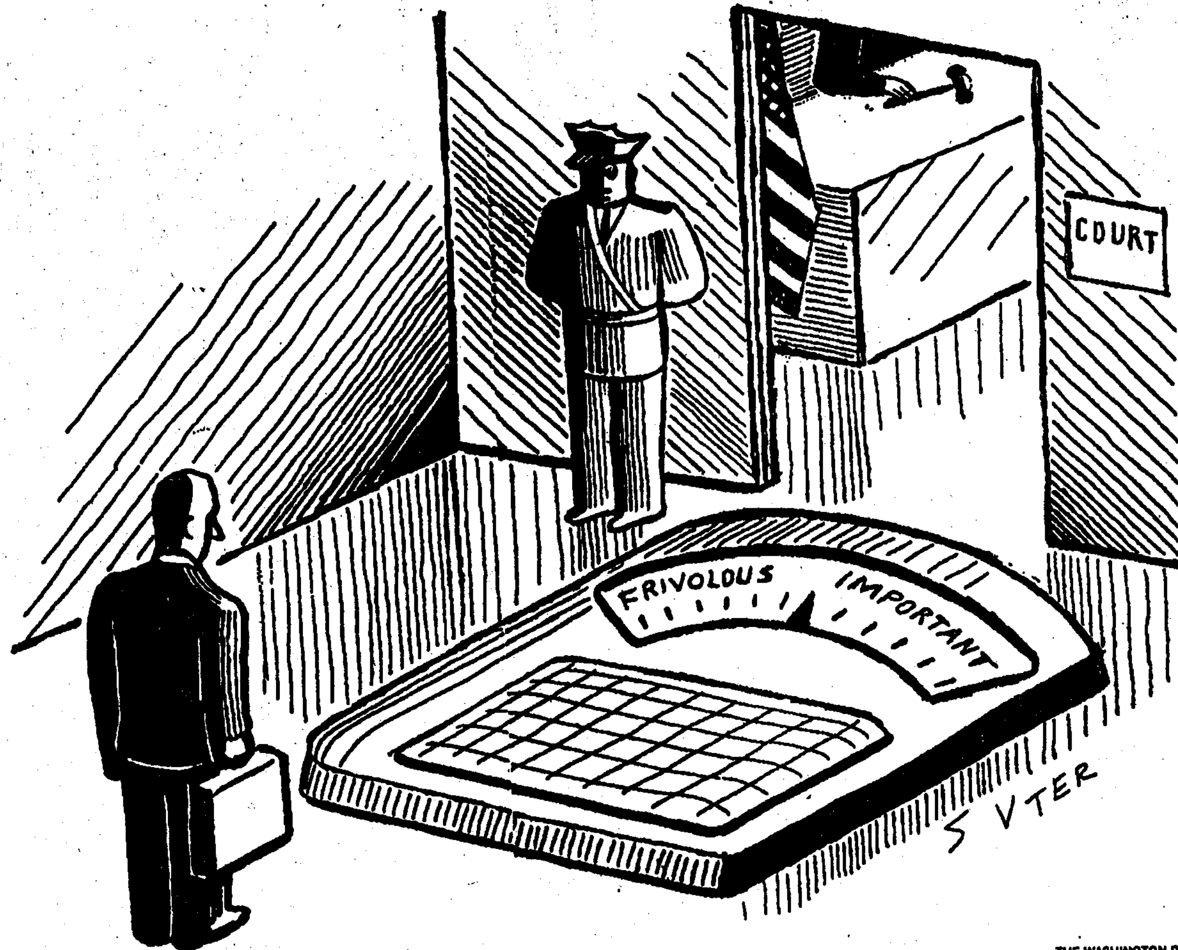
6 copy file 78-032/2420

Rule 11: Does It Curb Frivolous Lawsuits

By Ruth Marcus
Washington Post Staff Writer



THE WASHINGTON P

Eight years ago, in an effort to stem the perceived tide of meritless claims swamping the courts, federal judges were given increased power to fine lawyers and their clients for bringing and pursuing frivolous cases.

Since then, civil rights groups have complained that the new rule, known as Rule 11, was being used disproportionately against them, penalizing lawyers for filing civil rights claims and deterring others from taking such cases at all.

Two cases now before the Supreme Court highlight those concerns. Two prominent civil rights lawyers have asked the justices to review fines imposed against them for filing frivolous suits.

The court may announce as early as Monday whether it will hear the cases. One case involves sanctions that originally totaled $90,000 against Julius Chambers, now director-counsel of the NAACP Legal Defense and Educational Fund, and others for their conduct in the largest civilian employment discrimination suit ever filed against the Army.

The appeals court, upholding sanctions in the case, said the lawyers and their clients "pressed on a massive scale insubstantial claims unsupported by any credible evidence."

In the other case, civil rights lawyer William M. Kunstler and two other attorneys were fined more than $100,000 for filing a lawsuit on behalf of Indian rights advocates being prosecuted for a highly publicized hostage-taking at a North Carolina newspaper.

The trial judge found that the lawsuit, which charged local and state officials with an organized campaign to intimidate the Indian rights advocates in their political activity, was filed "for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings . . . and to intimidate those involved in the prosecution . . . ." The appeals court agreed.

rule be changed, said it "is being used disproportionately to punish civil rights lawyers."

"The fact that some prominent lawyers are being sanctioned does have a chilling effect," Aron added. "People said that when Julius Chambers was sanctioned in North Carolina, for instance, that lawyers thought long and hard before filing another discrimination case in that area."

Defenders of the rule say it serves an important role in guarding against abuses in civil rights cases and other lawsuits.

"I see no reason to make a special exception for civil rights attorneys in the absence of any proof that as a result of the application of the rule, civil rights plaintiffs are unable to find counsel, and I don't see that happening," said Richard A. Samp of the

tions under Rule 11 have become an almost routine part of civil litigation, with fines imposed in thousands of cases. That has generated grumbling from various sectors of the bar that the rule is being overused, but the complaints have been particularly forceful from the civil rights community.

"Everyone's concerned about the rule, but the civil rights bar in particular feels aggrieved," said George Cochran, a University of Mississippi law professor who helped oppose sanctions in the Chambers and Kunstler cases. "There is a perception among civil rights and public interest lawyers in this country that they may be practicing law at their own peril before the wrong judges."

$1 Million Sanction Pending

the Virgin Islands, found that rights plaintiffs and their law were sanctioned in 47.1 perce the cases in which the other filed Rule 11 motions, comp with 8.4 percent of plaintiffs in er cases.

But University of Pennsyl law professor Stephen B. Burt who conducted the study, said figures that indicate a dispro tionate applicaiton of Rule 1 civil rights cases may be mislea because of the types of cases are included in the universe of rights lawsuits, particularly cl by prisoners about their condit of confinement.

Professor Sees No Abus

Of the 25 civil rights case reviewed, Burbank said, "Very if any of them raised concerns a

have complained that the new rule, known as Rule 11, was being used disproportionately against them, penalizing lawyers for filing civil rights claims and deterring others from taking such cases at all.

Two cases now before the Supreme Court highlight those concerns. Two prominent civil rights lawyers have asked the justices to review fines imposed against them for filing frivolous suits.

The court may announce as early as Monday whether it will hear the cases. One case involves sanctions that originally totaled $90,000 against Julius Chambers, now director-counsel of the NAACP Legal Defense and Educational Fund, and others for their conduct in the largest civilian employment discrimination suit ever filed against the Army.

The appeals court, upholding sanctions in the case, said the lawyers and their clients "pressed on a massive scale insubstantial claims unsupported by any credible evidence."

In the other case, civil rights lawyer William M. Kunstler and two other attorneys were fined more than $100,000 for filing a lawsuit on behalf of Indian rights advocates being prosecuted for a highly publicized hostage-taking at a North Carolina newspaper.

The trial judge found that the lawsuit, which charged local and state officials with an organized campaign to intimidate the Indian rights advocates in their political activity, was filed "for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings . . . and to intimidate those involved in the prosecution . . . ." The appeals court agreed.

Cases Provoke Comment

The cases have attracted attention even before the court decides whether to hear them. Former attorney general Benjamin R. Civiletti filed a brief urging the court to use the Kunstler case to limit the "potential chill of Rule 11." On the other side, Sen. Jesse Helms (R-N.C.) joined a brief filed by the conservative Washington Legal Foundation describing the rule as "a valuable tool in the effort to curb abusive litigation" whose "use ought to be encouraged to the maximum extent possible."

The dispute over the Chambers and Kunstler cases mirrors a larger debate over how the rule is working in practice. Nan Aron of the Alliance for Justice, a liberal group that has been active in urging that the rule be changed, said it "is being used disproportionately to punish civil rights lawyers."

"The fact that some prominent lawyers are being sanctioned does have a chilling effect," Aron added. "People said that when Julius Chambers was sanctioned in North Carolina, for instance, that lawyers thought long and hard before filing another discrimination case in that area."

Defenders of the rule say it serves an important role in guarding against abuses in civil rights cases and other lawsuits.

"I see no reason to make a special exception for civil rights attorneys in the absence of any proof that as a result of the application of the rule, civil rights plaintiffs are unable to find counsel, and I don't see that happening," said Richard A. Samp of the Washington Legal Foundation.

Lawyers Held Responsible

As strengthened in 1983, Rule 11 of the Federal Rules of Civil Procedure holds lawyers responsible for making sure before filing cases that they have a reasonable basis in law and fact. It requires judges to impose "appropriate" sanctions—which may include payment for the other side's expenses and legal fees—on lawyers who fail to meet that standard.

The rule requires lawyers to certify that "after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for [changing] existing law" and that it has not been filed "for any improper purpose," such as harassment or delay.

Since 1983, motions for sanctions under Rule 11 have become an almost routine part of civil litigation, with fines imposed in thousands of cases. That has generated grumbling from various sectors of the bar that the rule is being overused, but the complaints have been particularly forceful from the civil rights community.

"Everyone's concerned about the rule, but the civil rights bar in particular feels aggrieved," said George Cochran, a University of Mississippi law professor who helped oppose sanctions in the Chambers and Kunstler cases. "There is a perception among civil rights and public interest lawyers in this country that they may be practicing law at their own peril before the wrong judges."

$1 Million Sanction Pending

In one case before the 11th U.S. Circuit Court of Appeals, the Christic Institute faces a sanction of $1 million.

Cochran and others suggest a conservative judiciary may be particularly hostile to civil rights claims or willing to punish lawyers for bringing novel claims.

And, they argue, civil rights lawyers, who often take cases on a contingency fee basis or agree to represent plaintiffs for free, may be deterred from doing so when the threat of personal liability or the cost of having to engage in such side litigation is thrown into an already risky mix.

The statistical evidence is open to interpretation.

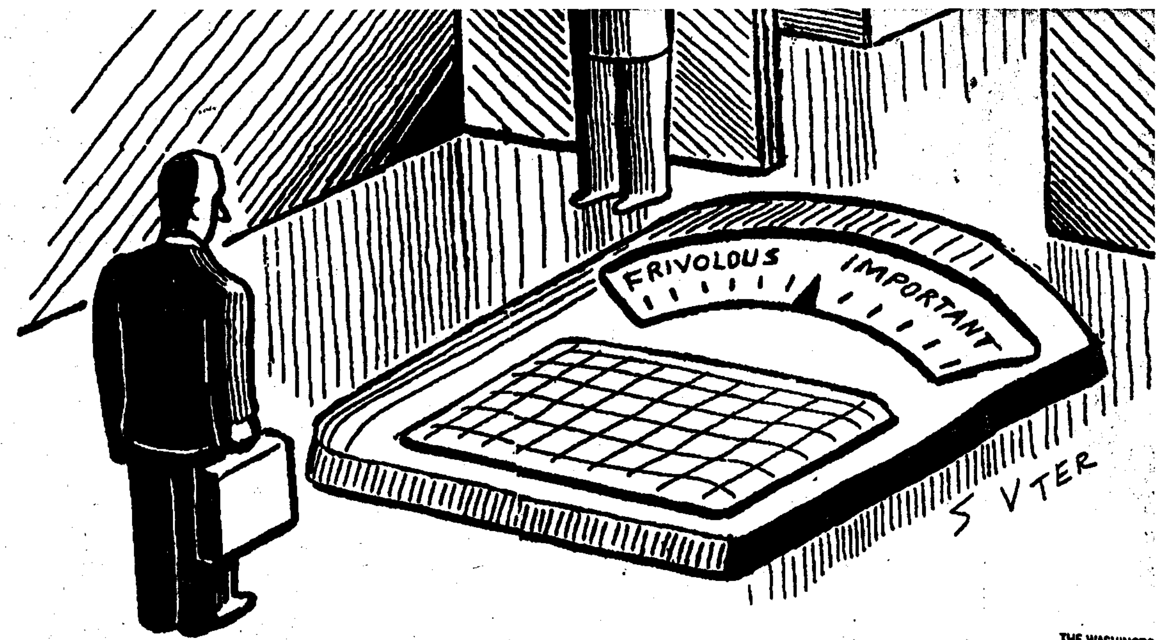
A study of Rule 11 motions in the 3rd Circuit, which covers Pennsylvania, New Jersey, Delaware and the Virgin Islands, found th rights plaintiffs and their l were sanctioned in 47.1 per the cases in which the oth filed Rule 11 motions, co with 8.4 percent of plaintiffs er cases.

But University of Penns law professor Stephen B. B who conducted the study, s figures that indicate a dis tionate applicaiton of Rule civil rights cases may be mis because of the types of cas are included in the universe rights lawsuits, particularly by prisoners about their co of confinement.

Professor Sees No Ab

Of the 25 civil rights c reviewed, Burbank said, "V if any of them raised concern abuse of the rule" by judges to civil rights.

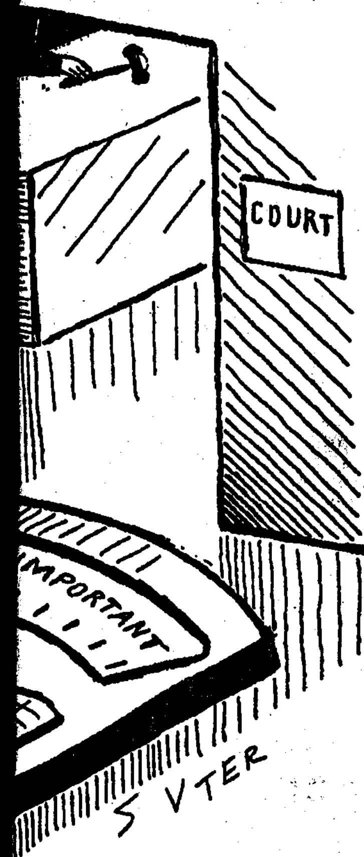
Likewise, Thomas Willgi deputy director of research Federal Judicial Center, sai viewed civil rights cases i sanctions were imposed in



THE WASHINGTO

RAL PAGE

Lawsuits or Civil Rights Claims?



THE WASHINGTON POST

the Virgin Islands, found that civil rights plaintiffs and their lawyers were sanctioned in 47.1 percent of the cases in which the other side filed Rule 11 motions, compared with 8.4 percent of plaintiffs in other cases.

But University of Pennsylvania law professor Stephen B. Burbank, who conducted the study, said the figures that indicate a disproportionate applicaiton of Rule 11 in civil rights cases may be misleading because of the types of cases that are included in the universe of civil rights lawsuits, particularly claims by prisoners about their conditions of confinement.

Professor Sees No Abuse

Of the 25 civil rights cases he reviewed, Burbank said, "Very few

dicial districts, including the District, and found "the sanctions were by and large warranted."

The cases filed *pro se,* by individuals without lawyers, were "truly outrageous," he said, and those which included lawyers often involved relitigating an issue that was already decided, or filing suit against an official who was clearly immune from damages.

"These were not Brown versus Board of Education cases," Willging said. "These were not cases involving public interest litigators or traditional activists, people seeking to reform the law." Chambers and Kunstler, he suggested, may well be "unusual cases."

Still, said Burbank, who worked to oppose sanctions in the Chambers case, "It's a situation where I'm not sure all the studies in the world are going to reveal the true social costs" of the rule and the deterrent effect on other lawyers considering bringing civil rights cases.

The Chambers Case

The Chambers case, *Chambers v. U.S. Department of the Army,* stems from an employment discrimination suit alleging racial discrimination at Fort Bragg, N.C., filed by Chambers and associates when he was in private practice in North Carolina. Most of the claims were settled during almost seven years of litigation.

The trial judge, in a mammoth 200-page opinion, then imposed sanctions of about $90,000—including $38,000 to reimburse the court for the time the judge and his staff spent hearing the case—against two of the plaintiffs and their lawyers.

The 4th U.S. Circuit Court of Appeals overturned part of the sanctions, saying the judge did not have the power to charge the costs of the court time and throwing out the fine against a young associate who had been left in charge of the case when Chambers moved to the Legal Defense Fund.

But it found that the lawyers "shirked [their] responsibility to explore the factual bases for the

role in the efforts to realize equal opportunity under law," it said Chambers's conduct in this case warranted sanctions.

In asking the high court to hear the case, Chambers's lawyers argue that "credibility was a central issue" in the case and that it is unfair to use hindsight to punish lawyers for failing to foresee that their clients' assertions will ultimately be rejected. The sanctions, they said, "punished the lawyers for seeking the very credibility determinations that the adversary system is designed to provide."

But the Justice Department said the sanctions were justified. It said the judge did not fine Chambers simply because he did not believe his clients, but because of "failure to conduct an adequate investigation into the basis of asserted claims after obtaining voluminous discovery, a failure that persisted well after commencement of trial."

The Kunstler Case

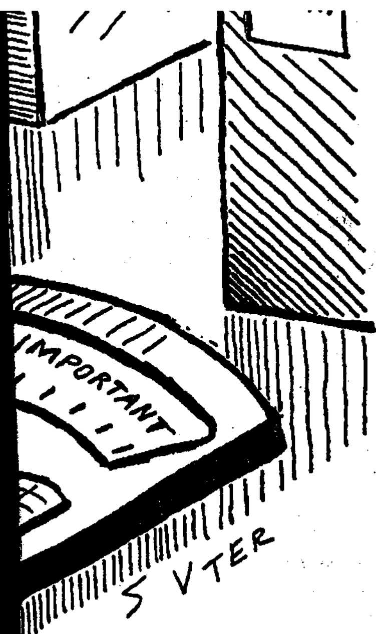
The Kunstler case, *Kunstler v. Britt,* concerns a different application of Rule 11. In the underlying civil rights case, the plaintiffs moved to dismiss the lawsuit, with the agreement of the defendants.

Then, 45 days later, lawyers for the state filed a Rule 11 motion against Kunstler and the two other lawyers, arguing they filed the suit without an adequate basis in law or fact and for an improper purpose.

After hearing arguments but without holding evidentiary hearings, the trial judge agreed. The 4th Circuit agreed, but ordered the judge to recalculate the amount of the award, which was based on the other side's calculation of its legal fees.

In asking the court to hear the case, Kunstler's lawyers at the Center for Constitutional Rights argue it violates his rights to have the court "rule on a lawyer's motivation in filing a complaint without hearing testimony, permitting cross-examination and determining credibility when confronted with conflicting affidavits as to the facts."

State officials said "there should



THE WASHINGTON POST

the Virgin Islands, found that civil rights plaintiffs and their lawyers were sanctioned in 47.1 percent of the cases in which the other side filed Rule 11 motions, compared with 8.4 percent of plaintiffs in other cases.

But University of Pennsylvania law professor Stephen B. Burbank, who conducted the study, said the figures that indicate a disproportionate applicaiton of Rule 11 in civil rights cases may be misleading because of the types of cases that are included in the universe of civil rights lawsuits, particularly claims by prisoners about their conditions of confinement.

Professor Sees No Abuse

Of the 25 civil rights cases he reviewed, Burbank said, "Very few if any of them raised concerns about abuse of the rule" by judges hostile to civil rights.

Likewise, Thomas Willging, the deputy director of research at the Federal Judicial Center, said he reviewed civil rights cases in which sanctions were imposed in five judge ... against an official who was clearly immune from damages.

"These were not Brown versus Board of Education cases," Willging said. "These were not cases involving public interest litigators or traditional activists, people seeking to reform the law." Chambers and Kunstler, he suggested, may well be "unusual cases."

Still, said Burbank, who worked to oppose sanctions in the Chambers case, "It's a situation where I'm not sure all the studies in the world are going to reveal the true social costs" of the rule and the deterrent effect on other lawyers considering bringing civil rights cases.

The Chambers Case

The Chambers case, *Chambers v. U.S. Department of the Army,* stems from an employment discrimination suit alleging racial discrimination at Fort Bragg, N.C., filed by Chambers and associates when he was in private practice in North Carolina. Most of the claims were settled during almost seven years of litigation.

The trial judge, in a mammoth 200-page opinion, then imposed sanctions of about $90,000—including $38,000 to reimburse the court for the time the judge and his staff spent hearing the case—against two of the plaintiffs and their lawyers.

The 4th U.S. Circuit Court of Appeals overturned part of the sanctions, saying the judge did not have the power to charge the costs of the court time and throwing out the fine against a young associate who had been left in charge of the case when Chambers moved to the Legal Defense Fund.

But it found that the lawyers "shirked [their] responsibility to explore the factual bases for the clients' suits and to examine the material obtained in discovery, instead charging forward with the litigation in disregard of its manifest lack of merit."

Although it described Chambers as a "respected civil rights advocate" who has "played a valuable ... failing to foresee that their clients' assertions will ultimately be rejected. The sanctions, they said, "punished the lawyers for seeking the very credibility determinations that the adversary system is designed to provide."

But the Justice Department said the sanctions were justified. It said the judge did not fine Chambers simply because he did not believe his clients, but because of "failure to conduct an adequate investigation into the basis of asserted claims after obtaining voluminous discovery, a failure that persisted well after commencement of trial."

The Kunstler Case

The Kunstler case, *Kunstler v. Britt,* concerns a different application of Rule 11. In the underlying civil rights case, the plaintiffs moved to dismiss the lawsuit, with the agreement of the defendants.

Then, 45 days later, lawyers for the state filed a Rule 11 motion against Kunstler and the two other lawyers, arguing they filed the suit without an adequate basis in law or fact and for an improper purpose.

After hearing arguments but without holding evidentiary hearings, the trial judge agreed. The 4th Circuit agreed, but ordered the judge to recalculate the amount of the award, which was based on the other side's calculation of its legal fees.

In asking the court to hear the case, Kunstler's lawyers at the Center for Constitutional Rights argue it violates his rights to have the court "rule on a lawyer's motivation in filing a complaint without hearing testimony, permitting cross-examination and determining credibility when confronted with conflicting affidavits as to the facts."

State officials said "there should be no Civil Rights Act exception to Rule 11. Litigants pursuant to this statute should be required to adhere to the same norms of professional behavior demanded of any litigant." They said Kunstler and the other lawyers "received all the process due them under these circumstances."

True Confessions

Once again, the Supreme Court has come to the aid of put-upon police interrogators in their valiant fight to rid us of the criminal element and restore good old law 'n' order. Now we won't have to worry about that pesky Fifth Amendment anymore [front page, March 27].

Whatever the hapless Rodney King may have confessed during his ... him of whatever offense he may be guilty of. And, of course, we all know he must be guilty of something, or else why would the police have had to beat him?

I know that now I can sleep better. Thank you, Mr. Rehnquist, Mrs. O'Connor, Mr. Scalia, Mr. Kennedy and Mr. Souter. Though I'm scared as hell, you make me proud to be an American.

Spotlight on Women Athletes

This letter is my applause for the University of Virginia Cavaliers and the Tennessee Volunteers and for The Post's effort to bring into the spotlight women's sports [front page, April 1].

Professional opportunities are limited for many outstanding women athletes. Ten years ago, when I played college basketball, only professional women tennis players and golfers oc-