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Sanctions In Spotlight

By BARBARA RABINOVITZ

In another display of its well-developed sanction muscle, the U.S. District Court has slapped a Boston attorney with a penalty of more than \$50,000 for violating Rule 11 of the Federal Rules of Civil Procedure.

U.S. District Judge Andrew A. Caffrey earlier this month ordered John F. Cullen, plaintiff-attorney in the case of John F. Cullen v. Robert Darwin, to pay \$50,449 to Darwin, formerly owner of the now-bankrupt Scandinavian Design furniture stores.

The case is *Lawyers Weekly* No. 02-070-92.

Last week, as word of Caffrey's order spread, lawyers were not surprised by the decision of the judge, who is well-known for his vigorous enforcement of Rule 11. But they were whistling in wonderment at the amount of the sanction. For them, the order was yet another reminder that the sanctions meted out in federal court continue to be much harsher and more frequent than those handed down in the state courts. (See accompanying story, on this page.)

The penalty also had the effect of spotlighting federal judges'



JUDGE ANDREW A. CAFFREY
'Reasonable prefilings inquiries' not

use of monetary sanctions against lawyers filing meritless pleadings—an aspect of federal practice being scrutinized in districts nationwide. Amended in 1983, Rule 11 has been a source of controversy within the bar, and Washington has taken note. Next month a committee of the federal judiciary takes up a package of additional amendments which, if approved by the U.S. Supreme Court and Congress, would make sweeping changes in Rule 11 and other procedural policies.

'Serious Consequences'

Invoking the current rule, Caffrey, in September 1991, ruled that Cullen, acting as plaintiff-attorney in his capacity as trustee for Scandinavian Gallery Inc., had not conducted "reasonable prefilings inquiries into the factual or legal viability" of a RICO claim he had brought against Darwin. The judge told Darwin to file an affidavit substantiating any costs associated with litigating motions made in response to the initial complaint, and he allowed Cullen to file a response.

Darwin submitted an affidavit stating that his attorney's fees totaled \$47,593.75 and litigation costs were \$2,855.63.

"Due to the complexity of this action, and the need for thorough legal representation due to the serious consequences for any man or woman ... who is publicly accused of racketeering," even in a private complaint, "this Court finds the costs reasonable," Caffrey wrote in a May 6 order adopting the \$50,449.38 sanction presented by Darwin.

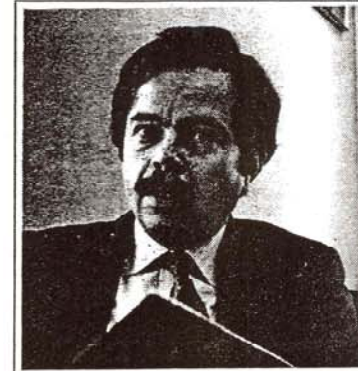
Asked last week to make further comment on the decision, Caffrey declined, pointing out that the case is still pending before him.

'The Sanction Was Justified'

Cullen, contacted Tuesday at his

The court is sending a message "that it will not tolerate frivolous pleadings in violation of Rule 11."

Kenneth A. Sweder
Boston attorney



Charlestown office, said he would be reviewing Caffrey's order with his lawyer, Boston attorney Jeremiah T. O'Sullivan, later in the week. O'Sullivan confirmed that he is representing Cullen "for certain limited purposes" but said, "I just don't think I ought to be discussing my client's position" in the press.

Boston attorney Kenneth A. Sweder, representing Darwin, did want to discuss his client's position.

While agreeing that the sanction imposed on his opposing counsel was "unusually large," Sweder said, "I believe that in this particular case, in view of the charges made and the total absence of any support in fact or in law for those charges, that the sanction was justified."

Sweder contended that Cullen, "in making numerous unsupported charges against my client, transcends not just the bounds permitted by Rule 11 but the bounds of decency. ... The charges were totally unfounded and had no basis whatsoever, but Mr. Cullen sought them anyway and obtained some publicity."

Such a complaint, Sweder charged, "does a great disservice to the system of justice. And the drafter should be held accountable for abusing the litigation process."

Caffrey's ruling, Sweder said, underscores a message delivered regularly by the court—"that it will not tolerate frivolous pleadings in violation of Rule 11."

The rule, as amended in 1983, "makes clear that an attorney has an affirmative duty to conduct a reasonable pre-filing inquiry into the factual and legal viability of [a] claim," Sweder said. Since that amendment took effect, he continued, "I have observed that the federal courts are taking a more serious look at Rule 11 violations and at the responsibility of attorneys to make their own independent inquiries of the pleadings they are filing. ... In this case, Judge Caffrey found that plaintiff-attorney did not conduct reasonable prefilings inquiries."

A Safe Harbor

Last summer, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference, which is the policy-

making arm of the federal judiciary, released for public comment proposed changes to the Rules of Civil Procedure, and among them were several modifications to Rule 11:

- An attorney could be sanctioned not only for filing a groundless pleading but also for refusing to amend or withdraw the pleading after it becomes apparent it lacks legal and factual support. The current rule does not impose this sort of ongoing obligation, according to rulings by federal appeals courts.

- A party could not move for imposition of sanctions until the other party has refused to withdraw or correct a pleading after receiving written notice from its adversary of a probable violation of the rule. This "safe harbor" provision is seen as reducing the use of the sanction motion as a tactical litigation tool.

- Sanctions could be imposed on the signing lawyer's law firm, another member of the firm, or co-counsel in addition to—or instead of—the signer or the litigant. However, in the routine case, the signing lawyer would be subject to sanctions.

- A party that successfully prosecutes—or resists—a Rule 11 motion for sanctions could recover costs and attorneys' fees expended in presenting or opposing the motion.

- Sanctions could be non-monetary, but should be limited to "what is sufficient to deter comparable conduct by persons similarly situated."

- A represented party would not be subject to monetary sanctions unless the party filed a paper for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

- The court could not impose a monetary sanction on its own initiative after the action has been voluntarily dismissed or settled.

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