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Frivolous Sanction Law in Wisconsin

by Janine P. Geske & William C. Gleisner III

On March 31, 2005, in Supreme Court Order (SCO) 03-06, the Wisconsin Supreme Court repealed the frivolous action rules contained in Wis. Stat. sections 802.05 and 814.025, effective July 1, 2005, and replaced them with new Rule 802.05.[1] This article briefly discusses the history of the frivolous action law in Wisconsin and the dissenting justices' objections to the new rule.[2] The article also discusses several important considerations relative to seeking and resisting sanctions enforcement actions under new Rule 802.05, including: 1) whether the frivolous action rule should be applied retroactively to actions already pending as of July 1, 2005; and 2) what sanctions can and should be imposed for violating the rule.

The History of Frivolous Action Law in Wisconsin

The frivolous action rules in former Wis. Stat. sections 802.05 and 814.025 were adopted in 1978. Under former section 802.05, a trial court had discretion to impose a sanction on finding that a party had filed a petition, motion, or other paper in bad faith, but that section provided little guidance as to the nature or extent of any possible sanction. Under former section 814.025, once a court made a finding of frivolousness under that section, the section required the court to award the party that moved for such a finding its costs and reasonable attorney fees. As a consequence, the Wisconsin Supreme Court concluded in *Jandrt v. Jerome Foods Inc.*[3] that it had to uphold an award of $716,081 in costs and attorney fees against a

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WILLIAM C. GLEISNER III, MARQUETTE 1974, AN ATTORNEY PRACTICING IN MILWAUKEE, COAUTHORED AN AMICUS CURIAE BRIEF SUBMITTED TO THE WISCONSIN SUPREME COURT ON BEHALF OF THE WISCONSIN ACADEMY OF TRIAL LAWYERS IN *JANDRT V. JEROME FOODS INC.*, WHICH WAS THE LANDMARK DECISION UNDER PREVIOUS SECTIONS 802.05 AND 814.025.

GESKE AND GLEISNER COAUTHORED "THE EFFECT OF *JANDRT* ON SATELLITE LITIGATION" IN THE MAY 2000 *WISCONSIN LAWYER* IN WHICH THEY SUGGESTED THAT WISCONSIN OUGHT TO CONSIDER ADOPTING FEDERAL RULE OF CIVIL PROCEDURE 11, AS AMENDED IN 1993.

Milwaukee law firm pursuant to section 814.025. In evaluating the reasonableness of an award of alleged costs and attorney fees, the *Jandrt* court further instructed trial courts that awards under section 814.025 could "fully compensate" an aggrieved party for its alleged harm because of a finding of frivolousness under the section. As the supreme court stated in *Jandrt*:

"Because the circuit court properly found that the Previant firm frivolously continued the underlying action, and we affirm, *sanctions in this case are mandatory*. See Wis. Stat. § 814.025(1) ... The Previant firm argues that while the sanction is mandatory, the amount awarded is not reasonable and is contrary to the purpose of Wis. Stat. § 814.025 which it believes is to deter litigants and attorneys from commencing or continuing frivolous actions and to punish those who do so. While we agree with the Previant firm that deterrence and punishment are the underlying purposes of § 814.025, ... we are less convinced that compensation is not an appropriate consideration. Certainly, deterrence and punishment of an attorney or party who maintains a frivolous action is not inconsistent with *fully compensating an opposing party for the costs and attorneys fees required to defend a frivolous action*."[4]

The *Jandrt* decision and the court's interpretation of former sections 802.05 and 814.025 generated controversy and calls for reform, which eventually led to the filing of petitions to and the holding of hearings before the Wisconsin Supreme Court. The criticisms centered on the fact that Wisconsin's frivolous action rules had not changed since their adoption in the mid 1970s although Rule 11 of the Federal Rules of Civil Procedure (FRCP 11), on which the Wisconsin rules were modeled, had undergone changes, the most significant of which occurred in 1993.

The Wisconsin Judicial Council first sought reform in a petition filed in October 2000, asking that the supreme court consider several proposed changes to the frivolous action rules, including the introduction of a 14-day "safe harbor" provision. Under that provision, no action or sanction could be imposed on a party charged with the frivolous filing of a court document, if the party withdrew the filing within 14 days of service of a motion on the party so charged.

While the Judicial Council did not call for adopting FRCP 11, as amended in 1993, a 2001 filing of the Wisconsin Academy of Trial Lawyers in support of the Judicial Council's petition did call for its adoption. Following a November 2001 hearing on the Judicial Council's petition, the supreme court in SCO 99-07 denied the Judicial Council's petition on Jan. 29, 2002.

On July 8, 2003, joint petition 03-06 was filed with the supreme court seeking repeal of sections 802.05 and 814.025 and asking the court to adopt FRCP 11, as amended in 1993, by means of enacting amended Rule 802.05. This petition had wide support from both the plaintiffs' bar and the defense bar, as evidenced by coauthorship of the petition by the Wisconsin chapter of the American Board of Trial Advocates, the Civil Trial Counsel of Wisconsin, the State Bar Litigation Section, and the Wisconsin Academy of Trial Lawyers. The petition asserted that when first adopted, sections 802.05 and 814.025 were patterned after the original FRCP 11, and that from time to time Wisconsin appellate courts have looked to federal court decisions in interpreting and applying these statutes. The joint petition noted that in *Jandrt*, the Wisconsin Supreme Court did in fact look to federal decisions interpreting FRCP 11 (albeit decisions interpreting FRCP 11 before its amendment in 1993). The joint petition also noted that there had been no substantive changes in the Wisconsin rules governing frivolous filings since they were adopted in 1978, but that FRCP 11 had undergone substantial revision, most notably in 1993. As stated in the Federal Advisory Committee Notes to FRCP 11, the 1993 amendments "were intended to remedy problems that have arisen in the interpretation and application of the 1983 revisions of the rule."

Joint petition 03-06 further argued that there were no unique aspects of Wisconsin practice that would justify departing from the approach taken by the federal courts under FRCP 11, as amended in 1993. The petition also argued that by adopting FRCP 11, as amended in 1993, Wisconsin attorneys and courts would be able to look to applicable decisions of federal courts since 1993 for guidance in interpreting and applying the mandates of FRCP 11 in Wisconsin.

Joint petition 03-06 recommended adopting the 1993 Federal Advisory Committee Notes to FRCP 11 to guide the bench and bar in arriving at reasonable interpretations of a Wisconsin version of FRCP 11. Those notes specified in part that "[FRCP 11, as amended in 1993] does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate

in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations."

Supreme Court Order 03-06

On Dec. 19, 2003, the supreme court held a public hearing on joint petition 03-06 and, at a subsequent public administrative conference, tentatively voted to approve the petition. The petition was again the subject of a supreme court public administrative conference on Nov. 16, 2004. On March 31, 2005, the court filed SCO 03-06.[5] It is very important to note that the supreme court adopted SCO 03-06 on a 4-3 vote.

Supreme Court Order 03-06 repeals Wis. Stat. sections 802.05 and 814.025, effective July 1, 2005, and adopts in their place a Wisconsin version of FRCP 11, as amended in 1993.

Supreme Court Order 03-06 consists of a main order entered by four justices and strenuous dissents by three justices. The dissents to the order are considered below, but first it is important that all practitioners understand how SCO 03-06 will affect their practices. A discussion of the substance of new Rule 802.05 follows.

The Safe Harbor

New Rule 802.05 provides a "safe harbor" of 21 days for litigants, within which time counsel accused of frivolous conduct can escape sanctions if he or she withdraws an offending document. In other words, a party who wishes to seek sanctions may immediately serve a motion for sanctions on an offending party. *However, that motion cannot be filed or presented to the court for 21 days after service.* Any party who seeks to file the motion or otherwise present the motion to the court before the expiration of 21 days (such as by seeking a hearing date during that time) risks being found in direct violation of Rule 802.05(3)(a).

Judicial Discretion in Awarding Sanctions for Frivolous Conduct

Gone from new Rule 802.05 is the suggestion that an aggrieved party can automatically use frivolous action rules to secure full compensation for the actual costs and attorney fees incurred due to allegedly frivolous conduct. New Rule 802.05 provides circuit courts with wide discretion in determining that an act is frivolous and ample guidance and suggestions as to how circuit courts can narrowly tailor sanctions to correct specific misconduct. New Rule 802.05(3)(b) provides in part that: "[a] sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. ... The sanction may consist of, or include, directives of a nonmonetary nature, 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 some or all of the reasonable attorneys' fees and other expenses. ..."

The flexibility in determining the scope of possible remedial responses is reinforced by the SCO 03-06 majority's comments to new Rule 802.05: "Factors that the court may consider in imposing sanctions include the following: (1) Whether the alleged frivolous conduct was part of a pattern of activity or an isolated event; (2) Whether the conduct infected the entire pleading or was an isolated claim or defense; and (3) Whether the attorney or party has engaged in similar conduct in other litigation. Sanctions authorized under s. 802.05(3) may include an award of actual fees and costs to the party victimized by the frivolous conduct."

Judicial flexibility in responding to allegedly frivolous conduct is also emphatically underscored in the 1993 Federal Notes that are set forth in SCO 03-06:

"The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. ... The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations."

Limited Permission to Make Factual Contentions that Lack Evidentiary Support

New Rule 802.05 specifically allows parties and their counsel ample opportunity to conduct discovery to shore up

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allegations and defenses in complaints, answers, and counterclaims. Rule 802.05(2) specifies:

"(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

"(d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

It appears clear that plaintiffs' counsel in particular will want to be very careful to denote with specificity the paragraphs in a complaint that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Defense counsel will want to be equally as careful to denote with specificity those paragraphs in an answer that are "reasonably" based on a lack of information or belief.

Regarding a certification that evidentiary support for an allegation in a complaint or a paragraph in an answer will require further discovery, it is important to note just what the 1993 Federal Notes anticipated in this regard. According to the 1993 Notes:

"[I]f evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. [The Rule] does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses. The certification is that there is (or likely will be) 'evidentiary support' for the allegation, not that the party will prevail with respect to its contention regarding the fact. ... Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true."[6]

In the case of plaintiffs' attorneys, the "certification" referred to in the above quote from the 1993 Advisory Notes is to the requirement in Rule 802.05(2) that when allegations in a complaint are specifically identified as lacking evidentiary support, the plaintiffs' attorney must in effect "certify" that such evidentiary support will likely be established after a reasonable opportunity has been afforded for further investigation or discovery. In the case of defense attorneys, the "certification" is to the requirement in Rule 802.05(2)(d) that when denials of factual contentions are specifically identified as not warranted by the facts, the defense attorney must in effect "certify" that they are nonetheless "reasonably based on a lack of information and belief."

Importance of 1993 Federal Advisory Committee Notes

It is important to emphasize that while the majority in SCO 03-06 did reproduce the 1993 Federal Advisory Committee Notes to FRCP 11, it supplied them "for information purposes only." The SCO 03-06 majority nevertheless emphatically signaled that the 1993 Advisory Committee Notes should be given a good deal of respect:

"FRCP 11 has ... undergone substantial revision, most recently in 1993. The court now adopts the current version of FRCP 11, pursuant [to] its authority under s. 751.12 to regulate pleading, practice and procedure in judicial proceedings. The court's intent is to simplify and harmonize the rules of pleading, practice and procedure, and to promote the speedy determination of litigation on the merits. In adopting the 1993 amendments to FRCP 11, the court does not intend to deprive a party wronged by frivolous conduct of a right to recovery; rather, the court intends to provide Wisconsin courts with additional tools to deal with frivolous filing of pleadings and other papers. *Judges and practitioners will now be able to look to applicable decisions of federal courts since 1993 for guidance in the interpretation and*

application of the mandates of FRCP 11 in Wisconsin."[7]

Because they have been reproduced as part of new Rule 802.05, the 1993 Federal Advisory Committee Notes bear careful study, despite their inclusion for "information purposes only." One of the points made in the 1993 Notes relates to the scope of the subject matter covered by Wisconsin's version of FRCP 11 in Rule 802.05:

"The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit."

Most important, the 1993 Notes make it crystal clear that the 1993 version of FRCP 11 was intended to remove much of the incentive for satellite litigation, that is, ancillary litigation undertaken to punish an attorney responsible for a frivolous filing for the purpose of obtaining full compensation for the harm done by frivolous conduct. Consider the following language from the 1993 Notes in light of the facts of the *Jandrt* decision:

"*Under unusual circumstances* ... deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. ... Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services *directly and unavoidably caused by the violation ... The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses.* Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources." [Emphasis added.]

The Dissents to Order 03-06

Three justices dissented from the entry of SCO 03-06. Justice Prosser wrote a dissent in which he underscored his objection to the action of the majority in repealing section 814.025 on the grounds that the supreme court had thus "obliterated a validly enacted statute" of the Wisconsin Legislature and eliminated the substantive rights of victims of frivolous conduct.

Justice Roggensack penned a much longer dissent, in which Justices Prosser and Wilcox joined, setting forth in detail the reasons for her belief that the majority was in error when it entered SCO 03-06. Justice Roggensack wrote: "I dissent for two reasons. First, this court does not have the power under either a statute or the constitution to repeal § 814.025, because it is a substantive law that was duly created by acts of the legislature. Second, while this court has the power to revise § 802.05 in certain instances because it began as a Supreme Court rule, the revisions made by the majority are contrary to the interests of the public."[8]

In Justice Roggensack's view Rule 814.025 granted to victims of frivolous lawsuits substantive relief, which could not be disposed of by a supreme court order. Justice Roggensack maintained that to allow the supreme court to repeal section 814.025 amounts to a violation of the separation of powers under the Constitution. Justice Roggensack also stated that new Rule 802.05 "does much to protect lawyers, but it does so at the expense of protecting the public from the expenses incurred in needless litigation."

Justice Roggensack acknowledged the "valid concerns" about access to justice raised by the dissent in *Jandrt*, but argued that those concerns could have been addressed without the wholesale revision of Rule 802.05 or the repeal of Rule 814.025.

Practical Problems: Should New Rule 802.05 Apply Retroactively?

Practical challenges will arise from attempting to enforce this rule in Wisconsin circuit courts. The first issue is whether new Rule 802.05 should apply retroactively to cases that were pending when it became effective on July 1, 2005. Research strongly suggests that it should apply retroactively.[9]

First, the supreme court did not repeal either section 802.05 or section 814.025 and then replace them with a rule located outside of the Code of Civil Procedure. New Rule 802.05 was made part of the Code of Civil Procedure. Furthermore, the recreation is based on and clearly derived from Rule 11 of the Federal Rules of Civil Procedure. As the SCO 03-06 majority stated:

"The court now adopts the current version of FRCP 11, pursuant to its authority under s. 751.12 to regulate *pleading, practice and procedure* in judicial proceedings. The court's intent is to simplify and harmonize the rules of pleading, practice and procedure, and to promote the speedy determination of litigation on the merits."[10]

New Rule 802.05 is not a statute enacted by the legislature. Therefore, the rule's retroactivity is not subject to the holdings in *Martin v. Richards, Neiman v. American National Property,* or *Matthies v. Positive Safety Manufacturing,*[11] all of which address in some measure the issue of whether the legislature intended a statute to apply retroactively. It is interesting to note, however, that even retroactive legislation enjoys a presumption of constitutionality.[12]

New Rule 802.05 was developed by the supreme court following lengthy public hearings and after lengthy deliberations that spanned two years. This new rule represents a thoughtful analysis of FRCP 11, as amended in 1993, and is intended to

eliminate perceived unfair aspects of previous sections 802.05 and 814.025. The public and interested organizations were permitted to submit materials, briefs, and arguments to the court before the new rule was adopted. The rule is clearly intended to streamline and modernize proceedings concerning frivolity and bring them into conformity with procedures that now exist in the federal arena pursuant to FRCP 11, as amended in 1993. In the words of the SCO 03-06 majority, "Judges and practitioners will now be able to look to applicable decisions of federal courts since 1993 for guidance in the interpretation and application of the mandates of FRCP 11 in Wisconsin."

Wisconsin cases do not appear to have directly addressed the issue of amendments to the Rules of Civil Procedure. The Fifth Circuit Court of Appeals, however, has held that "[a]mendments to the Federal Rules of Civil Procedure should be given retroactive application to the maximum extent possible,"[13] and a federal district court held that "[i]n determining whether the retrospective application of [a] rule is 'just and practicable,' [courts are] guided by the principle that to the maximum extent possible ... amended Rules should be given retroactive application...."[14]

The U.S. Supreme Court addressed the issue of amendments to rules of civil procedure in *Landgraf v. USI Film Products*[15] and concluded:

"Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. ... We noted the diminished reliance interests in matters of procedure. 337 U.S., at 71, 69 S. Ct., at 952-953. Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. *Cf. McBurney v. Carson,* 99 U.S. 567, 569, 25 L. Ed. 378 (1879). ... While we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case."[16]

As the Fourth Circuit noted in *Altizer v. Deeds,* "[t]he Supreme Court has upheld procedural changes even where they work to the disadvantage of defendants in pending cases. *See ... Collins v. Youngblood,* 497 U.S. 37... (1990); *Beazell v. Ohio,* 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925))."[17]

New Rule 802.05 did not arise from a specific decision of the Wisconsin Supreme Court within the context of a pending case. However, with respect to such decisions, the supreme court has established that retroactive application of a procedural decision in a civil action is ordinarily to be favored. As the court has noted, "Wisconsin generally adheres to the doctrine that retroactive application of judicial decisions is the rule, not the exception."[18] As the court stated further in *Bradley,* in the case of civil procedure rules "retroactive application is presumed."[19]

Even when a procedural rule results from the decision in a particular case, the preferred course is to apply the rule retroactively. In *Harper v. Virginia Department of Taxation,*[20] the U.S. Supreme Court held:

"When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[21]

Wisconsin appellate courts have taken a similar approach to new procedural rules developed in the course of litigation. Our courts refer to the concept of "sunbursting," which is a term used for prospective application of a rule developed within the common law as well as changes in the way that courts interpret statutes. According to *In re Thiel:*[22] "[L]imiting a new rule to prospective application only or 'sunbursting' is appropriate only if there is a compelling judicial reason to limit its application to future litigants."[23]

Appropriate Sanctions Under New Rule 802.05

As noted in SCO 03-06, "Judges and practitioners will now be able to look to applicable decisions of federal courts since 1993 for guidance in the interpretation and application of the mandates of FRCP 11 in Wisconsin." Since the amendment of FRCP 11 in 1993, courts have repeatedly stated that the basic principle under FRCP 11 is that the least severe sanction adequate to deter misconduct is the one that should be imposed. According to the court in *White v. Camden City Board of Education:*[24]

"Any sanction imposed under Rule 11 'should be calibrated to the least severe level necessary to serve the deterrent purpose of the Rule,' *Zuk v. Eastern Pa. Psychiatric Inst. of the Med. College of Pa.,* 103 F.3d 294, 301 (3d Cir. 1996) (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1336 (2d ed. Supp. 1996)), and may include monetary sanctions, reprimands, orders to undergo continuing legal education, and referrals to disciplinary authorities, *see Zuk,* 103 F.3d at 301."[25]

In *Zuk v. Eastern Pennsylvania Psychiatric Institute,* the court stated that: "[t]he 1993 revision ... makes clear that the main purpose of Rule 11 is to deter, not to compensate. Accordingly, it changes the emphasis in the types of sanctions to be ordered. It envisions as the norm public interest remedies such as fines and reprimands, as opposed to the prior emphasis on private interest remedies. Thus, the Advisory Committee Notes state that any monetary penalty 'should ordinarily be paid into the court' except 'under unusual circumstances'... Any sanction imposed should be calibrated to the least severe level necessary to serve the deterrent purpose of the Rule. In addition, the new Rule 11 contemplates greater use of nonmonetary sanctions, including reprimands, orders to undergo continuing education, and referrals to disciplinary authorities."[26]

According to *Leuallen v. Borough of*

Paulsboro: "Thus, an 'appropriate' sanction may be 'a warm-friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to circumstances.' The sanction *must* be the least severe sanction adequate to meet the purpose of the sanctions and *must* be tailored to the particular facts of each case."[27]

In a similar vein, the court in *Augustine v. Adams* stated: "'[T]he primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit.' *White,* 908 F.2d at 684. The amount of sanctions *must be* the minimum amount necessary to deter future violations."[28] It is true that courts must take an offending party's ability to pay into consideration in imposing FRCP 11 sanctions, but not in the same way a court or jury would do when assessing punitive damages. According to *Kassab v. Aetna Industries:*

"The principal goal of Rule 11 sanctions is deterrence, *with compensation to the party forced to litigate an improperly filed claim being a secondary aim. Orlett v. Cincinnati Microwave, Inc.,* 954 F.2d 414, 419 (6th Cir. 1992); *see also Danvers v. Danvers,* 959 F.2d 601, 605 (6th Cir. 1992). A claim for a party's total costs requires an investigation into the reasonableness of those costs. *Orlett,* 954 F.2d at 419; *see also, Bodenhamer,* 989 F.2d at 217 ('the amount of the sanction must be reasonable'); *Danvers,* 959 F.2d at 605 (*'because deterrence is the primary goal, the minimum necessary to deter the sanctioned party is the proper award, even if this amount does not fully compensate the moving party'*) (emphasis in original). Before awarding a party's total costs and fees as sanctions, the district court should consider the offending party's ability to pay, want of diligence, and the amount necessary and effective to bring about deterrence."[29]

It is very important to emphasize that "compensable fees under Rule 11 should be limited to those incurred as a result of the offensive pleading; a blanket award of all fees incurred during litigation is not authorized under Rule 11."[30] Courts have emphasized that under FRCP 11, as amended in 1993, the imposition of sanctions is very much a function of educating the bar. In *Shepherdson v. Nigro,* the court admonished counsel to exercise more care in future cases.[31]

Courts should very carefully scrutinize claims for attorney fees under FRCP 11 to determine whether the fee requests are reasonable and whether the fees were incurred as a result of the allegedly frivolous conduct. In *Elsman v. Standard Fed. Bank,* the court stated:

"A claim for a party's total costs

requires an investigation into the reasonableness of those costs. *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414 (6th Cir. 1992). Before awarding a party's total costs and fees as sanctions, the district court should consider the offending party's ability to pay, want of diligence, and the amount necessary and effective to bring about deterrence. *Id. Compensable fees under Rule 11 should be limited to those incurred as a result of the offensive pleading. See Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 989 F.2d 213, 217 (6th Cir. 1993). Further, when granting Rule 11 attorney fees on remand, *the district court must review such costs with exacting scrutiny; a blanket award of all fees incurred during litigation is not authorized under Rule 11.*"[32]

However, as the *Elsman* court makes clear, while courts should carefully and strictly review an award of actual and reasonable attorney fees, such an award is not precluded in an appropriate case.[33]

Dismissal is a legitimate FRCP 11 sanction[34] and in and of itself is a very strong and severe sanction.[35]

Conclusion

The 1993 Federal Advisory Committee Notes make it very clear that the touchstone of new Rule 802.05 should be equity and the proportionality of response to an allegedly frivolous act. This is a refreshing development in the jurisprudence of Wisconsin, and one that can and should lead to an increase in civility in our litigational process. We hope that Wisconsin practitioners and judges take the time to study both the text of new Rule 802.05 and the 1993 Federal Advisory Committee Notes. Those Notes provide rich insight into the spirit of FRCP 11, as amended in 1993. Moreover, counsel will discover that the case law that has come down under FRCP 11, as amended in 1993, serves to underscore the 1993 Notes.

Although the 1993 Federal Advisory Notes have been reproduced following new Rule 802.05 only for information purposes, it is well to remember that the SCO 03-06 court majority stated: "Judges and practitioners will now be able to look to applicable decisions of federal courts since 1993 for guidance in the interpretation and application of the mandates of FRCP 11 in Wisconsin." Full judicial discretion, equity, and fair play have now been returned to frivolous sanction practice in Wisconsin, and this development can only serve the best interests of the judiciary, the bar, and the general public.

Endnotes

[1]The text of Supreme Court Order 03-06, including dissents, was published in the May 2005 *Wisconsin Lawyer* and can be found online at www.wisbar.org/wl/2005/05/orders.

[2]Justices Prosser, Wilcox, and Roggensack dissented to SCO 03-06. Chief Justice Abrahamson and Justices Bradley, Crooks, and Butler supported the rule change.

[3]*Jandrt v. Jerome Foods Inc.*, 227 Wis. 2d 531, 597 N.W.2d 744 (1999). The *Jandrt* majority correctly noted that a finding against a lawyer or client pursuant to former section 802.05 permitted a court discretion to determine what sanction, if any, should be imposed against the offending party.

[4]*Id.* at 576-77 (emphasis added).

[5]*See supra* note 1.

[6]Order 03-06.

[7]Order 03-06 (emphasis added).

[8]Order 03-06, Roggensack dissent, at ¶ 7.

[9]Because new Rule 802.05 is a rule and not a statute enacted by the legislature, the authors believe that an issue of retroactivity could only arise if a case were actually pending on July 1, 2005, the date 802.05 became effective, and, even then, only if a motion were already pending as of that date.

[10]Order 03-06 (emphasis added).

[11]*Martin v. Richards*, 192 Wis. 2d 156, 531 N.W.2d 70 (1995); *Neiman v. American Nat'l Prop.*, 2000 WI 83, 236 Wis. 2d 411, 613 N.W.2d 160; *Matthies v. Postive Safety Mfg.*, 2001 WI 82, 244 Wis. 2d 720, 628 N.W.2d 842.

[12]*Martin*, 192 Wis. 2d at 200-01.

[13]*Long v. Simmons*, 77 F.3d 878, 879 (5th Cir. 1996). *See also Skoczylas v. Federal Bureau of Prisons*, 961 F.2d 543, 546 (5th Cir. 1992).

[14]*Wilson v. City of Atlantic City*, 142 F.R.D. 603, 605 (D.N.J. 1992) (quoting *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 823 (5th Cir. 1967)).

[15]*Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

[16]*Id.* at 275 dn. 28.

[17]*Altizer v. Deeds*, 191 F.3d 540, 546 (4th Cir. 1999).

[18]*State ex rel. Brown v. Bradley*, 2003 WI 14, ¶ 16, 259 Wis. 2d 630, 658 N.W.2d 427.

[19]*Id.* ¶ 13.

[20]*Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

[21]*Id.* at 97.

[22]*In re Thiel*, 2001 WI App 52, 241 Wis. 2d 439, 625 N.W.2d 321.

[23]*Id.* ¶ 11.

[24]*White v. Camden City Bd. of Educ.*, 251 F. Supp. 2d 1242 (D.N.J. 2003).

[25]*Id.* at 1248-49.

[26]*Zuk v. Eastern Pa. Psych. Inst.*, 103 F.3d 294, 301 (3d Cir. 1996).

[27]*Leuallen v. Borough of Paulsboro*, 180 F. Supp. 2d 615, 621 (D.N.J. 2002) (emphasis added).

[28]*Augustine v. Adams*, 88 F. Supp. 2d 1166, 1174 (D. Kan. 2000).

[29]*Kassab v. Aetna Indus.*, 265 F. Supp. 2d 819, 823 (E.D. Mich. 2003) (emphasis added).

[30]*Id.* at 823 (citing *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 989 F.2d 213, 217 (6th Cir. 1993)).

[31]*Shepherdson v. Nigro*, 179 F.R.D. 150, 152-53 (E.D. Pa. 1998). *See also Pickern v. Pier 1 Imports (U.S.) Inc.*, 339 F. Supp. 2d 1081, 1090-91 (E.D. Cal. 2004).

[32]*Elsman v. Standard Fed. Bank*, 238 F. Supp. 2d 903, 910 (E.D. Mich. 2003) (emphasis added).

[33]*Id.*

[34]*Marina Management v. Vessel My Girl*, 202 F.3d 315, 325 (D.C. Cir. 2000); *Jiminez v. Madison Area Tech. College*, 321 F.3d 652, 657 (7th Cir. 2003).

[35]*Williams v. Board of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998).