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Civil Procedure: *Cooter &(and) Gell v. Hartmarx Corp*: An Analysis of Rule 11 and Its Appropriate Standard of Review

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NOTES

Civil Procedure: *Cooter & Gell v. Hartmarx Corp.*: An Analysis of Rule 11 and Its Appropriate Standard of Review

One of the most intriguing issues currently confronting practicing attorneys concerns the use of rule 11 of the Federal Rules of Civil Procedure (FRCP).[1] Since 1983, a growing number of cases reporting sanctions arising under rule 11 have been handed down from the federal bench to unwary litigants.[2] The legal community has become concerned that federal judges have tried to expand the rule by using it to keep certain claims out of the federal courtrooms to control an ever increasing demand for docket-space.[3]

In the summer of 1990, the United States Supreme Court decided *Cooter & Gell v. Hartmarx*.[4] *Cooter & Gell* held that in the event a litigant properly dismisses a claim under rule 41(a)(1) of the FRCP,[5] rule 11 sanctions would be proper if the claim had originally been frivolously brought or was found to have a dilatory purpose.[6] In addition, the Court held that the proper standard of review of a rule 11 sanction for appellate courts is the abuse of discretion standard — one of the most difficult standards for an appellant

1. Rule 11 states, in pertinent part:

> 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. . . . 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 signed in 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.

FED. R. CIV. P. 11 (as amended).

2. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

3. Solovy, *The Cost of Rule 11 — Is It the Death Knell of Our Adversary System or the Salvation of Our Courts?*, COMPLEAT LAW., Spring 1990, at 27-30.

4. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990).

5. Rule 41 states, in pertinent part: "[A]n action may be dismissed by the plaintiff without order of court (i) by filing notice of the dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . ." FED. R. CIV. P. 41(a)(1).

6. *Cooter & Gell*, 110 S. Ct. at 2464.

to overcome.[7] The holdings of this case send a clear message to potential federal court litigants to properly investigate and carefully consider their case prior to filing a claim.

This note will discuss the development of the law regarding rule 11 and the standard of review used by federal appellate courts to check the appropriateness of rule 11 sanctions handed down from district courts. The note will then analyze the Court's rationale in *Cooter & Gell* and will examine the case's potential effects upon future rule 11 decisions.

I. Development of the Law Regarding Rule 11 and Rule 41(a)(1)

The Rules Enabling Act,[8] passed by Congress in 1934, directed the Supreme Court to devise a uniform set of rules governing the practice and procedures to be used in the federal district court system. In 1938, Congress adopted and passed the FRCP. The FRCP allow for notice pleadings to ease the technicalities associated with fact pleadings and to insure that disputes are settled on the merits of the litigants' claims.[9] However, the framers of the FRCP, aware of the many potential areas for abusive tactics by litigants using notice pleadings, drafted rule 11 to address some of those concerns.[10]

The original rule, passed in 1938, remained unchanged for the first 45 years of its existence.[11] From its inception, rule 11 attempted to impose control over attorneys who signed pleadings which lacked solid ground or were filed for purposes of delay.[12] Despite these goals, rule 11 was used sparingly in its early years.[13]

In 1983, amendments to rule 11 transformed this previously ineffective rule into a powerful mechanism for sanctioning an attorney who files meritless claims and defenses.[14] The intent of the amendment was to curb the abuses of unscrupulous attorneys and, as stated in the advisory committee notes, to encourage the courts to control attorneys' behavior in the court system.[15] The rule as amended was not intended to have a "chilling effect" on the litigants.[16] This "chilling effect" refers to the apprehensiveness

7. *Id.* at 2450.

8. 28 U.S.C. § 2072 (1934).

9. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (1990).

10. 5A *id.* § 1331.

11. *See* FED. R. CIV. P. 11 advisory committee notes.

12. *See* FED. R. CIV. P. 11.

13. Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1314 (1986).

14. *See* FED. R. CIV. P. 11 advisory committee notes to the 1983 amendment (recognizing the ineffectiveness of rule 11 as originally promulgated: "Experience shows that in practice Rule 11 has not been effective in deterring abuses.").

15. *See* FED. R. CIV. P. 11. The advisory committee notes to the 1983 amendment state: "The new language is intended to reduce the reluctance of the courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions." *Id.* advisory committee notes to the 1983 amendment.

16. *See* FED. R. CIV. P. 11 advisory committee notes to the 1983 amendment.

of attorneys to take questionable claims to court in fear of potential sanctions.[17] In a short time, the amendment strengthened the rule so as to give federal judges an incentive to apply it.[18] In fact, over 200 cases concerning rule 11 sanctions were reported during the first two years following the amendment.[19]

The 1938 Federal Rules also promulgated rule 41(a)(1) of the FRCP, the rule on dismissal by the filing litigant.[20] Rule 41(a) was intended to limit the right of dismissal by the litigant's unilateral act to the earliest stages of the litigation process, before the adverse party filed a responsive pleading.[21] In 1946, rule 41 was amended to allow a dismissal by notice only if the notice was filed before the adverse party filed a responsive pleading or a motion for summary judgment.[22]

Prior to the promulgation of the FRCP, various states dictated federal procedures, rules which often allowed dismissals or non-suits as a matter of right, up to the entry of the verdict.[23] Such state rules allowed unscrupulous attorneys the opportunity to use abusive tactics such as filing nuisance suits aimed only at achieving a valuable settlement out of an empty claim. A major goal of rule 41(a)'s creators was eradication of these abusive tactics.[24]

The major emphasis of rule 41(a)(1) and rule 11 remains curbing abuses of the judicial system. These rules were promulgated under the premise that litigants must be able to operate under the FRCP so as to formulate an appropriate legal strategy while at the same time protecting the interests of their opponents from harassment and embarrassment.

II. How Rule 11 and Rule 41(a) Work in Conjunction

The Second Circuit, in *Johnson Chemical Co. v. Home Care Products*,[25] addressed the question of possible rule 11 sanctions on a claim brought but properly dismissed under rule 41(a)(1). In *Johnson Chemical*, a distributor brought an action seeking injunctive relief against a manufacturer who had threatened to liquidate products made by the manufacturer but packaged in containers supplied by the distributor. The threatened liquidation was

17. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

18. Vairo, *supra* note 2.

19. Nelken, *supra* note 13, at 1314.

20. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2361 (1971).

21. *Id.* § 2362.

22. *See* FED. R. CIV. P. 41 advisory committee notes to the 1946 amendment.

23. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2363 (1971). Until the adoption of FRCP, the Conformity Act required the federal courts to apply the procedural laws of the states in which they sat.

24. *See* American Bar Association, Proceedings of the Institute and the Federal Rules, Cleveland, Ohio 350 (1938) (rule 41(a)(1) was intended to eliminate "the annoying of a defendant by being summoned to court in successive actions and then if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure.").

25. 823 F.2d 28 (2d Cir. 1987).

based on past due payments from the distributor to the manufacturer. The court granted the injunction, and the distributor posted a bond to secure the manufacturer's claim. After the distributor received the goods wrapped in their packaging, the distributor filed a notice of voluntary dismissal, under rule 41(a)(1), of its claim against the manufacturer.

The manufacturer promptly filed a motion to vacate the dismissal and petitioned the court to sanction the distributor under rule 11. The manufacturer's argument was based upon the theory that the distributor used the authority of the court for an "improper purpose."[26] The district court granted both of the manufacturer's requests, and the distributor appealed.

The Second Circuit held that once the distributor had dismissed the claim under rule 41(a)(1), the district court lost all jurisdiction over the action.[27] Thereafter, the Second Circuit vacated the rule 11 sanctions.

Johnson Chemical thus held that once a proper notice of dismissal has been filed under rule 41(a)(1), the claim being dismissed never existed. Voluntary dismissal means a total divestment of jurisdiction from the court to hear the motion for sanctions.[28] Such an action, therefore, would render the court powerless to impose sanctions thereafter.[29]

The majority view among the federal circuit courts concerning the propriety of rule 11 sanctions in such an instance rejects the reasoning of *Johnson Chemical*.[30] This majority view, as stated in *Szabo Food Service, Inc. v. Canteen Corp.*,[31] provides that the violation of rule 11 is complete when the paper or pleading is filed with the federal court clerk, and voluntary dismissal under rule 41(a)(1) will not expunge the rule 11 violation.[32]

In *Szabo Food Service*, the plaintiffs, a minority company, filed a complaint alleging racial discrimination on the grounds that they had not been awarded a service contract on which they had recently bid. The plaintiffs joined as defendants the victorious bidder, the Canteen Corporation, along with the party who had invited the bids and eventually decided which bid to accept. Subsequently, the plaintiffs dropped the suit by filing a notice of voluntary dismissal pursuant to rule 41(a)(1).

In a subsequent proceeding, it became apparent to Canteen Corp. that Szabo Food Service knew, before filing the original action, that Canteen Corp. was also a minority participant bidding on the contract. Because Canteen Corp. was a minority participant, they would have been excluded from potential liability in a race discrimination action.[33] Canteen Corp.

26. *Id.* at 30.

27. *Id.* at 31; *see also* Santiago v. Victim Servs. Agency, 753 F.2d 219 (2d Cir. 1985).

28. *Johnson Chem.*, 823 F.2d at 31.

29. *Id.*

30. *See* Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); Corcoran v. Columbia Broadcasting Sys., Inc., 121 F.2d 575 (9th Cir. 1941).

31. 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

32. *Id.* at 1077.

33. *Id.* at 1076.

subsequently filed a motion for sanctions under rule 11. The district court denied the motion.

On appeal, Szabo Food Service argued that the voluntary dismissal had divested the district court of jurisdiction to hear the rule 11 motion.[34] The Seventh Circuit, however, found that jurisdiction is an "all-purpose" word signifying adjudicatory power. The court held that a violation of rule 11 is completed when a party or its attorney files the complaint.[35] Pleading that a court lacks jurisdiction to describe its powers does not mean that the court may not hear ancillary claims concerning the original action.[36]

The Court in *Szabo* likened the award of fees under rule 11 to sanctions for contempt of court. The Seventh Circuit's analogy noted that the "award under Rule 11 is a sanction for violating a rule of the court."[37] As such, a party cannot absolve itself of responsibility by dismissing the suit.[38] This holding shows that the two rules, rule 41(a)(1) and rule 11, can work in conjunction with one another and are not mutually exclusive. The exercise of the former will not divest a court of the power to use the latter.

III. The Supreme Court's Decision in Cooter & Gell

The controversy over whether rule 11 and rule 41(a)(1) are mutually exclusive came before the Supreme Court in the case of *Cooter & Gell v. Hartmarx*,[39] approximately two years after the *Szabo Food Service* and *Johnson Chemical* cases. In *Cooter & Gell*, Danik, Inc., a customer of Hartmarx Corp., owned and operated a number of clothing stores in the Washington, D.C. area. Intercontinental Apparel, a subsidiary of Hartmarx, brought a breach of contract action against Danik in federal district court. Danik, represented by the law firm of Cooter & Gell, responded by filing a counterclaim alleging various violations of antitrust laws.

During litigation, Danik filed two additional antitrust complaints against Hartmarx and two of its subsidiaries. One of these complaints alleged a nationwide conspiracy to eliminate competition through an exclusive retail agent policy. In defense of these latter claims, Danik filed three affidavits setting forth the pre-filing research that supported the complaint. Because of this subsequent complaint, Hartmarx moved for sanctions under rule 11.

Subsequently, Danik filed a notice of voluntary dismissal pursuant to rule 41(a)(1) on the latter claims. However, before the dismissal became effective, the district court heard oral argument on the defendant's rule 11 motion. Three years after hearing the litigants' arguments, the district court granted Hartmarx's motion for rule 11 sanctions, holding that Danik's pre-filing inquiry was grossly inadequate.[40] As allowed by rule 11, the district court

34. *Id.*
35. *Id.* at 1077.
36. *Id.*
37. *Id.* at 1079.
38. *Id.*
39. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990).
40. Danik, Inc. v. Hartmarx Corp., 120 F.R.D. 439, 442 (D.D.C. 1988).

imposed sanctions against both the representative law firm of Cooter & Gell and the plaintiff, Danik.[41] Danik and Cooter & Gell both appealed the award of sanctions, and the Court of Appeals for the District of Columbia Circuit affirmed.[42] Only the law firm of Cooter & Gell petitioned for further appeal to the United States Supreme Court.

Before the Supreme Court, Cooter & Gell argued that the court's jurisdiction to hear the rule 11 motion was terminated by the notice to dismiss. The Court held that the district court's jurisdiction was invoked by the filing of the underlying complaint.[43] Filing an action in federal court gives the court the ability to hear both the merits of the action and the motion for rule 11 sanctions arising from that filing.[44] In essence, the Court adopted the *Szabo Food Service* holding that rule 41(a)(1) could not divest the court of jurisdiction to consider a motion for sanctions under rule 11.

The Court reasoned that in order to give rule 11 its fully intended use of mandatory sanctions once a violation of the rule had been perpetrated, a court must have the authority to consider whether there had been such a violation, regardless of the dismissal of the underlying action.[45] Nothing in the language of the FRCP indicates that a district court's authority to impose sanctions is severed by a dismissal filed by the litigant.[46]

The Court found strength in its decision from the well-established principle that the federal courts have the ability to consider collateral issues after an action is no longer pending.[47] The Court noted certain circuit court decisions which analogize rule 11 sanctions to contempt of court sanctions; both types of sanctions are intrinsically collateral issues apart from the proceedings at issue.[48] Regarding rule 11, the questions to be answered by the court are whether the attorney has abused the judicial process and, if so, what sanction would be appropriate.[49] These determinations have little to do with whether the action between the litigants is still pending. Accordingly, the Court held that rule 11 is a collateral issue to the actual dispute between the litigants, and a motion for sanctions under rule 11 may be heard regardless of whether the action had been properly dismissed.[50]

The Court also looked to the language of rule 41(a)(1) and found no codified policy of allowing litigants the right to file "baseless papers." The Court reasoned that both rule 41(a)(1) and rule 11 were intended to curb abuses of the judicial system by litigants and were, therefore, completely

41. *Id.* at 445.
42. Danik, Inc. v. Hartmarx Corp., 875 F.2d 890 (D.C. Cir. 1989).
43. *Cooter & Gell*, 110 S. Ct. 2455.
44. *Id.*
45. *Id.*
46. *Id.*; *see also* FED. R. CIV. P. 41(a).
47. *Cooter & Gell*, 110 S. Ct. at 2455.
48. *Id.* at 2456; *see also* Bray v. United States, 423 U.S. 73, 75 (1975) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 451 (1911) (a criminal contempt charge is likewise "a separate and independent proceeding at law" that is not part of the original action).
49. Adamson v. Bowen, 855 F.2d 688, 672 (10th Cir. 1988).
50. *Cooter & Gell*, 110 S. Ct. at 2456.

compatible.[51] Allowing a litigant to avoid sanctions by dismissing the action would contravene the purpose of both rules.[52]

In a lone dissent, Justice Stevens argued that the majority had erred by failing to read the FRCP within the limited mandate of the Rules Enabling Act.[53] According to Justice Stevens, the majority had "eviscerated" rule 41(a)(1) by focusing solely on rule 11, and thus created a generalized federal common law of malicious prosecution.[54] Justice Stevens' dissent focuses on the concept of fairness intended by the framers of the FRCP. He argued that rule 41(a)(1) was drafted so that litigants could file complaints and preserve their rights under a statute of limitations and then reconsider their position prior to the commencement of litigation.[55]

Further, Stevens found that a complaint, once properly withdrawn, did not remain an appropriate area for additional investigation by the federal courts.[56] In Stevens' view, the holding of the majority will only encourage the filing of sanctions motions and discourage voluntary dismissal.[57] Therefore, in Stevens' opinion, sanctioning a party after dismissal cannot be justified by the goal of the FRCP "to secure the just, speedy, and inexpensive determination of every action."[58]

IV. Analysis of the Court's Holding Regarding the Interaction of Rule 11 and Rule 41(a)(1)

A basic rule of statutory interpretation requires ambiguous statutes to be read narrowly. The Federal Rules are accompanied by advisory committee notes which give the reader the history and legislative intent behind the individual rules and their subsequent amendments. These notes are included with the rules to give an interpreter guidance on the proper usage of the rules.

From a strictly textual standpoint, the Court properly found that rule 41(a)(1) did not impede a trial court's ability to apply rule 11. In analyzing the compatibility of rule 11 and rule 41(a)(1), the Court looked at the individual rules and found that neither directly addresses the other.[59] The FRCP does not expressly mandate that the rules be mutually exclusive. Thus, the rules should be read so they can be applied together.

51. *Id.* at 2457. The Court noted how the rules were compatible by holding that "[b]aseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal." *Id.*

52. *Id.*

53. *Id.* at 2464.

54. *Id.* at 2463.

55. *Id.*

56. *Id.*

57. *Id.* at 2464.

58. *Id.* (quoting FED. R. CIV. P. 1).

59. *Id.* at 2456.

Each rule in the FRCP concerns a different part of federal district court procedure. The Federal Rules should be read so that they intertwine with one another and mesh like finely crafted gears; the full interpretation of one rule should not negate or cut short another. Like a well-written manuscript, the rules should logically flow together and give trial courts a cohesive network of guidelines to govern procedures in their courts.

Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and not interposed for any improper purpose.[60] An attorney who signs a paper so filed, without such a substantial belief, "shall" be penalized by an appropriate sanction.[61] The language of the statute is mandatory. The rule does not say "subject to Rule 41(a)(1)" or "unless the court has lost jurisdiction." No intrinsic competing interests exist between rule 41(a)(1) and rule 11 to make the application of both rules to the same claim incompatible. On the issue of statutory interpretation, the Court's decision deserves high marks.

The Court's decision was no real surprise, as it was consistent with the weight of the circuit courts' previous decisions.[62] *Cooter & Gell* gave the Court the opportunity to explore rule 11 and its foundation and address the difficult question concerning when rule 11 can be applied. The Court emphatically held that an attorney's abusive conduct triggers the rule's applicability and, once unleashed, nothing can call it back.[63] The Court voices a strong stance against abuses of the judicial system and looks to eradicate the frivolous lawsuit from the federal court system.

Strong policy reasons mandate the Court taking similar steps to protect the judicial process in the future. Protection against needless delays of the court system and backlogs of the federal dockets remains foremost. The litigation explosion of the 1980s has put a severe strain on the federal courts' once abundant resources.[64] The federal docket contains no room for wasted time caused by dilatory pleadings and frivolous lawsuits. Judicial economy demands protection. A litigant attempting to buy time should have taken the necessary steps to prepare his case prior to filing. Additionally, the federal courts have a near exclusive claim to jurisdiction over some of the fastest growing areas in the law — bankruptcy and patent law. This new strain on the federal courts cannot tolerate the competition of frivolous pleadings, motions, or lawsuits.

Second, litigation represents a public display of an individual's problems. A defendant who has been forced into court is subject to embarrassment and the social stigma of being a wrongdoer. The needless abuse of a

60. *See* FED. R. CIV. P. 11.

61. *Id.*

62. *See* Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987); Greenburg v. Sala, 822 F.2d 882 (9th Cir. 1987).

63. *Cooter & Gell*, 110 S. Ct. at 2455.

64. 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331 (1990).

defendant's peace of mind constitutes an act that the judiciary cannot permit. Corporations and businesses are not immune from the negative stigma of being identified as a defendant in a lawsuit. Frivolous lawsuits are costly and, more importantly, time consuming for those involved.

Rule 11 was forged so that federal judges could wield a tool to deter and combat the potential problems associated with unsound pleadings, insuring a speedy resolution to pending claims and discouraging improvident actions from being filed in the federal court system. The rule was promulgated to safeguard against "frivolous" lawsuits.[65]

Some commentators side with the Second Circuit's opinion in *Johnson Chemical* as being the proper analysis for dealing with the use of rule 11 after a litigant has voluntarily dismissed an action.[66] These commentators believe that litigants should not generally be punished if they have taken the desirable course of discontinuing an action. The opinion, however, does not take into consideration the potential costs of exhaustive legal research in answering a petition or the emotional trauma of being forced into the legal arena. The harm has already been done to the litigant's opponent. Why should a party successfully harassing another through the filing of a lawsuit be exempt from punishment for abusing the legal system and his opponent?

Cooter & Gell mandates federal courts to use rule 11. Federal courts will undoubtedly continue to apply the rule in ever increasing numbers. However, because rule 11 is so widely publicized, it is easy to lose sight of the fact that the scope of the rule is actually quite limited. The rule only applies to conduct relating to the signing of pleadings, motions, or other papers that are not well grounded in fact.[67] No other behavior falls under the sanctions of rule 11. The Court properly analyzed *Cooter & Gell* and determined its outcome in a manner that accords with the stated purpose of rule 11 — the eradication of the frivolous law suit.

V. Standard of Review

Because of the stigma attached to sanctions under rule 11, many sanctioned attorneys will undoubtedly appeal the penalty. An appellate court remains a court of review. Its purpose is not to retry the case, but to scrutinize the record of the trial court to determine whether reversible error has been committed.[68] In general, appellate courts are compelled to review lower courts' holdings with varying degrees of deference according to the finding on appeal. The particular degree of deference to be accorded a trial court's decision is called standard of review.

For purposes of standard of review, decisions by trial judges are traditionally divided into three categories: questions of fact, questions of law,

65. *See* FED. R. CIV. P. 11 advisory committee notes.
66. Vairo, *supra* note 2.
67. *See* FED. R. CIV. P. 11.
68. M. GREEN, BASIC CIVIL PROCEDURE 225 (1972).

and matters of discretion.[69] Choosing the appropriate standard of appellate review for a specific finding of the lower court is dictated by a long history of appellate practice.[70]

A. *Questions of Law: De Novo Review*

The reviewing court may pay little deference to a trial judge's finding on a question of law. The reviewing court will open the trial court record and review the evidence as if the appellate court had been present at trial.[71] This de novo review is justified because the appellate court is, like the trial judge, well schooled in the law and can make legal determinations by simply applying the blackletter law to the previously determined facts of the case.[72]

B. *Questions of Fact: Clearly Erroneous Review*

On findings of fact, the appellate court gives great deference to a fact finder's ability to determine the necessary background behind legal conclusions. The appellate court can reverse the lower court's findings of fact only if the findings are found to be clearly erroneous.[73] This high degree of deference is premised on the trial court's ability to observe and judge the demeanor of testifying witnesses on the stand — something the appellate court is unable to do.[74]

C. *Determinations Left to the Trial Court: Abuse of Discretion Review*

The abuse of discretion standard is used where certain issues have traditionally been left to the trial judges to determine. Many of these determinations are procedural in nature. Such decisions have been left to the trial judge's discretion because the trial judge is in the best position to make the determination. In making their decisions, trial judges may use their discretion, which is formulated by hearing pertinent evidence produced at trial.[75] This standard pays enormous deference to the trial judge. On appeal, the reviewing court may overturn a trial judge's discretionary determination only if it is found to be arbitrary or abusive in light of the surrounding circumstances.[76]

69. Pierce v. Underwood, 487 U.S. 552, 557 (1988).

70. *Id.*

71. J. LANDERS, J. MARTIN & S. YEAZELL, CIVIL PROCEDURE 878 (1988).

72. J. FRIEDENTAL, M. KANE, & A. MILLER, CIVIL PROCEDURE 600-01 (1985).

73. FED. R. CIV. P. 52(a). The clearly erroneous standard of review is codified in rule 52(a), which states in pertinent part: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." *Id.*

74. *See* Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id.

75. Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 570 P.2d 918, 921 (1977).

76. Saunderson v. Saunderson, 379 So. 2d 91, 92 (Ala. Civ. App. 1980).

VI. Review of Rule 11 Sanctions

Rule 11 presents a special problem to a reviewing court. Because of the nature of the rule, appellate review of orders imposing sanctions under rule 11 may require a number of separate inquiries.[77] That is, reviewing a rule 11 sanction encompasses all three of the above mentioned standards. The court must consider factual questions to determine the factual basis for the pleading and to check on the pre-filing investigation of the attorney.[78] Legal issues are present in determining whether the attorney's behavior constitutes a rule 11 violation.[79] Additionally, in affixing an "appropriate sanction," the trial judge must use his own discretion.[80]

In determining the appropriate set of standards to be applied in rule 11 sanction review, the circuit courts have been inconsistent. All circuits agree, however, on how an appellate court should review the lower court's selection of sanctions.[81] This review should be abuse of discretion. The language of the rule explicitly provides for the application of this standard.[82] Beyond this question of how to gauge the "appropriate sanction," the circuits have applied various combinations of standards in reviewing the other facets of the rule. Prior to *Cooter & Gell*, the circuit courts used three methods to review rule 11 orders: a two-tiered approach, a three-tiered approach, and the use of a unitary standard.

A. The Circuit Courts' Applications of Review to Rule 11

1. Two-Tiered Approach

The Circuit Court for the District of Columbia, in *Westmoreland v. CBS, Inc.*,[83] applied the abuse of discretion standard in determining whether the filing had a sufficient factual basis or was imposed for an improper purpose, but applied the de novo standard to determine whether the pleading or motion was legally sufficient.[84] In *Westmoreland*, a party to a civil action filed a petition in district court seeking to hold a non-party witness in contempt for refusing to consent to a videotaped deposition. The non-party witness petitioned the court for sanctions under rule 11 on the grounds that the litigant should have moved under the discovery rules of FRCP to compel the witness to attend the deposition. The district court refused the motion for sanctions, and the non-party witness appealed.

77. Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).
78. *Cooter & Gell*, 110 S. Ct. at 2457.
79. *Id.*
80. *Id.*
81. *Id.* at 2458.
82. *See* FED. R. CIV. P. 11 advisory committee notes. "The [District] [C]ourt, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has *discretion* to tailor sanctions to the particular facts of the case, with which it should be well acquainted." *Id.* (emphasis added).
83. 770 F.2d 1168 (D.C. Cir. 1985).
84. *Id.* at 1174-75.

The D.C. Circuit found the lower court in error for not awarding the non-party witness attorney's fees.[85] Rule 11 sanctions were appropriate because of the groundless motion filed by the party wishing to videotape the deposition.[86] On review, it was held that factual determinations must be accorded wide discretion because the district court had "tasted the flavor" of the litigation and was in the best position to make those types of determinations.[87] The court went on to hold that a determination of whether the pleading or motion is legally sufficient involves a question of law and therefore receives de novo review.[88]

2. Three-Tiered Approach

Two circuit courts use a three-tiered approach to review rule 11 sanctions.[89] This approach reviews historical facts under the clearly erroneous standard, the legal determination of whether rule 11 has been violated under a de novo standard, and the choice of sanctions under an abuse of discretion standard.[90] In *Zaldivar v. City of Los Angeles*,[91] the supporters of a city councilman brought an action against the City of Los Angeles, claiming that a recall election violated the Voting Rights Act.[92] Proponents of the recall intervened, moved to dismiss the complaint, and demanded sanctions under rule 11. The district court granted the proponents' motions and appeal was taken.

On appeal the Ninth Circuit reversed, holding that it was improper under the circumstances to impose sanctions under rule 11.[93] In reviewing the lower court's decision, the Ninth Circuit adopted the three-tiered approach to review rule 11 sanctions.[94] Prior to *Zaldivar*, the Ninth Circuit had not interpreted the appropriate standard to apply to rule 11 and, therefore, chose to remain consistent with the standards applied to traditional appellate review.[95]

3. Unitary Standard

The majority of the circuits have applied the abuse of discretion standard across the board to all facets of rule 11.[96] For instance, the Fifth Circuit

85. *Id.* at 1175. As stated in rule 11, attorney fees may be an appropriate sanction.

86. *Id.* at 1178.

87. *Id.* at 1174. Note, the court applies "abuse of discretion" to factual findings made by the lower court and not "clearly erroneous" as is mandated by rule 52(a).

88. Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985).

89. *Zaldivar*, 780 F.2d at 828; Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1434 (7th Cir. 1987).

90. *Zaldivar*, 780 F.2d at 828.

91. 780 F.2d 823 (9th Cir. 1986).

92. *See* 42 U.S.C. §§ 1971-1974 (1982).

93. *Zaldivar*, 780 F.2d at 835.

94. *Id.* at 828.

95. *Id.* at 828 n.4.

96. *See* Kale v. Combined Ins. Co. of Am., 861 F.2d 746, 757-58 (1st Cir. 1988); Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir. 1988), *cert. denied*, 488 U.S. 848 (1988); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 872 (5th Cir. 1988)

in *Thomas v. Capitol Security Services*,[97] held that a unitary standard of review for rule 11 sanctions, abuse of discretion, should be applied.[98] In *Thomas*, a group of employees filed suit against their former employer claiming title VII[99] violations. At trial, the employees lost, and after they appealed, the employer petitioned the court for sanctions under rule 11. The request for sanctions was based in part on the premise that the plaintiffs had knowingly reached far beyond the scope of title VII. The motion for sanctions was denied by the district court. On appeal, the Fifth Circuit remanded, demanding that all district court orders for rule 11 sanctions be documented by specific findings of fact and conclusions of law.[100]

On a second appeal, the Fifth Circuit, sitting en banc, took a careful look at the revised rule 11 and at the appropriate standard of review to be applied.[101] The court noted that the rule did not specify a standard; however, the court looked to the language of the advisory committee notes and found a basis to claim that the abuse of discretion standard should be applied.[102]

The Fifth Circuit found that the determination of a rule 11 motion involves a fact-intensive inquiry into the circumstances surrounding the alleged violation and that the trial judge is in the best position to review the circumstances and render an informed judgment.[103] The Fifth Circuit decided that the district court must have discretion to effectively regulate its courtroom.[104]

VII. Supreme Court's Determination on Appropriate Standard of Review

The Supreme Court finally addressed the issue of appropriate standards of review for rule 11 in *Cooter & Gell* when it sided with the majority of the circuit courts holding that the appropriate standard to be applied, across the board, is abuse of discretion.[105] The Court noted that rule 11 uniquely presents all aspects of review in that it requires factual and legal determinations and, of course, the discretionary matter of the amount of sanction to be levied.[106] In its analysis of standard of review, the Court began by affirming the premise that rule 11 has left the amount of sanctions to be

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(en banc); Century Prods. v. Sutter, 837 F.2d 247, 250 (6th Cir. 1988); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989); Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988); Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C., 789 F.2d 1056, 1060 (4th Cir. 1986).

97. 836 F.2d 866 (5th Cir. 1988).

98. *Id.* at 872.

99. 42 U.S.C. § 2000e to 2000e-17 (1976). In *Thomas*, the complaint specified sexual and racial discrimination in all aspects of their employment relationship with their employer.

100. Thomas v. Capital Sec. Serv., Inc., 812 F.2d 984, 990-91 (5th Cir. 1987).

101. Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir. 1988) (en banc).

102. *Id.* at 872.

103. *Thomas*, 836 F.2d at 873.

104. *Id.* at 872.

105. *Cooter & Gell*, 110 S. Ct. at 2463.

106. *Id.* at 2457.

awarded to the trial court's discretion. By using the term "appropriate" sanctions, rule 11 itself suggests that the district court is authorized to exercise its own discretion.[107] The Court then moved to determine how the circuit courts had reviewed rule 11 findings of fact made by trial courts.

Rule 52(a) mandates the appellate courts to uphold the district courts' findings of fact unless they are "clearly erroneous." "In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions."[108] The Court found that when an appellate court reviews a district court's factual findings, "the abuse of discretion and clearly erroneous standards are indistinguishable."[109] That is, "a court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding was clearly erroneous."[110] Effectively, the Court equated clearly erroneous and abuse of discretion.

Finally, the Court dealt with the sole determination of how to review the issue of the rule's legal determination — whether a rule 11 violation has occurred. A district court's legal determination of a rule 11 violation requires consideration of issues "rooted in factual determination."[111] The Court concluded that a district court, being familiar with the issues and litigants, is in a better position than the court of appeals to gather the pertinent facts and apply "the fact-dependent legal standard mandated by rule 11."[112] Because the legal conclusions of rule 11 are so fact-specific, the Court held that the reviewing court must pay deference to the district court's decision.[113]

The Court relied heavily on *Pierce v. Underwood*[114] in determining that the trial court should receive deference on its legal conclusions. In *Pierce*, the Court held that a district court's legal determination under the Equal Access to Justice Act (EAJA)[115] should be reviewed by an abuse of discretion standard.[116] Similar to rule 11, the EAJA requires the trial court to make legal determinations that are based on findings of fact made by the trial court.[117]

Pierce found two factors of paramount importance in arriving at its decision. First, the judicial actor deserved deference because he was better positioned than the appellate court to make the necessary determination regarding whether a violation of the statute had taken place.[118] In the EAJA, the government must be "substantially justified" in its position as a litigant

107. *Id.*
108. *Id.* at 2458.
109. *Id.*
110. *Id.*
111. *Id.* at 2459.
112. *Id.*
113. *Id.* at 2460.
114. 487 U.S. 552 (1988).
115. 28 U.S.C. § 2412(d) (1982).
116. *Pierce*, 487 U.S. at 561.
117. *Cooter & Gell*, 110 S. Ct. at 2459.
118. *Pierce*, 487 U.S. at 560.

or the adverse party will receive attorney's fees for being needlessly forced into court.[119] Whether a legal position is "substantially justified" depends upon factual determinations that the trial judge is in the best position to make.[120] Whether "a district court's ruling that a litigant's position is factually well grounded and legally tenable for rule 11 purposes is similarly fact-specific."[121]

A rule 11 legal conclusion is based wholly on an intricate factual determination. Review of legal issues under a de novo standard would require the court of appeals to spend needless time investigating a fact pattern previously determined.[122]

Second, *Pierce* found the abuse of discretion standard gave the trial court needed flexibility in resolving questions that involved special and narrow facts that resisted generalization.[123] The question in EAJA of whether the government has taken a "substantially justified" position requires the finding of unique facts that can not be generalized due to the various positions a litigant may take in the myriad of actions available in the federal court system.[124] Similarly, the *Cooter & Gell* Court found that the legal issues involved in determining whether an attorney had violated rule 11 likewise involve "fact intensive, close calls."[125]

The Court's final justification for adopting a unitary abuse of discretion standard to rule 11 review rested on policy considerations. Rule 11's policy goal of deterrence would best be served by deference to the judicial actor who is best acquainted with the local Bar's practices.[126] Such deference, the Court noted, would enhance the trial court's ability to control the litigants before them.[127]

Thus, the Supreme Court held that abuse of discretion is the appropriate method of review for sanctions under rule 11.[128] The district court may have insight not conveyed by the record into such matters as importance of particular evidence or whether critical facts could have been verified by the attorney.[129] Judicial economy and common sense were the backbone of the Court's decision.

VIII. Analysis of the Court's Holding Regarding Standard of Review

Despite its name, the abuse of discretion standard remains a wide-open area for possible misuses. Abuse of discretion accords the lower court's

119. *See generally* 28 U.S.C. § 2412(d) (1982).
120. *Pierce*, 487 U.S. at 560.
121. *Cooter & Gell*, 110 S. Ct. at 2460.
122. *Id.*
123. *Pierce*, 487 U.S. at 561-62.
124. *Id.*
125. *Cooter & Gell*, 110 S. Ct. at 2460.
126. *Id.*
127. *Id.*
128. *Id.* at 2461.
129. *Pierce*, 487 U.S. at 560.

decision an unusual amount of insulation from appellate review.[130] Thus, abuse of discretion becomes a review-restraining concept.[131] Abuse of discretion "gives the trial judge a right to be wrong without incurring reversal."[132] Herein lies its dangers.

Appellate review of district court holdings remains an extremely important part of our legal system. One reason for review is that it provides checks on the trial court's decision making process. Allowing total deference to the trial court's decision making process would effectively remove the check traditionally held by the reviewing courts.

For the sake of judicial economy, *Cooter & Gell* is a godsend because reviewing de novo a fact-specific legal conclusion is extremely time consuming for the appellate courts. The federal courts simply do not have the resources to spend time researching facts that have previously been decided.[133] Judicial economy remains a valid interest of the federal court system. However, judicial economy is not sufficient in and of itself to be the sole basis for the court to turn its back on years of precedent. Judicial economy, while a factor to consider, should be accompanied by other valid interests.

Moreover, certain types of claims may become prey to rule 11 sanctions by an unaccommodating judge. Human nature requires an individual to be opinionated and have preconceived notions on certain issues. Abuse of discretion demands that the trial judge's decision be paid an enormous amount of deference by the reviewing court. This deference becomes power in the judge's hand, and, to a certain extent, that power remains unchecked. However, along with power comes responsibility. A trial judge must make an enormous number of decisions while sitting on the bench. Many of those decisions are "gut feelings," such as whether certain evidence touted by a party is relevant to the issues actually being litigated. Trial courts are entrusted to apply the law in a just manner and to make decisions based on legal principles, not personal feelings. On one hand, rule 11 can be a tool to control litigants in a district court; however, the rule was never intended to eradicate unfavored claims.

The trial judge could wield this new power to give rule 11 the "chilling effect" that concerned the advisory committee. Now, the question exists whether there is a sufficient check on the trial judges or whether they have been given too much deference. The *Cooter & Gell* holding effectively takes a step of review away from litigants sanctioned under rule 11 and removes a sufficient check on the trial court. Too much deference is just as dangerous as too little deference. The power of rule 11 that is given to the trial judge through the *Cooter & Gell* decision should be used in a proper and forthright manner.

130. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

131. *Id.*

132. *Id.*

133. *Cooter & Gell*, 110 S. Ct. at 2460.

Another area of concern in *Cooter & Gell* lies in the Court's comment that seems to merge the abuse of discretion and clearly erroneous standards.[134] When the trial court is the fact finder, its determinations are to be paid the highest deference — the clearly erroneous standard. When the trial court makes decisions based on discretion, it has certain boundaries that it cannot cross without being reversed.

Clear error and abuse of discretion have arbitrary boundaries. The reviewing court establishes those boundaries by interpreting the definitions of the standards. "Abuse of discretion" will not be applied with the exact same zeal in all of the federal circuit courts. Similarly, it is very possible that standards of review will vary with differing fact patterns of individual cases presented in the same court. Because these "standards" have somewhat flexible definitions, the Court can find some backing for selecting the word "indistinguishable" in describing the comparison of "abuse" and "clear error."

Clear error has been described as that which shocks the judicial conscience.[135] However, clear error is seemingly treated with less deference when the findings of fact are made by the trial judge as opposed to when the same findings are made by a jury.[136] It might be this broad definition of "clear error" that allows the Court to equate the standards. Abuse of discretion requires high deference to the trial court's decisions; however, "abuse" does not equal "clearly erroneous."

IX. Conclusion

The Federal Rules of Civil Procedure were promulgated in an attempt to give a fair, just, and speedy determination of each action brought in federal court. A basic premise underlying the rules is to protect litigants while allocating a necessary amount of docket time to reach the correct result. To carry out these goals, the drafters placed necessary safeguards in the rules to control litigants' behavior while their claims are being tried.

Rule 41(a) and rule 11 are designed to control litigants by limiting their ability to withdraw from the actions brought and to deter them from bringing frivolous claims. The rules do not state that they are mutually exclusive. Moreover, rule 11 is not expressly limited by rule 41(a). Each time litigants bring claims, they also grant the court jurisdiction to hear a rule 11 motion brought by their opponents. Rule 11 achieves its intended purpose by allowing the court to sanction attorneys who bring frivolous lawsuits. Allowing a litigant to avoid sanctions by dismissing an action, even if dismissed properly under rule 41(a), would allow abuse of the court system. Permitting this "out" for a litigant would go directly against the letter and spirit of the FRCP.

The standard of review topic is rarely publicized. However, it remains an area of appellate procedure that most legal professionals know and under-

134. *Id.* at 2458.
135. State v. Roth, 471 A.2d 370, 386 (N.J. 1984).
136. M. GREEN, BASIC CIVIL PROCEDURE 249 (1972).

stand. Most applications of the various standards find their genesis in the common law. Broad areas of fact, law, and tradition filter appealed pleas into the different categories of review allowed by the appellate courts. Consistency has been a hallmark of the review process. *Cooter & Gell* displaced tradition and confined review of differing categories to a single, unitary standard, and, in doing so, gave the trial judge a powerful tool to control the courtroom. This type of unchecked power can be extremely dangerous in the wrong hands. The granting of such power is accompanied by a tremendous amount of responsibility which should guide an evenhanded approach to the use of rule 11.

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