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Pleadings

1 History

1.1 Ancient writ system

- Each substantive claim had an associated procedural form and writ
- Highly technical pleading Requirements
  - Failure to use "magic words" could result in dismissal

1.2 Code pleading

- Field Code (NY): 1848
  - Many other states adopted versions of the Field Code
- Common form of action for all claims (trans-substantivity)
  - Still requires detailed factual pleading

1.3 Notice pleading

Federal Rules of Civil Procedure

- Adopted in 1938, pursuant to Rules Enabling Act
  - Previously, federal courts followed state procedure
- 35 states have adopted versions of FRCP
  - Exceptions include CA, IL, NY, PA

Structure

Allocate different functions to different steps:

- Pleadings: provide notice of claims & defenses
  - Requires less factual detail than Code pleading
    - But see Twombly/Iqbal
  - Emphasize substance over form
- Rule 11 & Rule 12(b): weed out baseless claims
- Discovery: develop facts
- Summary judgment: narrow factual issues

2 Pleading Under the FRCP

2.1 Applicable Rules

Rule 7

Pleadings allowed

- Complaint
- Answer
- Answer to counterclaim
- Answer to crossclaim
- Third-party complaint
- Answer to third-party complaint
- Reply to answer, only if court orders

Rule 8

Requirements for stating a claim:

- "a short and plain statement of the grounds for the court's jurisdiction"
- "a short and plain statement of the claim showing that the pleader is entitled to relief"
- "a demand for the relief sought"
  - "may include relief in the alternative or different types of relief"

Rule 9(b)

- Particularized allegations of fact requrefd for fraud or mistake
- General allegations sufficient for malice, intent, knowledge, and other state of mind
  - But consider implications of Twombly/Iqbal: factual allegations must plausibly support *inference* of malice, intent, etc.

2.2 Notice Pleading

"Short and plain statement"

- Form 11–Complaint for Negligence
  - Compare code pleading
    - "In an action or defense based upon negligence, it is not sufficient to allege the mere happening of an event of an injurious nature and call it negligence on the part of the party sough to be charged. This is necessarily so because negligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause, or as one of the proximate causes, of the injury must be alleged." *Gillespie v. Goodyear Svc. Stores*, 258 N.C. 487 (1963), quoting *Shives v. Sample*, 238 N.C. 724 (1953).[1]

[1] N.B. The current NC Rules of Civil Procedure follow the FRCP model. *Gillespie* pre-dates the adoption of these rules.

3 Motions Under Rule 12

3.1 Defenses/Motions to Dismiss

Rule 12(b)

Grounds

- 12(b)(1): Lack of subject matter jurisdiction
- 12(b)(2): Lack of personal jurisdiction
- 12(b)(3): Improper venue
- 12(b)(4) & (5): Defects in service or form of process
- 12(b)(6): Failure to state a claim
- 12(b)(7): Failure to join necessary party under Rule 19

May be asserted by motion or as a defense in an Answer

- But if asserted by motion, must be done before filing an Answer

3.2 Joining Motions

Rule 12(g)

- May combine any of the Rule 12(b) grounds in a single motion
- Successive motions on same grounds not allowed

3.3 Timing & Waiver

Rule 12(h)

Defenses listed in Rule 12(b)((2)-(5) are waived *if*

- omitted from a 12(b) motion, or
- neither raised by motion nor included in responsive pleading

Defenses under Rule 12(b)(6) & (7) may be raised

- in responsive pleading,
- by motion, or
- at trial

Defense under Rule 12(b)(1) is never waived

4 Challenging the Sufficiency of a Complaint

4.1 Motion to Dismiss

Rule 12(b)(6)

- Failure to state a claim upon which relief can be granted
  - Challenges sufficiency of complaint under Rule 8

Meaning of Insufficiency

Even if everything in the complaint is true, the plaintiff does not show an entitlement to relief.

This may be true for two reasons

- No such claim
  - *Example*: Plaintiff sues for "Offensive Bad Taste in Music"
- Insufficient allegations to support claim
  - *Example*: Plaintiff sues for negligence, but fails to allege any injury

4.2 Plausibility Standard

Bell Atlantic v. Twombly (US 2007)

Claim

- Sherman Act, § 1: "Every contract, combination ... , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."
- Critical element: Agreement
  - Mere "parallel conduct" not sufficient for liability
  - This is a matter of substantive antitrust law

Analysis

- Court assumes truth of allegations re: common pricing, no geographic competition
- But court treats allegation that defendants acted pursuant to an agreement as conclusory
  - Plaintiffs merely recite the element, without alleging facts about agreement
  - Why isn't this sufficient?
    - Plaintiffs are relying on parallel conduct to raise an *inference* of an agreement; the implicit assertion is that the parallel conduct must have resulted from an agreement, rather than independent decisions by each defendant.
    - Majority says the inference of an agreement isn't sufficiently *plausible* given only parallel conduct.
    - Alternative explanation: market efficiency.
- What more should the plaintiffs have done to satisfy the Court?
  - They don't necessarily have to allege detailed facts about the agreement (who, what, where, when).
    - Heightened pleading standard for fraud under Rule 9 doesn't apply.
  - But they must allege enough to suggest that an agreement (as opposed to lawful parallel conduct) is a plausible inference.
  - Does that place an unreasonable burden on plaintiffs in cases this this, where the relevant facts aren't readily observable or disclosed?
    - What could the plaintiffs realistically have alleged?
- What concerns motivate the majority
  - Burden on defendant in having to answer and defend suits
- Are these valid concerns in the context of the FRCP?

- Rule 8(a) is supposed to require only notice of the claim, saving proof for discovery.
- Rule 11 subjects parties to sanctions for alleging facts or asserting claims without a reasonable foundation.

Ashcroft v. Iqbal (US 2009)

Claim

- Deprivation of federal civil rights by Attorney General & FBI Director
  - "Constitutional tort" under federal common law
  - High-ranking government officials are liable only for their own unconstitutional actions. No *respondeat superior* liability
- In this case, plaintiffs must plead & prove the Attorney General & FBI Director adopted the detention policy *for the purpose of discrimination* on unconstitutional grounds (race, religion, national origin).
  - "Disparate impact" is not enough.

Analysis

- Factual allegations v. legal conclusions
  - Court assumes truth of factual allegations about who was detained and how they were treated.
  - But court disregards, as legal conclusion, allegation of discriminatory motive.
- Plausibility of inference
  - Absent direct evidence of discriminatory purpose, plaintiffs rely on factual allegations about detention to raise inference.
  - Majority: The factual "allegations are consistent with with [defendants] purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose."
  - Majority distinguishes between constitutionality of plaintiff's *arrest* and constitutionality of the policy for classifying detainees as "high interest".
    - Plaintiff's claim against Attorney General & FBI Director went only to the policy, not the arrest itself.
    - Allegation that defendants "adopt[ed] a policy approving 'restrictive conditions of confinement' for post-Sepember 11 detainees until they were 'cleard by the FBI'" is insufficient to plausibly support inference that they did so because of detainees' "race, religion, or national origin."
    - "All it plausibly suggests is that the Nation's top law enforcement officers ... sought to keep suspected terrorists in the most secure consitions available until the suspects could be cleared of terrorist activity."

4.2.1 Making Sense of Twombly/Iqbal

Steps to analysis

1. Assume truth of all (non-conclusory) factual Allegations
2. Ignore allegations that are mere legal conclusions
   - Treat these as "inferences" that must be plausible based on the factual allegations

3. Assess whether the factual allegations plausibly suggest an entitlement to relief
    - i.e., if the factual allegations themselves are not sufficient on their face to satisfy the elements of the claim, do those allegations plausibly support an inference?
    - Consider plaintiff's inference(s) against alternative explanations.

Meaning of "Plausibly"

- Legal Plausibility
    - Do the facts alleged plausibly satisfy the elements of the claim?
        - Court considers "obvious alternative explanation".
    - Criticism
        - Shouldn't weigh competing explanations at pleadings stage; that's for discovery and summary judgment.
- **Not** factual plausibility
    - The Court in both cases disclaims this meaning of "plausible"
        - Discredit factual allegation only if facially incredible (e.g. "little green men")
    - At dismissal stage, not supposed to weigh likelihood that plaintiff will prove its allegations
        - Isn't that what the majority is really doing with "more likely explanations"?

Plausibility & Inferences

Inference: Additional fact(s) or conclusion(s) drawn from factual allegations in the complaint

- *Twombly*: Plaintiffs relied on factual allegations about defendants' common pricing and lack of geographic competition to establish an inference that they acted pursuant to an agreement.
- *Iqbal*: Plaintiff relief on factual allegations about detention based on religious/national origin profile to establish an inference that the Attorney General & FBI Director adopted the detention policy with the intent to discriminate on the basis of religion/national origin.
- In each case, the majority concluded that the inference was not sufficiently plausible.
    - Too great a leap from the factual allegations to the inference, where the factual allegations are at least equally consistent with some other (innocent) explanation
        - *Twombly*: conduct resulted from market efficiency.
        - *Iqbal*: detention policy was based on law enforcement information about likely suspects and witnesses in the 9/11 attacks.

Applying Twombly/Iqbal

FRCP Form 11: Complaint for negligence

> *On [DATE] at [PLACE], the defendant negligently drove a motor vehicle against the plaintiff.*

- Is negligence a plausible inference from the fact that defendant drove vehicle into plaintiff?

How does the complaint in *Swierkiewicz v. Sorema* fare under the Towmbly/Iqbal standard?

- Is discrimination based on national origin a plausible inference from the facts alleged in that case?

5 Answers

5.1 Requirements

Rule 8(b):

5.2 Ineffective Denials

Reis Robotics, USA, Inc. v. Concept Industries, Inc. (N.D. Ill. 2006)

- "To the extent the alleged 'contract' ... failed to warrant [quality of goods], it was procured by fraud and was of no validity; accordingly, the remaining allegations in this paragraph are denied as true"
- This is "equivocal and serves to confuse the issues that are in dispute".

Zielinski v. Philadelphia Piers, Inc. (E.D. Pa. 1956)

Facts & Procedural History

- Zielinski was injured when he was hit by a fork lift while at work.
- Believing that the fork lift was owned by Philadelphia Piers, Inc. (PPI) and that the fork lift driver was a PPI employee, Zielinski sued PPI for his injury.
  - N.B. Workers compensation bars claims by an employee against their employer for injury sustained in the course of employment. But workers compensation does not bar claims for work-related injuries against third-parties.
- In fact, a year before the accident, PPI had sold its business to another company, Carload Contractors, Inc. (CCI), and the fork lift operator who caused the accident became a CCI employee. PPI continued to own the fork lift and the pier where the accident happened, which it leased to CCI.
  - Upon receiving the complaint, PPI notified its insurance carrier, noting that CCI should be the defendant instead of PPI.
  - CCI was insured by the same carrier, and had notified the carrier of the accident the day after it occurred.
- Zielinski's complaint included this allegation:

  > *"a motor-driven vehicle known as a fork lift or chisel, owned, operated and controlled by the defendant, its agents, servants and employees, was so negligently and carelessly managed * * * that the same * * * did come into contact with the plaintiff causing him to sustain the injuries more fully hereinafter set forth."*

- In its Answer (filed after PPI contacted the insurance company to point out the mistaken identification of the responsible defendant), PPI responded to this paragraph with a general denial, without explaining that it no longer owned the fork lift or employed the operator at the time of the accident.
- PPI also failed to point out the sale of its business in its responses to the plaintiff's discovery requests.
  - The fork lift operator, apparently unaware that his employer had changed, identified himself as an employee of PPI in his deposition.
- More than two years after the compliant and answer were filed, the plaintiff learned that PPI had sold its business to CCI prior to the accident.

- At some point after filing its Answer (in which it generally denied the allegations including ownership of the fork lift), PPI admitted that it owned the fork lift and the pier, which it least to CCI.

Holding & Analysis

- General denial in Answer was ineffective, where PPI admitted ownership of the fork lift.
- As a result of ineffective denial, and failure to correct it for over two years, PPI is deemed to have admitted *both* that it owned the fork lift (which was actually true) *and* that the operator was employed by and working for PPI at the time of the accident (which was not actually true).
- Court assusmed there was no bad faith, but concluded that "principles of equity require that defendant be estopped from denying agency because, otherwise, its inaccurate statements and statements in the record, which it knew (or had the means of knowing within its control) were inaccurate, will have deprived plaintiff of his right of action."
  - If defendant had answered properly, plaintiff could have sued CCI instead.
  - N.B. Under FRCP Rule 15(c)(1)(C), plaintiff might still be able to amend the complaint to substitute CCI for PPI as the defendant.
  - CCI had knowledge of the suit within the requisite time.
    - But this case pre-dates the addition of Rule 15(c)(1)(C), so that wasn't an option.
  - Court notes that PPI and CCI are both insured by same company, which will pay any judgment in any event, so there's no real prejudice in requiring PPI to proceed as defendant.

5.3 Affirmative Defenses

Rule 8(c)

- Affirmative defenses are waived if not raised with answer
  - But defendant may be able to amend
- Substance over form
  - Mistaken designation of defense as counterclaim (or vice versa) is ok

5.4 Twombly/Iqbal and Answers/Defenses

Majority view: Twombly/Iqbal does not apply to answers/defenses

6 Amendments

6.1 Amending as a Matter of Course

Rule 15(a)(1)

Party may amend, without consent of opposing party or court, one time

- Only allowed one time
- Must be within 21 days of
  - service of the pleading to be amended, *or*

- service of a responsive pleading or Rule 12(b)/(e)/(f) motion
  - i.e. responsive pleading or motion resets the 21 day clock

6.2 Amendment by Leave of Court

Rule 15(a)(2)

Subsequent amendments, or any amendent after the 21 day time limit, requires either

- Consent of opposing party, *or*
- Leave of court: "freely give[n] when justice so requires"
  - Party opposing amendment must show
    - Prejudice
    - Bad faith, or
    - Fultility

Shiflet v. Allstate Ins. Co. (D.S.C. 2006)

Facts & Procedural History

- Plaintiff sued defendant for breach of contract & bad faith over denial of insurance claim
- Defendant filed an answer denying liability.
- Defendant then sought leave to amend answer to include defense of arson.
  - Plaintiff opposed on grounds that amendment was prejudicial, in bad faith, and futile.

Analysis & Holding

- Mere delay is not sufficient reason to deny leave to amend, absent showing of prejudice, bad faith, or futility.
- No prejudice by undue delay
  - Defendant filed motion for leave to amend within time allotted by court's scheduling order, and with more than three months remaining for discovery,
  - Discovery revealed new information, previously unavailable, that suggested arson.
- Proposed amendment not futile
  - Arson provides complete defense to plaintiff's claims.
  - Amendment is futile only if "clearly insufficient or frivolous on its face"

Beeck v. Aquaslide "n" Dive Corp.

Facts & Procedural History

- Plaintiff was injured on a swimming pool slide and sued the manufacturer.
- In its answer, Defendant admitted that it manufactured the slide.
  - After further investigation, the Defendant concluded it had not really manufactured the slide.
  - Defendant moved to amend its answer to deny manufacture.
    - Court granted leave to amend.
- Case went to trial on the issue of whether defendant manufactured the slide.
  - Jury found for defendant on that issue and court entered judgment in favor of defendant.

Analysis

- Prejudice
  - Burden is on party opposing amendment
    - Will amendment "sound the 'death knell'" to plaintiff's claim?
    - Can plaintiff proceed against other (proper) parties?
  - Co-defendants are still in the case
    - How much does this influence the court's decision?
- Can plaintiff amend to name real manufacturer?
  - Relation back would probably not be allowed under Rule 15(c)(1)(C).
    - But, if real manufacturer fraudulently labelled the product with the defendant's name, equitable tolling might extend the statute of limitations.
- No prejudice to plaintiff where "the amendment would merely allow the defendant to contest a disputed factual issue at trial".
- Denial of leave to amend would prejudice defendant.
  - They shouldn't be stuck admitting a disputed fact, where their initial mistake was reasonable.

6.3 Relation Back

Relation back allows an amendment to assert a claim for which the limitations period expired after the original complaint was filed.

- Treat the new claim as if it had been included in the original complaint, for purposes of statute of limitations.

Rule 15(c)

Rule 15(c)(1)(A)

- Relation back allowed if permitted under the law providing the applicable statute of limitations.
  - You'd look to the substantive law for this.

Rule 15(c)(1)(B)

- Relation back allowed if amended pleading asserts claim or defense arising out of same conduct, transaction, or occurrence set out in original pleading.
  - Justification: Opposing party is already on notice.

6.3.1 Same Conduct, Transaction, or Occurrence

Examples

Blandings hires Simms to design & build a new house. Alleging that the house collapsed because Simms used shoddy materials, Blandings sues for breach of contract. A few weeks later, Blandings seeks to amend to add a claim for negligence. The limitations period for the negligence claim expired the day after the original complaint was filed.

- Amended complaint should relate back, because it arises out of the same conduct (the construction of the house) as the original breach of contract claim.

Moore v. Baker (11th Cir. 1993)

Facts & Procedural History

- Moore sued Baker for failure to advise her of therapy as alternative to surgery.
- Trial court granted summary judgment for Dr. on that claim.
  - Moore sought leave to amend to add claim for negligence in performance of surgery.
  - Statute of limitations ran out on day original complaint was filed.

Holding

- Malpractice claim, arising from performance of surgery, does not relate back to original complaint, which stated claim arising from conduct in consultation before the surgery.
- Turns on how broadly to construe "conduct, transaction, or occurrence".
  - Plaintiff's argument: Course of treatment is a single CTO.
  - Defendant's argument: Consultation & surgery are separate CTOs.
- Court accepts defendant's view, focusing on whether original complaint, based on conduct before surgery, put defendant on notice of potential claims for negligence during & after surgery.
  - Claims require proof of "completely different facts".

Problem

Mottley sues R.R. for breach of contract, based on R.R.'s failure to honor lifetime free pass. R.R. moves for summary judgment, arguing the contract is void based on federal statute prohibiting free passes. Mottley seeks to amend, asserting claim that R.R. fraudulently induced Mottley to accept free pass in settlement of personal injury claim, knowing it would be void.

- Mottley's best argument: Fraud claim and breach of contract claim both involve the same contract, and both claims turn on the same issue of whether the pass is void under federal law.
- R.R.'s best argument: The two claims are arise out of different acts at different times, and breach of contract claim (which assumes the pass was valid) did not put R.R. on notice that Mottley would contend the pass was void.

6.4 Change of party or naming of party

15(c)(1)(C)

Relation back is permitted if, within period for service under Rule 4(m), newly-added or newly-named party:

- received such notice of the action that it will not be prejudiced in defending on the merits; *and*
- knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity

6.4.1 Mistake Concerning Party's Identity

Worthngton v. Wilson (7th Cir. 1993)

Facts & Procedural History

- Plaintiff brought federal civil rights suit under 52 U.S.C. § 1983 over alleged excessive use of force by police officers in the course of an arrest.
- Because plaintiff did not know the names of the arresting officers, the complaint named "three unknown named police officers" as defendants.
- Plaintiff subsequently filed an amended complaint substituting two officers, Wilson & Wall, for the "unknown named police officers".
  - Wilson & Wall moved to dismiss the complaint based on the statute of limitations, which had expired the day after the original complaint was filed.
  - Worthington argued that the amended complaint related back to the original date of filing.

Holding & Analysis

- Relation back not allowed because requirements under Rule 15(c)(1)(C) were not satisfied.
  - Wilson & Wall did have notice of the action within the requsite time. Rule 15(c)(1)(C)(i)
  - But plaintiffs failure to name Wilson & Wall as defendants in the original complaint did not result from a *mistake* concerning the defendants' identity.
    - Court distinguishes plaintiff's *lack of knowledge* as to defendant's identify from a *mistake* concerning that identity.

Questions

- What might plaintiff have done to avoid this problem?
  - Pre-complaint investigation to ascertain names of arresting officers
    - Get copy of arrest report; ask city attorney or police department; interview witnesses.
    - Query whether court would have decided differently if plaintiff had shown he made reasonable efforts to identify the officers before filing.
      - Might have argument for equitable tolling of Statute of Limitations if the defendants and/or city attorney improperly impeded plaintiff from identifyin the arresting officers.
  - Could plaintiff just name every officer in the police department, and then later amend to dismiss those who were not involved?
    - Rule 11: Plaintiff must have foundation for alleging the named officers were involved.

"John Doe" defendants

- Majority of courts have likewise held that lack of knowledge is not a *mistake* for purposes of Rule 15(c)(1)(C)(ii).
- Majority of courts have also held that identifying defendants as "John/Jane Doe" (instead of "unknown") does not satisfy the *mistake* requirement (because the plaintiff didn't mistakenly think the defendant's name was "John/Jane Doe").

Krupski v. Costa Crociere, S.P.A. (US 2010)

Facts & Procedural History

- Plaintiff sued Costa Cruise Lines for injury on a cruise ship

- Costa Cruise Lines moved for summary judgment, asserting it was not the proper defendant.
- Plaintiff sought leave to amend to name Costa Crociere as defendant instead.
  - Trial court granted motion.
  - Costa Crociere moved to dismiss based on one-year limitations period.
  - Plaintiff argued amended complaint should relate back to date of original filing.

Issue

- Whether relation back under Rule 15(c)(1)(C)(ii) was proper where plaintiff knew or should have known that Costa Crociere existed but sued Costa Cruise Lines instead.

Analysis

- Rule 15(c)(1)(C)(ii) applies to "mistake concerning the proper party's identity".
- "Mistake" is not precluded where plaintiff knew of proper defendant's existence.
  - Plaintiff might still be mistaken as to which entity was liable.

Question

- Does *Krupski* alter the result in *Worthington*?
  - Court in *Krupski* cites a dicitionary definition of "mistake" that includes "a wrong action or statement proceeding from faulty judgment, *inadequate knowledge*, or inattention."
  - But Supreme Court didn't directly address the "lack of knowledge" question

7 Good Faith in Pleadings

7.1 Signature

FRCP Rule 11(a)

- Signature required for "every pleading, written motion, and other paper"
  - Does not apply to discovery
    - Discovery requests and responses are not submitted to the court
    - Discovery requests and responses are covered under Rule 26(g)

7.2 Representations

Rule 11(b)

Representations to the Court

- No improper purpose
  - harassment
  - delay
  - increase cost
- Claims and defenses warranted by law
  - existing law, or non-frivolous argument for extension, modification, reversal
- Factual allegations supported by evidence

  - or likely to be supported after investigation and discovery
- Factual denials warranted on evidence or reasonably based on belief or lack of information

Standard

- Objective standard: "Reasonable lawyer"
- Requires "reasonable inquiry" before filing

Cf. Model Rules of Professional Conduct Rule 3.1 ("Meritorious Claims and Contentions")

7.3 Sanctions

Imposition of sanctions

- Rule 11(c)(2): on motion
- Rule 11(c)(3): on court's own initiative

Nature of sanction: Rule 11(c)(4) & (5)

- May be monetary or non-monetary
- "limited to what sufficed to deter repetition of the conduct or comparable conduct by others similarly situated"
- No monetary sanction against represented party for violation of Rule 11(b)(2)
  - Because client is entitled to rely on lawyer's expertise and judgment as to the law
- No sua sponte sanctions unless court makes show-cause order "before voluntary dismissal or settlement"

7.4 Reasonable Inquiry

Turton v. Virginia Dept. of Educ. (E.D. Va. 2015)

Facts & Procedural History

- Plaintiff sued school districts for discrimination under federal law
- Plaintiff also asserted state law tort claims against school district attorney
- After court dismissed complaint, attorney moved for Rule 11 sanctions, arguing claims against him
  - lacked a legal basis
  - lacked a factual basis
  - were filed for an improper purpose

Defendant's Arguments & Court's Ruling

- No legal basis
  - Argument: Court lacked subject-matter jurisdiction over state law claims
    - Court: Based on precedent, plaintiff's lawyer could reasonably have believed court had subject matter jurisdiction over state law claims
  - Argument: Plaintiff failed to exhaust administrative remedies

        - Court: Plaintiff's lawyer identified no legal authority to support application of futility exception to administrative exhaustion requirement
    - Argument: No legal support for claim for breach of duty based on special relationship
        - Court: Settled Virginia law established that school district attorney owed no duty to any third party, and plaintiff's lawyer did not appear to have performed any legal research on the issue.
- No factual basis
    - Argument: Complaint did not offer sufficient factual basis for claims
        - Court: Reasonable investigation would have revealed that defendant was not attorney for certain schools districts and was not involved in their actions, contrary to allegations in complaint. Failure to conduct reasonable factual investigation violates Rule 11.
- Improper purpose
    - Argument: Plaintiff's "primary motives were to gain publicity, and to embarrass teachers, principals, and state and county officials." Relies on public statements by plaintiff's counsel "We took a chance because there was not a lot of case law … but something had to be done to wake up the defendants and get the information out there."
        - Court: No indication that plaintiff never intended to litigate (distinguishing *Kunstler*). But willful filing of baseless complaint supports inference that suit was improperly filed for a purpose other than to vindicate legal rights.

7.5 Good Faith Arguments for Change in Law

Hunter v. Earthgrains Co. Bakery (4th Cir. 2002)

Facts & Procedural History

- Attorney filed Title VII claims on behalf of bakery workers
- Employer argued claims were subject to mandatory arbitration under CBA
- Trial court granted summary judgment and imposed Rule 11 sanctions

Issue

- Whether attorney had a good faith argument for challenging the 4th Circuit's prior decision in *Owens-Brockway Glass Container*, holding CBA applied to Title VII claims?

Analysis

- Appellate court review for abuse of discretion
- Purpose of Rule 11 sanctions
    - Deter future litigation abuse

Standard

- Claim is frivolous under Rule 11 only where it has "absolutely no chance of success under the existing precedent"
    - This was not the case here
    - 4th Circuit's decision in *Owens-Brockway* was contrary to decisions of other circuits to have considered the issue

- N.B. Trial court issued its decision imposing sanctions after the Supreme Court issued its decision in *Wright v. Universal Maritime Svcs Corp.* (1998), which adopted the position that Hunter advanced in support of her claims.
- But even if the Supreme Court had ultimately decided the issue the other way, the existence of a split among the lower courts would be enough to give plaintiff a good faith argument for their position.

Postscript

The attorney in this case, Pamela Hunter, was censured by the NC State Bar Grievance Committee in 2010, for her conduct in connection with a medical malpractice case. Matter of Hunter. 10G0295 (2010)

- The Grievance Committee found that Hunter violated Rule 3.1 by filing the suit with "no factual basis".
- Hunter also violated Rules 1.4 & 1.8 by dropping the suit and personally paying her client $20,000, without explaining the purpose of the payments to the client, who though the case had settled.

7.6 Improper Purpose

Sussman v. Bank of Israel (2d Cir. 1995)

- Plaintiff's pre-filing communication to defendant, warning of adverse publicity in event of lawsuit, did not support Rule 11 sanctions on grounds of improper purpose, where Complaint was not frivolous
- Not improper for plaintiff with a colorable claim to communicate with defendant before filing suit, in an effort to settle claim
- Not improper for plaintiff to note the effect of potential adverse publicity, where plaintiff has a colorable claim