REPORT ON THE 1993 AMENDMENTS TO THE FEDERAL RULE OF CIVIL PROCEDURE 11

Committee on Litigation

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The Litigation Committee of the Association of the Bar of the City of New York

Report on the 1993 Amendments to Federal Rule of Civil Procedure 11[1]

I. Introduction

Substantively, Federal Rule of Civil Procedure 11 was most recently amended in 1993.[2] After a brief overview of the history and development of Rule 11, this report will examine the post-amendment application and enforcement of the Rule by federal courts within the Second Circuit.

II. The History and Development of Rule 11

A. The 1983 Amendment

As adopted in 1937, Federal Rule of Civil Procedure 11 required that all pleadings be signed by an attorney or by a party if the party was proceeding *pro se.* The signing of a pleading by an attorney "constituted[d] a certificate by him that he has 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."[3] The Rule empowered the district courts to subject an attorney "to appropriate disciplinary action" if the attorney willfully violated the Rule or if the attorney inserted "scandalous or indecent matter" into the pleading.[4] Between its adoption in 1937 and its first amendment in 1983, Rule 11 "fell into disuse because attorneys rarely invoked it and judges

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1 The primary authors of this report were Jeremy A. Berman, Carl Hasselbarth and George Klidonas of the Litigation Committee, with the assistance of Sean McGrane then a summer associate at Skadden, Arps, Slate, Meagher & Flom LLP.

2 In 2007, the language of Rule 11 was "amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." FED R. CIV. P. 11 advisory committee notes (2007 amendment). These changes were "intended to be stylistic only." *Id.*

3 FED. R. CIV. P. 11 (1940)

4 *Id.*

were reluctant to impose sanctions."[5] Indeed, as the Advisory Committee recognized in its Notes to the 1983 amendment, "Rule 11 has not been effective in deterring abuses."[6]

The 1983 amendment imposed a more rigorous burden on attorneys submitting signed pleadings, motions, or other documents to the court. Attorneys were now required to perform a "reasonable inquiry" into the legal and factual basis of a paper submitted to the court – a higher standard than the "best of his knowledge" standard included in the original 1937 rule. The amended Rule read:

> 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.[7]

A failure to abide by the rule could result in "an appropriate sanction,[8] 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."[9]

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5 Margaret L. Sanner & Carl Tobias, *Rule 11 and Rule Revision*, 37 LOY. L.A. L. REV. 573, 575 n.2 (2004).

6 FED. R. CIV. P. 11 advisory committee notes (1983 amendment).

7 FED. R. CIV. P. 11 (1988)

8 Rule 11 is not the only vehicle for imposing sanctions on litigants; indeed, there are two other methods whereby courts can impose sanctions. First, it is within the court's inherent authority to impose sanctions. The United States Supreme Court has held that a court may impose attorneys' fees as sanctions, pursuant to its inherent authority, where a party willfully disobeys a court order or "when a party has '"acted in bad faith, vexatiously, wantonly, or for oppressive reasons."'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citations omitted). Second, Federal Rule of Civil Procedure 37 empowers the court to sanction litigants for discovery abuses. "The Sanctions expressly permitted under Rule 37 include taking facts as established, striking answers or defenses, precluding the introduction of evidence, striking out pleadings, dismissal, judgment by default, holding a party in contempt, and assessing reasonable expenses, including attorney's fees." Eric C. Surette, *Sanctions Available Under Rule 37, Federal Rules of Civil Procedure, Other than Exclusions of Expert Testimony, for Failure To Obey Discovery Order Not Related to Expert Witness*, 156 A.L.R. Fed. 601, 601 (1999).

9 FED. R. CIV. P. 11 (1988) (citation omitted)

The Advisory Committee, in its Notes to the 1983 amendment to Rule 11, wrote that the "new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions."[10] The Committee further asserted that "[g]reater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."[11]

Despite the Advisory Committee's hopes, the 1983 amendment failed to streamline the litigation process; rather, the opposite occurred. Indeed, the amendment led to much costly and unwarranted satellite litigation largely unrelated to the substantive merits of disputes.[12] As one scholar noted:

> The effect of the 1983 amendment upon the number of Rule 11 cases was extraordinary. Under the old version, during the previous forty-five years, there were approximately 25 reported cases. In ten years after the 1983 amendment, there were at least 6000 Rule 11 cases reported in computerized databases. The actual number of Rule 11 cases during this period may have been twice that figure.[13]

Professor Georgene Vairo, the author of a treatise on Rule 11, observed that "by 1985 . . . Rule 11, although designed to become a tool for curbing abuse and streamlining litigation, had become a tool of abuse in the opinion of most commentators, including many of its early supporters."[14]

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[10] FED. R. CIV. P. 11 advisory committee notes (1983 amendment).

[11] *Id.*

[12] *See* Sanner & Tobias, *supra* note 5, at 576.

[13] Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 157 (1999) (footnotes omitted).

[14] Georgene M. Vairo, Foreword, Symposium, *Happy (?) Birthday Rule 11*, 37 LOY. L.A. L. REV. 515, 517 (2004).

B. The 1993 Amendments

The 1983 amendment to Rule 11 proved so unworkable that, by 1989, the Advisory Committee decided to consider further amendments to the rule.[15] Federal District Court Judge Sam C. Pointer, Jr. – who chaired the Advisory Committee from early 1991 until mid-1993 – acknowledged that, in the wake of the 1983 amendment, the "'Committee had received various requests, formal and informal, for further amendment or abrogation of [the 1983 version] of Rule 11' and 'was aware of several studies of the rule undertaken by various individuals, bar associations, and courts.'"[16] By 1991 the Advisory Committee had formulated a preliminary draft revision of Rule 11 and, in 1993, the Rule was formally amended.

1. Procedural Requirements

A major goal of the 1993 amendment was – as the Advisory Committee Notes explain – to place "greater constraints on the imposition of sanctions and [to] reduce the number of motions for sanctions presented to the court."[17] The principal way in which the drafters of the Rule implemented these new constraints came in the form of new procedural requirements – what the Advisory Committee called the Rule's "safe harbor" provision.[18] The safe harbor provision, as currently phrased, appears in Rule 11(c)(2):

> A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or

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[15] Sanner & Tobias, *supra* note 5, at 580.

[16] *Id.* at 580 & n. 29 (alteration in original; footnotes omitted).

[17] FED. R. CIV. P. 11 advisory committee notes (1993 amendments; purpose of revision).

[18] FED. R. CIV. P. 11(b), (c) advisory committee notes (1993 amendments; subdivisions (b) and (c)).

> appropriately corrected within 21 days after service or within another time the court sets.[19]

Thus, under the terms of the safe harbor provision, a party seeking sanctions must serve a motion on the opposing party at least 21 days before submitting the motion to the court. If, at the end of this 21-day period, the non-moving party has not withdrawn the challenged paper, then the moving party may file the motion with the court. The non-moving party essentially must give any potential violator of Rule 11 a warning before filing.

The Advisory Committee, in its Notes, identified one of the principal rationales for the safe harbor provision: "Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions."[20] As one scholar has noted, the safe harbor provision provides parties and attorneys a "'last clear chance' to renounce" a challenged statement.[21]

The Advisory Committee Notes for the 1993 amendments identify three other procedural issues related to Rule 11. First, the Committee emphasized the Rule's requirement that requests

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[19] FED. R. CIV. P. 11(c)(2). The "safe harbor" as currently phrased reflects the 2007 amendments to the Federal Rules of Civil Procedure, "part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." FED. R. CIV. P. 11(c)(2) advisory committee notes (2007 amendment). The "safe harbor" originally appeared as Rule 11(c)(1)(A):

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

FED. R. CIV. P. 11(c)(1)(A) (1994).

[20] FED. R. CIV. P. 11 advisory committee notes (1993 amendments; subdivisions (b) and (c)).

[21] Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 610 (2004).

for sanctions must be made as a separate motion, not "simply included as an additional prayer for relief contained in another motion."[22] Second, the Committee suggests that in most cases, before preparing and serving a Rule 11 motion on an opposing party, the moving party "should be expected to give informal notice to the other party, whether in person or by a telephone call or letter," of the potential violation.[23] Finally, the Notes shed light on the Rule's provision allowing the court to initiate sanctions proceedings *sua sponte*. As the Advisory Committee Notes point out, the "power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order."[24] Thus, a court may not impose sanctions *sua sponte*, but may issue a show cause order demanding that a party show why sanctions should not be imposed; and, if the response is not satisfactory, the court may then impose sanctions.

2. Substantive Provisions

While these procedural restraints on the imposition of sanctions were unique to the 1993 version of Rule 11, many of the substantive provisions remained unchanged from the 1983 version of the Rule. As Professor Charles Yablon writes: "Although there were some subtle changes in wording, essentially the same conduct prohibited prior to 1993 is prohibited by the post-1993 version of Rule 11."[25] The new version restated "the provisions requiring attorneys and *pro se* litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents."[26] The new version likewise retained "the

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[22] FED. R. CIV. P. 11 advisory committee notes (1993 amendments; subdivisions (b) and (c)).

[23] *Id.*

[24] *Id.*; *see* FED. R. CIV. P. 11 (c)(3) (sanctions on the court's initiative).

[25] Yablon, *supra* note 21, at 603.

[26] FED. R. CIV. P. 11 (b), (c) advisory committee notes (1993 amendments; subdivisions (b) and (c)).

principle that attorneys and *pro se* litigants have an obligation to the court to refrain from conduct that frustrates" the just, speedy, and inexpensive determination of all civil actions.[27] Representations to the court made "to harass" or to "cause unnecessary delay" remained sanctionable.[28]

Not all substantive provisions remained the same, however. The Advisory Committee Notes state that the 1993 amendments "in part expand[] the responsibilities of litigants to the court." In particular, the Notes state that the newly amended Rule "emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable."[29] Thus, under the 1993 amendments,

> 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.[30]

This language from the Advisory Committee strikes a different note than language used in the Notes to the 1983 amendment, where the Committee wrote: "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."[31] Under the 1993 amendments there is a continuing obligation.

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[27] FED. R. CIV. P. 11 advisory committee notes (1993 amendments; purpose of revision).

[28] FED. R. CIV. P. 11 (b)(1).

[29] FED. R. CIV. P. 11 (b), (c) advisory committee notes (1993 amendments; subdivisions (b) and (c)).

[30] *Id.*

[31] FED. R. CIV. P. 11 advisory committee notes (1983 amendment).

3. Nature of Sanctions

The 1993 amendments also aimed to change the nature of sanctions imposed against violators of Rule 11. Under the 1983 version of the Rule, judges frequently imposed sanctions that included large attorney's fees, which some commentators viewed as "inappropriately stressing the compensatory goal of the proviso and improperly deemphasizing the stricture's deterrence objective."[32] The 1993 amendments sought to reemphasize this deterrence objective, while subordinating the award of attorney's fees and other monetary sanctions. Indeed, Rule 11(c)(4) states: "A sanction imposed under this rule must be limited to what suffices to deter repetition of such conduct or comparable conduct by others similarly situated."[33] This language, again, is in marked contrast to the language of the 1983 version of the Rule, which stressed that appropriate sanctions "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."[34] The 1993 version of Rule 11 explicitly limits the award of attorney's fees to situations where such an award is "warranted for effective deterrence."[35]

The Advisory Committee Notes to the 1993 amendment further highlight the amended Rule's emphasis on nonmonetary, deterrent sanctions. The Committee noted that courts have a variety of possible sanctions to impose on violators, including "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,

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[32] Sanner & Tobias, *supra* note 5, at 573.

[33] FED. R. CIV. P. 11 (c)(4).

[34] FED. R. CIV. P. 11(1988).

[35] FED. R. CIV. P. 11 (c)(4).

or agency head), etc."[36] The Committee further noted the Rule's text included reference to nonmonetary sanctions "for emphasis."[37] Finally, the Committee noted that since "the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty;" but, in "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."[38] Accordingly, the Rule authorizes the court, "if requested in a motion and if so warranted, to award attorney's fees to another party."[39]

The 1993 Rule further provides that sanctions should be imposed on any persons – whether attorneys, law firms, or parties – who have violated the rule or who may be determined to be responsible for the violation.[40] With regards to the responsibility of a law firm for the behavior of one of its attorneys, the Advisory Committee noted: "Absent exceptional circumstances, a law firm is to be held also responsible when . . . one of its partners, associates or employees is determined to have violated the rule."[41] Monetary sanctions, however, "may not be imposed on a represented party for [violations] of subdivision (b)(2), involving frivolous

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[36] FED. R. CIV. P. 11 (b), (c) advisory committee notes (1993 amendments; subdivisions (b) and (c)).

[37] *Id.* ("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.") (emphasis added).

[38] *Id.*

[39] *Id.*

[40] *See* FED. R. CIV. P. 11 (c)(1).

[41] FED. R. CIV. P. 11 (b)(c) advisory committee notes (1993 amendments; subdivisions (b) and (c)).

contentions of law." As the Advisory Committee noted: "Monetary responsibility for such violations is more properly placed solely on the party's attorneys."[42]

III. Rule 11 as Applied in the Second Circuit

The remainder of this report will focus on the way courts in the Second Circuit have applied Rule 11 since its amendment in 1993. The discussion will be broken into three parts. First, the report will discuss the way courts have enforced the new safe harbor provision, and discuss other procedural issues that have arisen since the Rule's amendment. Second, the report will examine the kind of conduct courts have determined to be sanctionable. Third, the report will identify the types of sanctions courts have imposed on litigants who violate Rule 11.

A. Rule 11's New Procedural Mandates

1. The Safe Harbor Provision

The Second Circuit Court of Appeals, and federal district courts within the Second Circuit, have enforced Rule 11's new safe harbor provision strictly. In order for Rule 11 sanctions to be imposed against a litigant, the party moving for sanctions must comply with the Rule's safe harbor provisions – namely, the movant must (1) submit a motion separate from other motions or request; (2) serve a copy of the motion on the opposing party; and (3) wait at least 21 days from service on the opposing party before filing the motion with the court. Only if the challenged paper or claim has not been withdrawn within the 21-day safe-harbor period will courts then consider the motion for sanctions. Case law indicates that federal courts in New York cut litigants little slack for failing to comply with the Rule's procedural mandates.

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[42] *Id.*

a. Notice Requirement

As the United States District Court for the Southern District of New York has explained: "The salutary purpose of the 1993 amendments is to give the party or counsel allegedly subject to sanctions an opportunity to cure the challenged misconduct."[43] In *R.B. Ventures, Ltd. v. Shane*, the defendant's motion for sanctions was denied because the defendant failed to give the plaintiff the opportunity to remedy his alleged sanctionable behavior – namely, the defendant failed to meet his obligation "to serve a motion for sanctions, specifying the alleged violative conduct on the part of plaintiff or plaintiff's counsel, and then wait for 21 days before filing the motion with the court."[44]

Thus, notice to the alleged violator is an important part of the safe harbor provision. The Second Circuit has held that a "'sanctioned attorney must receive *specific notice of the conduct alleged to be sanctionable*'" in order for Rule 11 sanctions to be properly imposed.[45] Notice is important because, if a party or attorney has not been put on notice that its conduct may be sanctionable, the party will not then have the opportunity to voluntarily withdraw the offending paper.

Per the terms of Rule 11, "notice" to a litigant comes in the form of "service of the motion", by the moving party, at least 21 days before the motion is filed with the court. Courts within the Second Circuit have strictly adhered to this procedural requirement and rejected attempts by a movant to avoid it. In *Carruthers v. Flaum*,[46] for example, Judge McMahon wrote:

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[43] *R.B. Ventures, Ltd. v. Shane*, No. 91 Civ. 5678 (CSH), 2000 U.S. Dist. LEXIS 10170, at *4 (S.D.N.Y. July 19, 2000).

[44] *Id.*

[45] *Martens v. Thomann*, 273 F.3d 159, 177 (2d Cir. 2001) (quoting *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 92 (2d Cir. 1999)).

[46] 450 F. Supp. 2d 288 (S.D.N.Y. 2006).

"In this Circuit, compliance with the procedural requirements of Rule 11 is mandatory. Sanctions may not be imposed if the party seeking them failed to comply with the technical requirements of Rule 11."[47] There, in an earlier proceeding, the court had criticized certain of the plaintiffs' claims "as a 'fishing expedition,'" and warned plaintiffs and their counsel that continued assertion of those claims would leave them "open to sanctions."[48] Later, defendants argued that the "court's skepticism about the claims against them constituted 'notice' to plaintiffs that was equivalent to the service of motion papers for [Rule] 11(c)(1)(A) purposes, and started the 21-day period running."[49] The *Carruthers* court flatly rejected the defendant's "constructive notice" argument:

> No law supports defendants' suggestion that a remonstrance from this Court constitutes some type of "constructive notice" for Rule 11 purposes. The rule requires the service of a motion by the party seeking sanctions in order to start the clock. The Second Circuit does not permit any variation on that procedure.
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> . . . .
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> . . . The law in this Circuit is clear: the only way to start the 21 day clock running is for a party seeking sanctions to serve a fully supported motion.[50]

Similarly, a party seeking sanctions cannot satisfy Rule 11's notice requirement simply by sending a letter to opposing counsel. In *Bellistri v. United States*,[51] counsel for a defendant informed plaintiffs' counsel by letter that defendant would file a motion for sanctions if the plaintiff did not "'voluntarily withdraw the complaint against him.'"[52] Although the letter

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[47] *Id.* at 304.

[48] *Id.* at 305.

[49] *Id.*

[50] *Id.* at 305-06 (characterizing plaintiffs' "constructive notice" argument as "*utter nonsense*") (emphasis added).

[51] No. 94 Civ. 3768 (KMW), 1997 U.S. Dist. LEXIS 2826 (S.D.N.Y. Mar. 11, 1997).

[52] *Id.* at *9-10.

complied with the spirit of the safe harbor provision by providing plaintiff an opportunity to withdraw its claim, the court nevertheless rejected the motion for sanctions: "[B]ecause courts construe Rule 11's safe harbor provision strictly, [defense counsel's] prior letter does not constitute the service of [defendant's] motion for sanctions that is required by Rule 11."[53] Thus, it is clear that courts will not impose sanctions under Rule 11 unless the moving party serves a fully-supported motion on the opposing party or counsel.[54]

Rule 11's notice requirement also means that a party must be informed of the specific conduct alleged to have violated Rule 11 before sanctions can be imposed. As the Second Circuit has held: "We believe that a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter."[55] In *Ted Lapidus, S.A. v. Vann*, the Second Circuit vacated the district court's imposition of Rule 11 sanctions against defendant partly on notice grounds. There, plaintiff's Rule 11 motion had only cited defendant's refusal to withdraw his third-party complaint as sanctionable conduct; the district court, however, imposed sanctions partly because the defendant had tried to use the third-party claims as a way to disqualify plaintiff's counsel.[56] Because the district court had imposed sanctions for conduct not specified in the Rule 11 motion, the Court of Appeals vacated the sanctions order, in part because the defendant "was entitled to a more specific notice and a more focused hearing before sanctions

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53 *Id.* at *10-11 (citation omitted).

54 *See generally Williamson v. Recovery Ltd. P'ship*, 542 F.3d 43, 51-52 (2d Cir. 2008) (affirming denial of request for attorneys' fees under Rule 11 on the ground that the defendant had failed to comply with the Rule's procedural requirements), *cert. denied*, 129 S. Ct. 956 (2009).

55 *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 97 (2d Cir. 1997).

56 *Id.*

were imposed."[57] By sanctioning the defendant for conduct not specified in the plaintiff's Rule 11 motion, the district court abused its discretion and failed to properly apply the Rule's notice requirements.

b. When Should a Rule 11 Motion be Filed?

Prior to the 1993 amendments, a good number of sanctions motions were presented to the court after disposition of the underlying merits. Movants benefited from what one scholar has called the "powerful 'hindsight effect,' under which judges, having just dismissed or having decided to dismiss a case as non-meritorious, [were] then asked whether the claim lacked such a basis in law or fact that it should never have been brought in the first place."[58] Some analogized winning a sanctions motion to "running up the score in a lopsided football game" – the movant, having already won on the merits, returns to the court seeking additional redress.

The 1993 amendments have indirectly changed the time period in which a litigant may move for a Rule 11 sanction. The current edition of *Moore's Federal Practice* describes the change:

> The 21-day, safe harbor service requirement controls not only the earliest date on which a motion may be filed . . . it also indirectly controls the last date on which a Rule 11 sanctions motion may be filed. At the very least, a party must serve its Rule 11 motion before the court has ruled on the pleading, and thus before the conclusion of the case. Otherwise, the purpose of the safe harbor provision would be nullified.[59]

Thus, if the challenged paper has already been ruled on by the court, the party filing the paper would have no opportunity to withdraw the paper, and thus would be unable to avail itself of the safe harbor provision.

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[57] *Id.*

[58] Yablon, *supra* note 21, at 604.

[59] 2 JAMES WM. MOORE et al., MOORE'S FEDERAL PRACTICE § 11.22[1][c], at 11-46 to 11-47 (3d ed. 2010).

Courts in the Second Circuit have recognized that the 1993 amendments restrict litigants' ability to seek Rule 11 sanctions after the merits have been adjudged. As the Second Circuit has stated:

> Although Rule 11 contains no explicit time limit for serving the motion, the 'safe harbor' provision functions as a practical time limit, and motions have been disallowed as untimely when filed after a point in the litigation when the lawyer sought to be sanctioned lacked an opportunity to correct or withdraw the challenged submission."[60]

Thus, a litigant seeking Rule 11 sanctions should file a motion with the court after the 21-day safe harbor provision has passed, but before the challenged paper or representation has been adjudged by the court.

When the party seeking to recover attorney's fees does so under the federal securities laws, it may be advantageous to move sooner rather than later. The Private Securities Litigation Reform Act of 1995 ("PSLRA")[61] requires district courts, at the conclusion of actions arising under the federal securities laws, to make Rule 11 findings as to "each party and each attorney,"[62] and, if a Rule 11 violation is found, the statute mandates the imposition of sanctions. Because of the mandatory nature of the court's sanctions evaluation under these provisions of the PSLRA, parties and their attorneys are not afforded the protection of a 21-day safe harbor as they would be if the sanctions motion were brought under Rule 11. Also unlike the provision for sanctions under Rule 11, where the goal is deterrence rather than compensation, there is a rebuttable presumption under these provisions of the PSLRA that an appropriate sanction "for substantial failure of any complaint to comply with . . . Rule 11(b) . . . is an award to the

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60 *In re Pennie & Edmonds, LLP*, 323 F.3d 86, 89 (2d Cir. 2003).

61 Pub. L. No. 104-67, 109 Stat. 743 (amending the Securities Act of 1933, 15 U.S.C. §§ 77a to 77aa, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a to 78oo).

62 15 U.S.C. § 77z-1(c)(1) (Securities Act); 15 U.S.C. § 78-u-4(c)(1) (Securities Exchange Act).

opposing party of the reasonable attorneys' fees and other expenses incurred in the action."[63] This presumption can be rebutted by proof by the party or attorney against whom sanctions are to be imposed that "the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed" or that "the violation of Rule 11(b) . . . was de minimis."[64]

In *ATSI Communications, Inc. v. Shaar Fund, Ltd.*,[65] in discussing what constitutes a "reasonable" attorney's fee, the Second Circuit said that allowing the defendant to recover *all* of its legal fees from the plaintiff found to have violated Rule 11 may produce an excessive legal fee where the defendant could have made its Rule 11 motion sooner, thereby potentially reducing the fees incurred by the plaintiff.[66] This rationale suggests that, if a party has a reasonable expectation that the opposing party in a securities case has a realistic chance of being sanctioned, that party should move for Rule 11 sanctions at an early stage to avoid the continuing incurrence of legal fees that will ultimately not be reimbursed.

c. Using the Safe Harbor

For a nonmoving party seeking protection within the safe harbor, the mechanics are very simple – if the litigant withdraws the challenged paper within the 21-day safe harbor period, the court cannot impose Rule 11 sanctions on the litigant. In *Unite Here v. Cintas Corp.*,[67] defendants sought sanctions for what they believed was a frivolous complaint that violated Rule

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63 15 U.S.C. § 77z-1(c)(3)(A); 15 U.S.C. § 78u-4(c)(3)(A).

64 15 U.S.C. § 77z-1(c)(3)(B); 15 U.S.C. § 78u-4(c)(3)(B).

65 579 F.3d 143 (2d Cir. 2009).

66 *See id*. at 154-55.

67 500 F. Supp. 2d 332 (S.D.N.Y. 2007).

11. Because, however, plaintiff had voluntarily dismissed the complaint within the safe harbor period, the court held that sanctions were "unavailable to the defendant" – whether or not the complaint actually violated Rule 11.[68] By withdrawing the challenged paper within the safe harbor period, the plaintiff immunized itself from the possibility of Rule 11 sanctions. Plaintiffs similarly avoided sanctions in *Photocircuits Corp. v. Marathon Agents, Inc*.[69] Some courts have found that a party may avail itself of the safe harbor provision when it takes "substantial steps" towards the withdrawal of the claim within the 21-day time limit, even if additional steps remain to be taken.[70]

2. Court-Imposed Sanctions

As mentioned earlier, as amended, Rule 11 allows the court to impose sanctions on its own initiative, but the court must first enter a "show cause" order giving the alleged violator an opportunity to argue to the court why sanctions should not be imposed. An example of this procedure can be found in *Allstate Insurance. Co. v. Administratia Asigurarilor de Stat*.[71] There, the court found that "defense counsel's conduct may warrant sanctions under Rule 11," and then, noting that "a court must provide a party with a reasonable opportunity to respond" before imposing Rule 11 sanctions, ordered the defendant to return to court at a later date "to show cause why" the court should not impose such sanctions.[72]

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[68] *Id.* at 338.

[69] 162 F.R.D. 449 (E.D.N.Y. 1995); s*ee id*. at 452 (voluntary withdrawal of complaint prior to filing of motion for sanctions "immunized plaintiff's counsel").

[70] *See Carruthers v. Flaum*, 450 F.2d 288, 306-07 (S.D.N.Y. 2006).

[71] 163 F.R.D. 196 (S.D.N.Y. 1995).

[72] *Id.* at 200.

The "objective unreasonableness" standard that applies when a party moves for Rule 11 sanctions does not apply when the court *sua sponte* orders a party to show cause why it should not be sanctioned. In *In re Pennie & Edmonds LLP*,[73] the Second Circuit recognized an exception to the standard of objective unreasonableness, applicable when a district court initiates Rule 11 sanctions "long after" the sanctioned lawyer had an opportunity to correct or withdraw the challenged submission. In such cases, a lawyer may be sanctioned only upon a finding of subjective bad faith.[74] The court distinguished cases in which show cause orders were issued long after the asserted Rule 11 violative conduct on the basis that in cases where a party moves for a Rule 11 sanction, the party against whom the motion is made has the opportunity to withdraw the allegedly offensive pleading, while no such opportunity for withdrawal of the challenged pleading is afforded when the order to show cause is issued long after the challenged conduct.[75] In cases where the court *sua sponte* issues a show cause order regarding sanctions, which the Second Circuit found to be akin to a contempt hearing, a greater showing, one of "subjective bad faith," is required before sanctions may be imposed.[76]

While courts do have this power to impose sanctions *sua sponte*, a review of the case law since 1993 shows that they rarely do so. Of course, in instances where the conduct in question is particularly egregious, the opposing side will move for sanctions, obviating the court's need to impose them *sua sponte*.

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[73] 323 F.3d 86 (2d Cir. 2003).

[74] *See id.* at 91-92.

[75] *See id.*

[76] *See generally ASTI Commc'ns, Inc. v. Shaar Fund¸ Ltd.*, 579 F.3d 143, 150-51 (2d Cir. 2009).

3. Other Procedural Notes

In the Second Circuit, the Court of Appeals reviews a district court's decision to impose Rule 11 sanctions under an abuse of discretion standard. The standard is "a deferential standard of review since the district court, which is '[f]amiliar with the issues and litigants, . . . is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11.'"[77]

Rule 11 does not create an independent cause of action. "As a general rule only parties to an action and certain other participants have standing to move for sanctions under Rule 11."[78] So, for example, a non-party attorney who was the target of alleged baseless allegations in a complaint lacked standing to move for Rule 11 sanctions.[79] With limited exception, only the parties themselves may move for the imposition of sanctions. One possible limited exception, noted in *New York News, Inc. v. Kheel*, was where a non-party witness was defending against a petition for contempt arising out of the non-party's deposition.[80]

Finally, where a complaint is filed in state court but subsequently removed to federal court, Rule 11 sanctions are inapplicable to papers and other pleadings first submitted in the state court. Only papers filed with the federal court following removal from state court are subject to Rule 11 sanctions.[81]

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[77] *Caisse Nationale de Credit Agricole-CNCA, N.Y. Branch v. Valcorp, Inc.*, 28 F.3d 259, 264 (2d Cir. 1994) (citation omitted).

[78] *Sean Michael Edwards Design, Inc. v. Pyramid Designs*, No. 98 Civ. 3700, 1999 U.S. Dist. LEXIS 17442, at *2-3 (S.D.N.Y. Oct. 30, 1999).

[79] *See New York News, Inc. v. Kheel*, 972 F.2d 482, 487 (2d Cir. 1992).

[80] *Id.* at 488-89.

[81] *See Kalika v. Stern*, 911 F. Supp. 594, 605 (E.D.N.Y. 1995).

B. What Conduct is Sanctionable?

What standards do courts use when determining whether a party or attorney's conduct has violated Rule 11? What specific conduct have courts in the Second Circuit found to be in violation of Rule 11? The following section addresses these and other related questions.

1. Legal Standards in the Second Circuit

The Second Circuit Court of Appeals, in *Caisse Nationale de Credit Agricole-CNCA, N.Y. Branch v. Valcorp, Inc.*, provided a broad overview of the sort of behavior sanctionable under Rule 11:

> [S]anctions may be imposed on a person who signs a pleading, motion, or other paper for an improper purpose such as to delay or needlessly increase the cost of litigation, or does so without a belief, formed after reasonable inquiry, that the position espoused is factually supportable and is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law. An argument constitutes a frivolous legal position for purposes of Rule 11 sanctions if, under an "objective standard of reasonableness," it is "clear . . . that there is no chance of success and no reasonable argument to extend, modify, or reverse the law as it stands."[82]

Thus, the standard for judging whether a pleading or other paper contains a "frivolous" argument in violation of Rule 11 is "'objective unreasonableness.'"[83] The signing party's subjective belief is irrelevant – "'[a] pleading, motion or paper violates Rule 11 if it is frivolous, legally unreasonable, or factually without foundation, even though not signed in subjective bad faith.'"[84]

The touchstone of complying with Rule 11 is conducting a "reasonable inquiry" into the legal and factual basis for the signed paper. If an attorney or unrepresented party performs an

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[82] *Caisse Nationale de Credit Agricole*, 28 F.3d at 264 (citations omitted).

[83] *Salovaara v. Eckert*, 222 F.3d 19, 34 (2d Cir. 2000) (citation omitted).

[84] *Safe-Strap Co. v. Koala Corp.*, 270 F. Supp. 2d 407, 411 (S.D.N.Y. 2003) (citation omitted).

objectively reasonable inquiry into the factual and legal basis supporting the signed pleading, the attorney or party will insulate him or herself from Rule 11 sanctions. Courts in the Second Circuit have cautioned that the reasonableness inquiry should be conducted "without the benefit of hindsight, based on what was objectively reasonable to believe at the time the pleading, motion or other paper was submitted."[85] Furthermore, the reasonableness inquiry can depend on a variety of factors – how much time for investigation was available to the signer, whether the pleadings were based on a plausible view of the law, and whether the signer relied on information provided by a client or by another member of the bar.[86]

Courts do not impose Rule 11 sanctions lightly. Indeed, courts in the Second Circuit have held that sanctions should only be imposed "'where it is patently clear that a claim has absolutely no chance of success,'" and that all doubts as to whether the challenged conduct violates Rule 11 "must be resolved in favor of the signer of the pleading."[87] This reluctance to impose sanctions derives from the Supreme Court's command that the Rule be read "in light of concerns that it will . . . chill vigorous advocacy."[88] But the line between "vigorous advocacy" and sanctionable conduct is often a fine one – a concept that has been recognized by courts in the Second Circuit: "[T]he Court is mindful that there is a twilight zone at the confluence where zealous advocacy on behalf of a client, counsel's legal creativity, and protection of an attorney's professional reputation and practice intersect with outright frivolous argument."[89] Thus, because

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85 *Carlton Group, Ltd. v. Tobin*, No. 02 Civ. 9065, 2003 U.S. Dist. LEXIS 13332, at *9 (S.D.N.Y. July 31, 2003).

86 *Id.*

87 *Id.* at *8 (citation omitted).

88 *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 393 (1990).

89 *Winn v. McQuillan*, 403 F. Supp. 2d 292, 294 (S.D.N.Y. 2005).

courts tend to err against imposing sanctions, violations of Rule 11 are often granted only where the offending party has acted flagrantly – as will be seen in the examples below.

2. Conduct for Which Sanctions Have Been Imposed

The following list includes cases in which courts in the Second Circuit have imposed sanctions on attorneys or parties for violating Rule 11, and a description of the conduct found to violate the Rule. In all of the below cases, the side moving for sanctions adequately complied with the rule's safe harbor provisions.

- A failure to make a reasonable inquiry into the legal or factual bases of a claim is the most commonly-sanctioned conduct. A representative example is *Howard v. Klynveld Peat Marwick Goerdeler*,[90] where the court granted the defendant's sanctions motion after finding that plaintiff had pled a baseless theory of personal jurisdiction and had ignored a clear requirement that the dispute be arbitrated. On the latter point, the court noted: "[P]laintiff's counsel had no reasonable basis for filing the instant action given [plaintiff's] clear obligations to arbitrate her claims against the defendants."[91]
- In *Margo v. Weiss*,[92] plaintiffs filed their original complaint to the court and, during subsequent depositions, stated they had learned about a particular dispute in 1992 or early 1993. Plaintiffs later filed an amended complaint, and in affidavits accompanying the amended complaint, stated they had learned about the dispute in 1994. Shortly after filing the amended complaint, plaintiffs submitted errata sheets

[90] 977 F. Supp. 654 (S.D.N.Y. 1997), *aff'd mem.*, 173 F.3d 844 (2d Cir. 1999).

[91] *Id.* at 666.

[92] 213 F.3d 55 (2d Cir. 2000).

for the deposition transcripts, asserting more than 70 errors in the deposition transcript in an effort to "change their testimony so as to establish that their discovery of the dispute . . . had occurred less than three years before their initiation of suit."[93] The Court of Appeals affirmed the district court's award of sanctions against the plaintiffs and plaintiffs' counsel, holding that it "was objectively unreasonable" for counsel to file affidavits that clearly contradicted the earlier depositions.[94]

- In *In re September 11th Liability Insurance Coverage Cases*,[95] an insurance company contended in its original and amended complaints that the Port Authority of New York was not covered by a particular policy. The court stated that the factual assertion that the insurer did not intend to extend additional insured status was objectively without rational basis and this factual contention led to many proceedings causing substantial expense and a substantial waste of the court's time.[96] The court, finding that the insurance company's representations in the complaint were "either dishonest, or objectively unreasonable, or the product of a failure to make reasonable inquiries," granted the motion for sanctions against the insurance company.[97] The court also wrote:

> A baseless factual contention poses a greater threat to justice than a baseless legal contention. The evidentiary foundation upon which an attorney rests his assertions of fact is, for the most part, exclusively within the control of the attorney and his client . . . . An attorney who abuses the trust of the court [by making baseless factual contentions], and who causes

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93 *Id.* at 58-59.

94 *Id.* at 65.

95 243 F.R.D. 114 (S.D.N.Y. 2007).

96 *Id.* at 130-31.

97 *Id.* at 126.

> such delay and needless expense thereby, should be penalized. In contrast, a misstatement of law is much more easily remedied, by the adverse party's research, or the court's own research.[98]

- *O'Brien v. Alexander*[99] demonstrates an important point about Rule 11 – namely, parties or attorneys can be sanctioned not only for signed papers submitted to the court, but also for oral representations made before the court which are addressed in an underlying paper. As the *O'Brien* court noted: "[Z]ealous oral advocacy must be conducted according to the rules and counsel may not 'knowingly make a false statement of law or fact.'"[100] An oral representation made to the court can is sanctionable under two conditions: (1) it must "advocat[e] baseless allegations, and (2) it must relate directly to a matter addressed in the underlying paper and be in furtherance of that matter."[101] Thus, under the second condition, a party or attorney can only be sanctioned for oral representations already made in the signed paper; sanctions cannot be imposed for oral assertions made relating to an issue that arises for the first time at oral argument. In *O'Brien*, counsel was sanctioned for making an oral statement to the court, relating to the pleadings, that was "totally lacking in evidentiary support" and "flatly contradicted by" an earlier decision of the district court.[102]
- Courts tend to show particular displeasure with parties or attorneys who persist with legally or factually baseless assertions after being informed, either by the court or by

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98 *Id.* at 124.

99 101 F.3d 1479 (2d Cir. 1996).

100 *Id.* at 1482 (citation omitted).

101 *Id.* at 1490.

102 *Id.*

the opposing party, of their baselessness. In *Hodge v. RCA Global Communications*,[103] the court, in imposing sanctions against the plaintiff, noted that plaintiff's former counsel not only "failed to conduct the rudimentary investigation required under Rule 11" before bringing the claim, but also "persist[ed] with this matter after being advised of the deficiencies in the complaint" by counsel for defendant.[104] In *Kochisarli v. Tenoso*,[105] the defendant presented a set of counterclaims that were "'neither short nor plain,' and in some places 'indecipherable.'"[106] The court instructed the defendants to resubmit the claims in a more suitable fashion – but the Amended Counterclaim "was again 'indecipherable.'"[107] The court then "detailed precisely how Counter-claimants [sic] should endeavor to frame their Second Amended Counterclaims," but the third submission was also "deficient."[108] The court ultimately granted the plaintiff's motion for sanctions, holding that "'[b]y submitting essentially the same indecipherable set of counterclaims for a third time, in direct defiance of two explicit orders from this Court, Mr. Webb was harassing or causing unnecessary delay or needless increase in the cost of litigation.'"[109]

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[103] No. 93 Civ. 261, 1994 U.S. Dist. LEXIS 7089 (S.D.N.Y. May 25, 1994).

[104] *Id.* at *11.

[105] No. 02-CV-4320, 2007 U.S. Dist. LEXIS 23741 (E.D.N.Y. Mar. 30, 2007).

[106] *Id*. at *2.

[107] *Id.*

[108] *Id.* at *2-3.

[109] *Id.* at *9 (citation omitted).

- Monetary sanctions may be awarded against a plaintiff who filed a complaint barred by res judicata or barred by the statute of limitations, especially where the magistrate judge had repeatedly warned the plaintiff of the frivolous nature of the claims.[110]

3. Conduct for Which Sanctions Have Not Been Imposed

The following list includes cases in which courts in the Second Circuit have denied motions for Rule 11 sanctions, and a description of the conduct found not to violate the Rule.

- In *Kiobel v. Millson*,[111] the Second Circuit reversed the award of sanctions against defendant's counsel who had, *inter alia*, made statements about plaintiff's counsel, accusing them of knowing that plaintiff's witnesses' testimony was false, where the statements by defendant's counsel were "not 'utterly lacking in support.'"[112] The *Kiobel* court quoted with approval a decision from the First Circuit, holding that "'Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement,'"[113] and, from the Fourth Circuit, a decision holding that '"[Rule 11 sanctions] do[] not extend to isolated factual errors, committed in good faith, so long as the pleading as a whole remains "well grounded in fact."'"[114]
- In *Savino v. Computer Credit, Inc.*,[115] the Second Circuit affirmed the district court's decision not to impose sanctions on the plaintiff, even though plaintiff's deposition

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110 *See Star Mark Mgmt. Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, No. 07-CV-3208, 2009 U.S. Dist. LEXIS 81170, at *39-40 (E.D.N.Y. Sept. 8, 2009).

111 592 F.3d 78 (2d Cir. 2010).

112 *Id.* at 83 (quoting *Storey v. Cello Holdings, LLC*, 347 F.3d 370, 388 (2d Cir. 2008)).

113 592 F.3d at 83 (quoting *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993) (Breyer, J.)).

114 592 F.3d at 83 (alterations in original) (quoting *Forrest Creek Assocs., Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987)).

115 164 F.3d 81 (2d Cir. 1998).

testimony contradicted allegations in the complaint. While similar conduct was found to be a violation of Rule 11 in *Margo v. Weiss*,[116] here plaintiff avoided sanctions by filing an affidavit detailing "the pre-filing inquiry into the facts forming the basis" for the allegations contained in the complaint.[117] In affirming the denial of sanctions, the Second Circuit concluded: "Because Savino's counsel documented reasonable inquiry into the allegations in the complaint, the fact that Savino's deposition testimony later contradicted those allegations does not rise to the high threshold necessary for the imposition of sanctions under Rule 11 . . . ."[118]

- In *Yu v. Nimmervoll*,[119] again, the court refused to grant sanctions for alleged inconsistencies between the complaint and the plaintiff's deposition testimony. "[T]he Court finds that it is unclear if the two are markedly inconsistent, and moreover, even if minor inconsistencies are present, Defendants have not been prejudiced."[120]
- In *Pro Bono Investments, Inc. v. Gerry*,[121] counsel for the defendant wrote a letter to the court, indicating that plaintiff's counsel had agreed to extend the time to file various motions. Plaintiff's counsel, however, had not agreed to an extension, and sought sanctions for the "unnecessary delay and expense allegedly connected with the

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116 213 F.3d 55, 65 (2d Cir. 2000).

117 *Savino*, 164 F.3d at 88.

118 *Id.*

119 No. 98 Civ. 6759, 2001 U.S. Dist. LEXIS 793 (S.D.N.Y. Jan. 29, 2001).

120 *Id.* at *5-6.

121 No. 03 Civ. 4347, 2005 U.S. Dist. LEXIS 22346 (S.D.N.Y. Sept. 30, 2005).

misrepresentation."[122] In rejecting the motion for sanctions, the court noted that while defense counsel had been "careless," no sanctions beyond reprimand by the court at a pre-trial conference were warranted.[123]

- Sanctions will not be granted simply because the plaintiff has failed to state a colorable claim in the complaint. "'Otherwise Rule 11 sanctions would be imposed whenever a complaint was dismissed, thereby transforming it into a fee shifting statute under which the loser pays.'"[124] The Second Circuit has further cautioned that there is a "considerable difference for Rule 11 purposes between an entirely frivolous complaint and a complaint including both 'doubtful' counts and counts of 'reasonable merit.'"[125] Thus, a defendant who is victorious on a Rule 12(b)(6) motion is by no means guaranteed a victory on a Rule 11 motion for sanctions.
- Rule 11 sanctions are not an appropriate remedy for discovery abuses. Subsection (d) of Rule 11 specifically excludes discovery motions from its scope. Thus, in *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*,[126] the Second Circuit vacated the district court's award of Rule 11 sanctions to defendant for plaintiff's failure to fully answer interrogatories.[127]
- *Pro se* parties are subject to sanctions for violating Rule 11, but the standard for imposing sanctions on such parties is higher. "[*P*]*ro se* litigants are held to a more

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122 *Id.* at *17.

123 *Id.*

124 *Team Obsolete Ltd. v. A.H.R.M.A. Ltd.*, 216 F.R.D. 29, 44 (E.D.N.Y. 2003) (citation omitted).

125 *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 177 (2d Cir. 1999).

126 222 F.3d 52 (2d Cir. 2000).

127 *See id.* at 57-58.

lenient standard than professional counsel, with Rule 11's application determined on a sliding scale according to the litigant's level of sophistication."[128]

C. Are Magistrate Judges Authorized to Impose Sanctions?

There is an open question in the Second Circuit about whether magistrate judges have the power to impose sanctions. In *Kiobel v. Millson*,[129] the magistrate judge had sanctioned the defendant's counsel for making statements about plaintiff's counsel that the magistrate judge found had no factual support, and the district court affirmed.[130] The Second Circuit reversed on the ground that the sanctioned conduct did not violate Rule 11.[131] In so ruling, however, the Second Circuit also extensively discussed, but did not rule on, the issue of whether magistrate judges had the power to sanction parties under Rule 11. In three separate concurring opinions, Judge Cabranes explained why magistrate judges do not have the power to sanction parties under Rule 11,[132] Judge Leval found that magistrate judges do have such power,[133] and Chief Judge Jacobs found that the statute relating to the powers of magistrate judges was too ambiguous to decide the issue and that Congress or the Supreme Court ought to clarify the standard.[134]

Decisions by magistrate judges since *Kiobel* was decided reflect the new uncertainty in the law. One magistrate judge vacated his own order imposing a $250 fine for counsel's failing to comply with a scheduling order because of both the magistrate judge's doubts about whether

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[128] *Horton v. Trans World Airlines Corp.*, 169 F.R.D. 11, 16 (E.D.N.Y. 1996).

[129] 592 F.3d 78 (2d Cir. 2010).

[130] *See id.* at 80-81.

[131] *See id.* at 83-84.

[132] *See id.* at 84-90 (Cabranes, J., concurring).

[133] *See id.* at 90-105 (Leval, J., concurring).

[134] *See id.* at 106-07 (Jacobs, C.J., concurring).

he had inherent authority to impose sanctions in light of *Kiobel* and the magistrate judge's desire to avoid burdening the district court with having to deal *de novo* with a relatively small ministerial issue, like a violation of a scheduling order.[135] Another magistrate judge reacted to the uncertainty created by *Kiobel* by adding to his decision a proviso that if his determination were held dispositive then his decision should be deemed a report and recommendation to the district court, thereby obviating the question of whether a magistrate judge is authorized to impose sanctions.[136]

D. What Types of Sanctions do Courts Award?

As mentioned above, one goal of the 1993 amendments was to steer courts away from using Rule 11 sanctions as a fee-shifting device. Prior to the amendments, courts had been increasingly awarding attorney's fees to parties winning a Rule 11 motion. This practice of awarding attorney's fees, however, contrasted with the stated goal of sanctions – namely, deterrence. As the Second Circuit Court of Appeals has noted, "the principal objective of the imposition of Rule 11 sanctions is not compensation of the victimized party but rather the deterrence of baseless filings and the curbing of abuses."[137] The Southern District of New York has offered these views on the 1993 amendments:

> Under the amended rule, however, before even reaching the question of the amount of reimbursement, the court must first determine whether that sanction is appropriate at all. Rule 11(c)(2) . . . specifies three types of sanctions which the court's order "may include": non-monetary sanctions; the payment of a penalty into court; and lastly, if "warranted for effective deterrence," "an order directing

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[135] *See Beckford v. City of New York*, No. 09-CV-00286, 2010 U.S. Dist. LEXIS 33297, at *2-4, *8-9 (E.D.N.Y. Apr. 5, 2010) (Orenstein, Magis. J.).

[136] *See Diversified Control, Inc. v. Corning Cable Sys., LLC*, No. 05-CV-0277, 2010 U.S. Dist. LEXIS 33671, at *1-2 & n.2 (W.D.N.Y. Apr. 6, 2010) (McCarthy, Magis. J.).

[137] *Caisse Nationale de Credit Agricole-CNCA New York Branch v. Valcorp, Inc.*, 28 F.3d 259, 266 (2d Cir. 1994).

> payment to the movant for some or all of the reasonable attorney's fees or other expenses incurred as a direct result of the violation."[138]
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> The 1993 amendment makes explicit what the earlier case law found implicit in Rule 11, permitting reimbursement of the injured party's attorneys' fees only where "warranted for effective deterrence." The drafters of the amendment contemplated that fee-shifting would be used only "under unusual circumstances, particularly for (b)(1) violations" where "deterrence may be ineffective" without such an award.
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> The body of reported decisions imposing a monetary sanction payable to the adverse party under the amended rule is small, but the cases discovered by our research have involved modest awards, substantially lower than either the amount claimed or the "lodestar." These decisions reflect the heightened emphasis, in the amended rule, on the limitation of *any* sanction "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[139]

Courts in the Second Circuit have imposed a wide array of sanctions on parties found to have violated Rule 11. Attorney's fees are still awarded, although often the amount awarded is considerably less than the amount sought by the moving party. In *Banco de Ponce v. Buxbaum*, for example, the plaintiffs sought more than $43,000 in fees after the court held the opposing party violated Rule 11. The court, however, awarded the winning side $2,000 – a considerably smaller number.[140] Likewise, in *Kochisarli v. Tenoso*,[141] the court awarded plaintiffs $4,000 in attorneys' fees, despite plaintiff's request for $11,000.[142] Another monetary sanction courts can and do impose is a penalty payment to the court. In *Chalais v. Milton Bradley Co.*,[143] the court

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[138] *Banco de Ponce v. Buxbaum*, No. 90 Civ. 6344, 1995 U.S. Dist. LEXIS 2692, at *29 (S.D.N.Y. Mar. 7, 1995), *aff'd mem.*, 99 F.3d 402 (2d Cir. 1995).

[139] *Id.* at *39-40 (citations omitted).

[140] *See id.* at *8-13, *37-38, *41-42.

[141] No. 02-CV-4320, 2007 U.S. Dist. LEXIS 23741 (E.D.N.Y. Mar. 30, 2007).

[142] *Id.* at *12-13, *16-17.

[143] No. 95 Civ. 0737, 1996 U.S. Dist. LEXIS 13438 (S.D.N.Y. Sept. 11, 1996), *aff'd mem.*, 121 F.3d 727 (Fed. Cir. 1997).

ordered plaintiff's counsel to pay to the clerk of the court "the nominal amount of $300," so as to "deter further submissions of the sort made here."[144]

Courts have imposed nonmonetary sanctions as a result of Rule 11 violations that include requiring the offending attorney to notify the Disciplinary Committee of the New York State Bar Association[145] and issuing an injunction against future use of the courts for claims against the same defendant.[146]

IV. Conclusion

When the 1993 amendments to Federal Rule of Civil Procedure 11 were put into place, the principal aim of the Rule's drafters was to significantly reduce the amount of satellite sanctions litigation that had originated after the Rule's previous amendment in 1983. After more than fifteen years in practice, Rule 11's safe harbor provision has done just that – there is "virtually universal agreement that the 1993 amendments substantially reduced sanctions litigation."[147] The practice of imposing attorneys' fees and other monetary fees against parties found to have violated Rule 11 has similarly become less common. In this sense, then, the 1993 amendments have succeeded in eliminating some of the more egregious abuses that existed under the Rule's prior terms, and have allowed courts to expend far less resources on sanctions-related matters.

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144 *Id.* at *8.

145 *See Pfizer, Inc. v. Y2K Shipping & Trading, Inc.*, No. 00 CV 5304, 2004 U.S. Dist. LEXIS 10426, at *40 (E.D.N.Y. Mar. 26, 2004).

146 *See Schwartz v. Nordstrom, Inc.*, No. 94 Civ. 1005, 1994 U.S. Dist. LEXIS 15203, at *9-10 (S.D.N.Y. Oct. 24, 1994).

147 Yablon, *supra* note 21, at 618.