

Civil Rights Actions

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CIVIL RIGHTS ACTIONS

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INTRODUCTION

Civil rights actions may be brought directly under the Constitution or under a federal statute. They may also be implied under the Constitution or federal statutes. As such, they arise under federal law and may be brought in federal district court

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pursuant to the jurisdiction conferred by 28 U.S.C. § 1331.¹
By amendment effective December 1, 1980, the amount in
controversy requirement was re-

(Text continued on page F1-3)

¹ See Forms F1.01-1 and F1.02-2 *infra*.

moved from section 1331.² Consequently allegations concerning the amount in controversy are no longer required. Federal district court jurisdiction over civil rights actions is also conferred by the provisions of 28 U.S.C. § 1343, which also contains no amount in controversy requirement.

Although there is no judicially-imposed requirement that the plaintiff exhaust administrative remedies prior to bringing suit under the Reconstruction Statutes (42 U.S.C. §§ 1981-1983, 1985-1986), Congress can impose such an exhaustion requirement and has done so in some civil rights statutes, such as title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act.³ Therefore, different civil rights actions have different exhaustion requirements and the practitioner needs to consult the particular statute under which the action is brought. It should be noted, however, that although exhaustion of remedies is not a prerequisite to bringing a section 1983 action, the availability of a state remedy may be relevant in determining whether there has been a constitutional violation.⁴

Procedures of significance in civil rights cases are class actions and removal of actions from state to federal court. Another procedural issue of significance is the application of the signing requirement in Fed. R. Civ. P. 11 to civil rights actions. Removal, class actions and Rule 11 sanctions are generally discussed in this introduction. Attorneys' fees are also discussed here, briefly, as they may be pleaded at the outset. However, a more complete discussion appears elsewhere.⁵

CLASS ACTIONS

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. In order to maintain a class action under Rule 23 the plaintiff must meet all the prerequisites of Rule 23(a) and, in addition, must show that the action is maintainable under Rule 23(b). The prerequisites of any class action are:

² See 2 J. Cook & J. Sobieski, *Civil Rights Actions* ¶ 3.23 (1983).

³ See Chapter F3 *infra*.

⁴ See *Parratt v. Taylor*, 451 U.S. 527 (1981); *Ingraham v. Wright*, 430 U.S. 651 (1977).

⁵ See Chapter F14 *infra*.

- ☐ The class is so numerous that joinder of all members is impracticable;
- ☐ There are questions of law or fact common to the class;
- ☐ The claims or defenses of the named parties are typical of those of the class; and
- ☐ The named parties will fairly and adequately protect the interests of the class.

A class action is maintainable under Rule 23(b) if:

- ☐ Separate actions by the individual class members would create a risk of inconsistent adjudications which would create incompatible standards of conduct for the opposing party or would create a risk of individual adjudications which would dispose of the interests of the non-party members of the class or would substantially impair their ability to protect their interests; or
- ☐ The opposing party has acted or refused to act on grounds generally applicable to the class, making final injunctive relief or declaratory relief appropriate with respect to the class as a whole; or
- ☐ The court finds that the questions of law or fact common to the class predominate over those questions affecting individual members only and that a class action is superior to other available methods of adjudicating the controversy.⁶

REMOVAL

Removal of a civil rights action begun in state court to federal court is governed by 28 U.S.C. § 1441, which authorizes removal upon a showing by the defendant that the action is one which could have been brought originally in a federal district court. Private defendants may also remove actions under 28 U.S.C. § 1443(1), provided that the following very restrictive conditions are satisfied:

- ☐ The right upon which the defendant relies is a “right under any law providing for . . . equal civil rights; and

⁶ For a thorough discussion of class actions, see 3B Moore's Federal Practice, Chapter 23.

- ☐ The defendant demonstrates that he "is denied or cannot enforce" that right in the state courts.⁷

The notice of removal, required by 28 U.S.C. § 1446, must be signed in accordance with Rule 11.

RULE 11—SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

As amended in 1983, Rule 11 required courts to impose sanctions on attorneys and parties who failed to conduct reasonable inquiries before filing court papers. The purpose of the rule was to make attorneys aware of the need for careful prefiling investigations of facts and inquiries into the law, and it did deter some frivolous and wasteful litigation.⁸ However, the rule was criticized for its broad application and chilling effect and for generating excess litigation unrelated to the merits of the lawsuits. Also a source of criticism was the rule's inconsistency in application⁹ and its disproportionate impact on plaintiffs.¹⁰

Perhaps the most severe criticism of Rule 11 was its adverse effect on civil rights plaintiffs and their attorneys. In large part, this disproportionate impact was due to the resource constraints of civil rights plaintiffs and also to the inherent characteristics of civil rights suits.¹¹ As a result, under the 1983 rule,

⁷ See 2 CIVIL RIGHTS ACTIONS, n.2 *supra* ¶ 3.23.

⁸ See Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1014-1015 (1988).

⁹ There was much disagreement among the courts about the appropriate sanctions in particular cases, as well as the manner in which monetary sanctions were to be calculated. See Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buffalo L. Rev. 485, 488 (1989).

¹⁰ Statistics showed that the rule was invoked and sanctions imposed more frequently against plaintiffs than against defendants, with a high percentage of the sanctions based upon complaint filed by plaintiffs. Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (American Judicature Society, 1989), at 62.

¹¹ In civil rights actions, information needed to state a claim and to withstand scrutiny is often in the defendant's possession and, since it is likely to be available only through discovery, cannot be obtained before the complaint is filed. Tobias, n.9 *supra* at 487, 498.

an inordinate number of sanctions were sought in civil rights cases, and plaintiffs in such actions were sanctioned at a higher rate than those pursuing any other type of federal civil litigation.¹²

In 1993, Rule 11 was once again amended. The purpose of the revision was to increase the rule's fairness and effectiveness as a deterrent and to reduce the frequency of Rule 11 motions.¹³ Under the amended rule, by "presenting" to the court a pleading, written motion, or other paper,¹⁴ an attorney or unrepresented party certifies that:

- ☐ the paper is not being presented for any improper purpose;
- ☐ the paper's claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- ☐ the paper's allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- ☐ the paper's denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.¹⁵

Once the court finds that there has been a violation of the rule, it may, but is not required to, impose a sanction; the

¹² *Id.* at 490.

¹³ The 1993 revision of the rule was quite extensive. As one commentator explains, the amendments "provide a new trigger for Rule 11 liability, clarify and liberalize the standard for complying with Rule 11, provide procedural safeguards and a safe harbor provision, deemphasize the use of compensatory sanctions, and expand the conduct to which Rule 11 applies and the targets of Rule 11 motions." 2A Moore's Federal Practice, ¶ 11.02[1.-(2)] (Matthew Bender) (footnotes omitted).

¹⁴ "Presenting" includes "signing, filing, submitting, or later advocating" the paper. Under the former version of Rule 11, violation was determined as of the time the offensive paper was signed. The rule is no longer so limited.

¹⁵ Fed. R. Civ. P. 11(b)(1)-(4).

imposition of sanctions is permissive.¹⁶ The sanction may be imposed on either the party or the attorney, or both. However, monetary sanctions cannot be imposed upon a represented party for a violation of subdivision (b)(2), that is, for presenting a legal contention that is not warranted by existing law or by a nonfrivolous argument for the extension or reversal of existing law or the establishment of new law.¹⁷ The court can act on its own initiative, within certain limits. Attorney's fees may be awarded only on motion and if incurred as a direct result of the violation, and only if "warranted for effective deterrence."¹⁸ Moreover, monetary sanctions may not be awarded on the court's initiative "unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned."¹⁹

It remains to be seen whether the 1993 revision of Rule 11 will reduce the rule's disproportionate impact on civil rights plaintiffs and their attorneys. However, the revision will likely have some ameliorative effect. For instance, the amended rule recognizes that sometimes a party will believe the truth of an allegation but will need discovery to confirm the allegation. And as for counsel's legal determinations, sanctions are not appropriate if the plaintiff's position is supported by a *nonfrivolous* argument. According to the Advisory Committee note:

The extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.²⁰

¹⁶ Fed. R. Civ. P. 11(c). Under the 1983 version of the rule, the imposition of sanctions was mandatory. The 1993 change will likely decrease the number of Rule 11 motions.

¹⁷ Fed. R. Civ. P. 11(c)(2).

¹⁸ Fed. R. Civ. P. 11(c)(2). The 1993 Advisory Committee note states that "if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty."

¹⁹ Fed. R. Civ. P. 11(c)(2)(A).

²⁰ Fed. R. Civ. P. 11, Advisory Committee note of 1993.

In addition, the amended rule's "safe harbor" provision permits a party to avoid the imposition of sanctions. Under that provision, the motion "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."²¹

Notwithstanding the changes to Rule 11, plaintiffs and their attorneys should keep in mind the following:

- ☐ Be aware that some defense counsel may continue to seek Rule 11 sanctions on a routine basis, especially at the complaint stage, to require plaintiffs to justify the legal and factual foundations for pleadings and motions, and sometimes merely as an instrument of delay. Such use of Rule 11 is improper,²² and is itself sanctionable.²³
- ☐ Because filing suit and subsequently using discovery as the *sole* means of finding out whether you have a case is prohibited by Rule 11, you must compile adequate information before filing a complaint.²⁴
- ☐ When the plaintiff's prefiling investigation into the facts is challenged under Rule 11, the plaintiff should argue that the facts are as alleged, or where appropriate, that the facts are in the defendant's possession.

²¹ Fed. R. Civ. P. 11(c)(1).

²² In the words of the 1993 Advisory Committee note:

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings . . . Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation . . .

²³ The opposing party will rarely need to file a cross motion, because the rule expressly states that "[i]f warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion."

²⁴ The 1993 Advisory Committee note points out that tolerance for factual allegations made on information and belief does not relieve parties from the responsibility of conducting an appropriate investigation. It is also not a license to make claims without any factual basis or justification.

ATTORNEY'S FEES

There is statutory authority permitting the award of fees in the overwhelming majority of civil rights actions. Such statutes include the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981–1983 1985–1986, 1988, Titles II and VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Fair Housing Act, the Omnibus Crime Control Act, and the Voting Rights Act—to name some of the most important.²⁵ These statutes, however, vary in terms of who may recover fees and under what circumstances. The practitioner, therefore, should carefully examine every statute that might apply to his or her case.

The practitioner should also note that Fed. R. Civ. P. 54(d) was revised in 1993 to set forth the procedure for recovering attorney's fees in federal court.²⁶ Among other requirements of the rule, a claim for attorney's fees must be made by motion served no later than 14 days after the entry of judgment. In addition, the motion must specify the grounds of entitlement and must state the amount sought, or a fair estimate thereof.

(Text continued on page F1-5)

²⁵ See Chapter F14 *infra*.

²⁶ Fed. R. Civ. P. 54(d)(2). The procedures do not apply if the recovery of attorney's fees is an element of damages to be proved at trial. Fed. R. Civ. P. 54(d)(2)(A).

