Enabling Act’s grant of authority, streamline the administration and procedure of the federal courts.” *Id.*

88. *Townsend*, 929 F.2d 1358, 1363 (citing *Murphy*, 854 F.2d 1202).

89. *Townsend*, 929 F.2d at 1363.

90. *Id.* at 1362.

91. *Id.*

92. *Id.* See also *Westlake North Property Owners v. Thousand Oaks*, 915 F.2d 1301 (9th Cir. 1990). “In the context of a complaint, pleadings must first be determined to be frivolous before they can be determined to have been filed for an improper purpose.” *Id.* at 1305; *Zaldivar v. Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986). The grounds for imposing sanctions may apparently be considered independently when referring to arguments contained within pleadings, motions, or papers other than complaints. *Westlake North Property Owners*, 915 F.2d at 1305. This is to ensure that plaintiffs’ rights to bring legitimate complaints before the purview of the courts is not quelled by the threat of the improper purpose doctrine. *Townsend*, 929 F.2d at 1362. Indeed, the point of the adversarial system is to encourage the amicable resolution of disputes through the courts, not to discourage it. *Id.*

93. See *supra*, notes 7-12 and accompanying text for a discussion of the offending complaint in the underlying *Townsend* litigation.

94. *Townsend*, 929 F.2d at 1362.

95. *Id.* at 1361.

circumstances, the district court's findings that Wright failed to make a "reasonable inquiry"⁹⁶ prior to filing the first amended complaint were justified and did not constitute an abuse of discretion.⁹⁷ The Circuit further affirmed the district court's objective findings that Wright's naming of Wilson as a defendant was essentially vindictive.⁹⁸ The Ninth Circuit thus affirmed the \$3,000 sanctions awards levied against Wright for his filing of the first amended complaint, even though the complaint also contained non-frivolous claims.⁹⁹

5. *Potential Chilling Effects of Rule 11*

Cooter & Gell recognized that concerns about Rule 11's potential chilling effect on vigorous advocacy and its possible creation of satellite litigation could not be taken lightly.¹⁰⁰ The Ninth Circuit examined these concerns and stated that whatever must be done to quell such concerns, "construct[ing] an artificial 'safe harbor' for frivolous allegations or claims" is not the best way to answer them.¹⁰¹ Rather, the court said, these concerns could be addressed by an objective standard of inquiry that would take into account the unique circumstances of each case.¹⁰² Thus, echoing *Cooter & Gell*, the Ninth Circuit noted that an attorney with only a very limited time in which to file a complaint or risk expiration of the statute of limitations would be afforded more latitude than an attorney with ample time for investigation.¹⁰³

96. *Townsend*, 929 F.2d at 1362. The court stated, "Plaintiff did not make the 'reasonable inquiry' required by Rule 11 and it is found that suing the lawyers was not in good faith and for the purposes of harassment." *Id.*

97. *Id.* at 1366.

98. *Id.*

99. *Id.* at 1367. In its reasoning, the majority added a caveat to district court judges that "thorough explanations of their reasons for imposing sanctions" are essential; appellate courts accord "great deference" to the "broad fact-finding powers" of district courts. *Id.* at 1366.

100. *Id.* "Rule 11 must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy." *Townsend*, 929 F.2d at 1363 (quoting *Cooter & Gell*, ___ U.S. at ___, 110 S. Ct. at 2454).

101. *Townsend*, 929 F.2d at 1364.

102. *Id.* at 1364; *Cooter & Gell*, ___ U.S. at ___, 110 S. Ct. at 2459; *Golden Eagle*, 801 F.2d at 1536. "The new Rule was designed to create an affirmative duty of investigation both as to law and as to fact before motions are filed. It creates an objective standard of 'reasonableness under the circumstances.'" *Id.* (citing Advisory Committee Note, 97 F.R.D. 165, 198 (1983)).

103. *Townsend*, 929 F.2d at 1364. The Ninth Circuit found support for this approach when it looked to the Second Circuit's decision in *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986). In determining the propriety of sanctions *Oliveri* held that a court must evaluate what information and knowledge the signer "reasonably" could have attained at the time of filing. *Oliveri*, 803 F.2d at 1278-79.

The Ninth Circuit also stated that the liberal pleading standards imposed by the federal rules, which allow unlimited joinder of unrelated claims and parties in a single pleading,¹⁰⁴ require some sort of deterrent effect not contained in its prior rulings embodied in *Murphy*.¹⁰⁵ To determine the appropriateness of a multi-party and multi-claim pleading, the court stated that an objective standard of 'reasonableness under the circumstances' must apply.¹⁰⁶

Because an assessment of whether or not a document is frivolous involves intense scrutiny by the district court,¹⁰⁷ the Ninth Circuit held that such scrutiny "both adequately addresses the concern that Rule 11 will be used to chill vigorous advocacy and . . . serves the Rule's central purpose of deterring abusive litigation tactics."¹⁰⁸ In response to concerns that excessive satellite litigation would abound as Rule 11 sanctions were appealed, the Ninth Circuit deferred to the Advisory Committee on Civil Rules of the Judicial Conference, which is studying the matter.¹⁰⁹

104. See generally Fed. R. Civ. P. 18(a): "A party asserting a claim to relief as an original claim . . . may join . . . as many claims . . . as the party has against an opposing party." See also Fed. R. Civ. P. 20(a): "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants . . ."

105. *Townsend*, 929 F.2d at 1363.

106. *Id.* at 1364.

If the relevant facts are in control of the opposing party, more leeway must be given to make allegations in the early stages of litigation that may not be well-grounded. In a similar vein, leeway should be given to make allegations relating to an opposing party's knowledge, purpose or intent. If the case is one in which a prudent lawyer, to be safe, would name a number of defendants . . . imprecision at the outset of litigation should be tolerated. The same should be true if the case is one where, knowing a given set of predicate facts, a prudent lawyer would assert more than one legal theory as the basis for relief and would make alternative or inconsistent allegations . . . to support the different theories.

Id.

107. "The issues involved in determining whether an attorney has violated Rule 11 . . . involve fact-intensive close calls." *Cooter & Gell*, 110 S. Ct. at 2460 (citations and internal quotations omitted).

108. *Townsend*, 929 F.2d at 1364.

109. *Townsend*, 929 F.2d at 1365. See also *Call for Comments*, 131 F.R.D. 335. Although the results of the study have not yet been published, the Call for Comments suggests that Rule 11 may well be revised in the near future.

6. *The Post-Judgment Motion*

The Ninth Circuit next turned its attention to the district court's disposition of Wright's motion to reconsider the attorneys fee award, pursuant to Fed. R. Civ. P. 60(b),¹¹⁰ and Wright's alternative motion for a stay pending appeal.¹¹¹ The motions were filed after Wright had filed a notice of appeal from the order imposing sanctions.¹¹² The Ninth Circuit affirmed the district court's disposition of the first motion.¹¹³ The filing of the notice of appeal divested the district court of all jurisdiction to consider any modification or reversal of its previous sanction order and thus the motion was frivolous.¹¹⁴

The Ninth Circuit differed with the district court, however, regarding the disposition of Wright's alternative motion for a stay pending appeal.¹¹⁵ The district court appeared to deny Wright's alternative motion based on Fed. R. Civ. P. 62(d),¹¹⁶ which allows an appellant to obtain a stay pending appeal by giving a supersedeas bond.¹¹⁷ The stay becomes effective when the bond is approved by the court.¹¹⁸ The Ninth Circuit reasoned that past cases "have held that the district court may permit security other than a bond."¹¹⁹ Therefore, the court reasoned, Wright's alternative motion for a stay had a valid and supportable argument, and he should not be

110. Fed. R. Civ. P. 60(b) provides, in pertinent part:

On motion . . . the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud, . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . . ; or (6) any other reason justifying relief from the operation of the judgment

....

111. *Townsend*, 929 F.2d at 1366.

112. *Id.*

113. *Id.* at 1367.

114. *Townsend*, 929 F.2d at 1366-67. See *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976). (District court has no jurisdiction to enter order under Rule 60(b) during pending appeal.)

115. *Id.* at 1367.

116. *Supra*, note 20.

117. Fed. R. Civ. P. 62(d).

118. *Id.*

119. *Townsend*, 929 F.2d at 1367; see *International Telemeter v. Hamlin Int'l Co.*, 754 F.2d 1492 (9th Cir. 1985). "Although . . . a supersedeas bond may be used to stay execution of a judgment pending appeal, the court has discretion to allow other forms of judgment guarantee." *Id.* at 1495.

penalized merely because he failed to cite relevant case law.¹²⁰ The Ninth Circuit accordingly ruled that the district court's use of the alternative motion for a stay as an additional basis for imposing sanctions was an abuse of discretion.¹²¹ The second sanctions award was thus remanded to the district court for a redetermination of the propriety of the amount of sanctions awarded based on Wright's frivolous motion.¹²²

B. THE CONCURRENCE

The concurring opinion by Judge Canby¹²³ agrees with the treatment by the majority opinion of the sanctions imposed by the district court.¹²⁴ However, the concurrence argues that *Murphy* and its subsequent line of cases should not have been overruled.¹²⁵

Rather than overrule *Murphy*, the concurrence would prefer a narrow holding that leaves in place a 'bright-line' rule: "Rule 11 sanctions for the filing of a complaint containing frivolous allegations or claims are inappropriate unless *all* of the claims against any particular defendant are frivolous."¹²⁶ The concurrence reasoned, "[t]he unfounded claims have forced a party to come into court when that party never should have been involved at all."¹²⁷ The concurrence added that parties against whom well-founded claims have been pleaded must come into court to defend those claims and that the defense of any frivolous claims is typically "done by motion, without great hardship."¹²⁸

Addressing the concern that such a ruling will "chill vigorous advocacy and [tend] to lead to a great deal of satellite litigation,"¹²⁹ the concurrence said, "[these potential consequences constitute] a lesser evil than is likely to arise under the majority's approach."¹³⁰

120. *Townsend*, 929 F.2d at 1367; *Golden Eagle*, 801 F.2d at 1541.

121. *Townsend*, 929 F.2d at 1367.

122. *Id.* at 1367.

123. Judge Pregerson joined in Judge Canby's concurrence.

124. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1367 (9th Cir. 1991) (Canby, J., concurring opinion, n.1).

125. *Id.* at 1367-68.

126. *Id.* at 1368. (Emphasis in original).

127. *Id.* at 1367.

128. *Id.* at 1368.

129. *Id.* at 1368 (citing *Golden Eagle*, 801 F.2d at 1540 n.4, 1541).

130. *Townsend*, 929 F.2d at 1368.

The concurrence concluded that such a rule “would protect defendants against frivolous lawsuits, without snaring the vigorous advocate who is viewed as having added one too many claims to a good lawsuit. And it would establish an easily-administered boundary within which to confine burgeoning satellite litigation over sanctions.”¹³¹

V. CRITIQUE

While the majority opinion seems concerned with the potential adverse effects of its ruling in *Townsend*, its concerns are not adequately addressed by the result it has fashioned. Although the ruling upholding the district court’s award of sanctions against Wright seems proper under the circumstances, the potential for chilling creative advocacy, particularly in the area of civil rights is too great, and the proposed safeguards too ineffective, for the majority’s holding to make good law.

A number of practitioners and academics alike have voiced concerns over the potential chilling effects of Rule 11 since the 1983 adoption of Rule 11.¹³² In a symposium on the amended Rule conducted in 1985,¹³³ at least one critic noted that a chill to creative advocacy would destroy growth and development, both in the law, and, eventually, in society.¹³⁴ Even those who

131. *Id.* at 1368-69.

132. *See, e.g.*, *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986). “Another major concern was that the broadened availability of sanctions might lead to protracted and expensive satellite litigation over the appropriateness of sanctions.” *Id.* at 1537. The Advisory Committee on Civil Rules acknowledged and addressed such concerns when it recommended the adoption of the Rule: “The Rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer’s conduct by inquiring what was reasonable to believe *at the time* the pleading, motion, or other paper was submitted.” Advisory Committee Notes, 97 F.R.D. at 199. (Emphasis added).

133. *Symposium: Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?* Association of the Bar of the City of New York, April 24, 1985.

134. Melvyn L. Weiss, *A Practitioner’s Commentary on the Actual Use of Amended Rule 11*, 54 *FORDHAM L. REV.* 23.

Lawyers are trained to be creative and to be aggressive for their clients. It is that process that brings about meaningful changes in the law, changes which society requires in order to move forward. Unfortunately, I believe Rule 11 may stifle this evolutionary process. If lawyers become inhibited because of concern over the imposition of sanctions, we all become losers.

Id. at 23.

generally favor the Rule warn of its potential to impede access to litigation.¹³⁵ These concerns even touched the Advisory Committee that authored the amended version of the Rule.¹³⁶

Given these concerns, the majority opinion in *Townsend* fails to fully recognize the potential danger of its holding. By failing to delineate a clear standard with which pleadings, motions and other papers filed in the district court can be determined to be frivolous, the Ninth Circuit is stifling creativity in the courtroom. Lawyers simply cannot tell, under the standard outlined in *Townsend*, when they may be subject to sanctions under the Rule.

In fairness, the majority attempts to delineate a clear standard by requiring that each claim, argument, or motion be meritorious or risk being the subject of sanctions. The clear standard fails, however, given the liberal pleading and broad access to discovery provided by the Federal Rules. It is often only through discovery that a litigant may discover that an individual claim is without merit;¹³⁷ yet it seems safe to presume that, as a general rule, a 'reasonable inquiry' will generally reveal proper defendants.¹³⁸

The concurrence acknowledges the legitimate concerns of the majority that a more liberal standard will result in a "safe harbor" for litigants to pile frivolous claims on top of more

135. Charles Sifton, *Response to a Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 *FORDHAM L. REV.* 28 (1985) "[W]e want to keep our courts open to people with grievances, even those who are mistaken on who is at fault." *Id.* at 30.

136. Advisory Committee Notes, 97 *F.R.D.* at 199 (*supra*, note 132).

137. Debate does exist over this issue. While some advocates believe that pleadings should carry substantial weight in setting issues for trial, others believe that pleadings should merely provide a guideline for the conduct of pretrial discovery, pretrial conferences, and judicious use of the summary judgment tool. JACK H. FRIEDENTHAL, ET AL., *CIVIL PROCEDURE SEC. 5.3* at 240 (1985).

138. Safeguards exist to protect defendants under this standard, as well. Amendments to pleadings adding additional defendants made after the expiration of the statute of limitations are generally disfavored, although the courts are very accommodating in allowing amendments containing minor corrections, such as spelling changes, to be filed even after the expiration of the statute of limitations, on a theory that such amendments "relate back" to the date the original pleading was filed. JACK H. FRIEDENTHAL, ET AL., *CIVIL PROCEDURE SEC. 5.27* at 306 (1985).

Beware, however, to the defendant who through artful pleading attempts to cause the plaintiff to avoid discovery of the proper defendant until the statute of limitations has passed. In those instances, courts will generally take a dim view of the defendants' actions and allow the amended complaint to relate back to the date of original filing, even after the statute of limitations has expired. *See, e.g., Zielinski v. Philadelphia Piers, Inc.*, 139 *F. Supp.* 408 (E.D.Pa. 1956).

worthy claims. Yet the concurrence believes that the evils of providing a potential "safe harbor" are far outweighed by the potential such a rule has for chilling creative advocacy.¹³⁹ Pleadings may be easily modified following discovery to remove those claims which do not have merit or for which evidence or support cannot be found;¹⁴⁰ as adversaries will generally have to defend against all the meritorious claims, defending against claims which may prove to be frivolous should not prove to be sufficiently difficult to warrant sanctions against the pleader.¹⁴¹

The majority opinion gives an illusion of protection to potential litigants by imposing higher standards for sanctioning complaints as opposed to other documents.¹⁴² In order for a complaint to be the subject of Rule 11 sanctions, at least one of its claims must be found to be both frivolous and to have been filed for an improper purpose.¹⁴³ Rather than opening the door to discovery so that the merit of some claims can be explored and, if necessary, withdrawn prior to trial, the *Townsend* opinion seems to set a standard close to that of the old equity court writ system, where all the evidence had to be in place before the writ could even be filed.¹⁴⁴

139. *Townsend*, 929 F.2d at 1368.

140. *See, e.g.*, Fed. R. Civ. P. 15(a):

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served Otherwise, a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

see also Fed. R. Civ. P. 15(b):

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby"

141. Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground in Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990). "Recently, the Supreme Court has eased the burden on the moving party in a summary judgment motion The increased availability of summary judgment should make it easier to dispose of meritless cases before trial and . . . should work in tandem with Rule 11 to reduce the burden such cases impose on the court system. *Id.* at 390 (*citing* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

142. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991).

143. *Id.* *See also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 837 (9th Cir. 1986).

144. FRIEDENTHAL, *supra* note 137, and Sec. 5.1 at 237. "Pleadings in courts of equity operated differently. There the pleadings consisted of the detailed statements of the parties, which in large part constituted both their contentions and the evidence upon which the case was decided." *Id.*

By comparison, the concurrence addresses the concerns of Rule 11's critics that vigorous and harsh interpretations of the Rule will stifle creative developments of the law. The concurrence suggests a compromise approach to the concerns of those critics while still addressing the purpose underlying Rule 11: streamlining district court litigation.¹⁴⁵ By leaving *Murphy* intact, the concurring opinion would provide all litigants with an adequate guideline with which to measure the potential for the imposition of sanctions, while at the same time would ensure broad access to the judicial forum.

The evils of chilling creative advocacy are ominous and widespread, particularly in the area of Civil Rights litigation, which seems particularly vulnerable to Rule 11 sanctions.¹⁴⁶ Recent studies suggest that defendants seek sanctions against plaintiffs far more often than plaintiffs seek sanctions against defendants,¹⁴⁷ and that sanctions are sought against civil rights plaintiffs in disproportionately high numbers.¹⁴⁸ One recent study found that while civil rights cases comprised only 7.65% of the civil docket, Rule 11 sanctions in civil rights cases accounted for 22.4% of the total number of Rule 11 sanctions considered.¹⁴⁹

Given the skew of these numbers, it is too soon to tell if they reflect an alarming and increasing use of Rule 11 as a weapon

145. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990).

146. Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89). "[I]mplementation [of Amended Rule 11] has disadvantaged civil rights litigants and attorneys during the initial half-decade of experience [with the Rule]. *Id.* at 487.

147. *Id.* at 490. See also Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). Professor Vairo found that:

In the 57.8% of the cases in which a Rule 11 violation is found, the plaintiff is the violator in 46.9% of the cases, while the defendant is the violator in only 10.9% of the cases. This great difference, however, is explained by the fact that the plaintiff is the *target* of the sanctions motion in 536 of the 680 cases (78.8%) in which sanctions were requested. Because plaintiffs are the target so much more frequently, it is not surprising that they would be the Rule 11 violators much more frequently in absolute numbers."

What is most frightening, perhaps, is that "plaintiffs are sanctioned at a higher rate than defendants" (59.6% of the time while defendants are sanctioned only 51.4% of the cases in which they are the target).

Id. (Emphasis in original).

148. Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327 (1986).

149. *Id.*

in civil rights litigation (as well as other types of litigation) or simply that frivolous civil rights claims are filed in disproportionately high numbers.¹⁵⁰ At least one commentator suggests that while the numbers themselves are not conclusive, they perhaps indicate that higher or different standards should be applied when considering sanctions in civil rights cases.¹⁵¹ This approach seems reasonable. A standard which would allow sanctions in civil rights cases to be imposed only by the court *sua sponte*, and not upon motion, and only in instances where the actions of a litigant are particularly egregious, should be sufficient to both prevent undue congestion in the courts and to still allow access to judicial resolution of civil rights matters. For it is imperative that creative advocacy, particularly in the area of civil rights, be encouraged. To illustrate my point, I quote from *Eastway Construction*:

Sometimes there are reasons to sue even when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education*.¹⁵²

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150. *Vairo*, 118 F.R.D. at 201.

151. *Id.*

152. *Eastway Construction v. City of New York*, 637 F.Supp. 558, 575 (E.D.N.Y. 1986).

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