

Judges Battling Frivolous Suits

Courts venting anger against lawsuits that waste time, money

By Jane Fritsch

A Florida judge orders a trailer park to pay more than \$6,000 in legal fees for suing a renter over a \$3.80 phone call.

A federal judge in Chicago throws out a wide-ranging civil-rights suit filed by a man jailed overnight on vandalism charges — and orders him to pay \$853.48 in legal fees.

The issue can be as minor as who should pay for a phone call or as troubling as an allegation of police misconduct. The nation's courts are open to all who want to plead their cases, big or small. But with increasing frequency and severity, frustrated judges around the country are sending out a new message to lawyers and their clients: "We'll hear your case, but watch out if you're wasting our time."

Armed with toughened procedural rules, federal judges nationwide have ordered attorneys and clients to pay the costs of frivolous lawsuits and motions in at least 400 cases over the last three years, compared to a handful in the years before the rules were toughened. The costs have ranged from \$50 to several hundred thousand dollars and generally are awarded to the winning side to help pay legal expenses. In New York state courts, lawyers who try the patience of judges have been ordered to pay court costs and fees and have even been jailed for contempt.

In the Florida case, a state judge last month ordered a lawyer and his client to pay more than \$6,000 in costs for suing an Orangeburg, N.Y., man over a \$3.80 phone call. The suit was filed by a Florida trailer park that called a renter collect because his monthly check was late. The renter, who lives part of the year in Orangeburg, accepted the call because he thought it was an emergency. When he found out it was not, he deducted the charge from his rent check.

"This is a stupid case," said Jerome Hall, the Florida lawyer who has been awarded \$6,450 in fees so far for representing the renter. "But I'm doing great," Hall said. "Let them keep appealing."

James Pollack, an attorney for the trailer park, says he plans to do just that. "My client thought there was a valid reason for suing," Pollack said, but he refused to discuss it while the case was pending.

Sanctions in such cases are part of a get-tough movement led by now-retired Chief Justice Warren Burger, who has charged that there is an explosion of frivolous litigation clogging the courts. In his final years as the nation's top judicial authority, Burger publicly scolded the legal profession and warned lawyers to "fasten their



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THE LAWYER: George Sassower, who is accused of filing almost 200 lawsuits and motions in violation of court orders, says, "I only sue people I think have done wrong."

THE PAPERWORK: Attorney Robert Calica sits amid legal files resulting from years of defending against litigation brought by Sassower.

cases without making lawyers so cautious that they refuse to bring innovative or risky lawsuits.

"We have in New York state the most imaginative lawyers in the country," said Sol Wachtler, chief judge of the New York Court of Appeals, the state's highest court. "They can come up with some novel lawsuits that on the face sound ridiculous, but could end up establishing important principles of law. Twenty years ago, we would have called a lawsuit to protect the environment crazy."

Judge Jack Weinstein, chief judge of the federal courts for the Eastern District of New York, one of the busiest jurisdictions in the country, said he sees little abuse of the legal system. "We don't shoot each other in the streets. We settle our disputes in court."

Martin Bradley Ashare, the Suffolk County attorney, said his office has been inundated with meritless claims. Suffolk County has spent \$80,000 over the last few years defending itself against one Westchester County lawyer who has brought hundreds of repetitious actions stemming from a dispute over his handling of an estate. The lawyer, George Sassower, also is the subject of an unusual disciplinary hearing in Brooklyn, where he filed nearly 200 lawsuits, motions and claims after he was ordered to stop litigating a case. He has been cited in numerous courts for filing frivolous suits.

"I would not be one who would want to stifle the creative instincts of lawyers," Ashare said. "But frivolous litigation comes at a tremendous cost to the taxpayers."

In the past 10 years, the number of civil suits filed in federal courts has doubled and crackdowns on crime have flooded the federal criminal courtrooms. Yet the cause of the increase is in dispute.

"Of course there is an increase in lawsuits, but that doesn't mean we're facing an epidemic of frivolous litigation by greedy lawyers," said David Trubek, a visiting professor at Harvard Law School. Trubek, who has studied trends in civil cases, said increases in lawsuits are often provoked by government policy decisions as seemingly innocuous as a move to go after delinquent student loans. In 1975, the federal courts reported 6,811 loan-recovery cases; in 1984 the figure had jumped to 46,000.

"I sympathize with the plight of the individual federal judge," Trubek said. But judges may be taking out their frustration over heavy caseloads on lawyers and clients who are not re-

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seat belts" and get ready for "a few carefully considered, well-placed" fines.

But with the first wave of new federal sanctions in place, appeals courts are taking a second look at the cases in an attempt to distinguish between frivolous litigation and creative

lawyering. Recent indications are that the higher courts think trial judges may have gone too far.

Some lawyers and judges say frivolous cases are inevitable in a legal system that allows anyone to sue over just about anything. At issue is whether it is possible to limit truly frivolous

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sponsible for the problem, he said.

The case of Long Island civil rights lawyer Arthur V. Graseck Jr., whose \$5,000 sanction in a frivolous case was reversed last month by the U.S. Court of Appeals in New York may put the issue before the Supreme Court and slow down the rush to impose sanctions.

"I'm happy about it," said Weinstein, a vocal foe of the rush to sanction attorneys. "That decision gave a clear signal to the trial judges not to impose sanctions too freely."

The judges who have imposed sanctions have been acting under a 1983 amendment that toughened a federal procedural rule known as Rule 11. Before 1983, attorneys could be penalized if it could be shown that they acted in "bad faith" in filing a suit or motion in federal court. Now attorneys are responsible for checking whether their claims have legal merit and are backed up by fact. The amendment does away with the so-called "empty head — pure heart" defense.

Georgene Vairo, a professor at Fordham University Law School, said the courts have been applying sanctions in an increasing range of cases. "At first, people were very concerned about the use of the rule in civil-rights cases," she said. "But more recently it has been used in complex cases, and has begun to hit corporate litigants as well."

Vairo points to a products liability case in which a woman sued nine manufacturers of the antibiotic tetracycline, alleging that it had discolored her teeth. Even though she did not know which firm's drug she had taken, she was able to sue all the manufacturers of the drug under a legal theory known as "enterprise liability." Later, after some pre-trial preparation, she dropped Upjohn and several other companies from the suit because it became clear that she could not prove they were to blame. Her attorney also dropped the enterprise-liability approach. Upjohn then requested and won an award of fees and expenses under Rule 11.

Vairo suggested that a simple dismissal of the case — without penalties against the woman — might have been sufficient. In some cases, Vairo said, plaintiffs can only get access to information that could prove their cases by subpoenaing documents and taking depositions. Normally, neither can be done without first filing a lawsuit. "Is it frivolous for a plaintiff to try to prove these things in a court of law?" Vairo asked.

In another recent case, a Chicago man sued after he was arrested for allegedly vandalizing the property of an automobile-towing service. He was acquitted of the charge and filed suit in federal court, alleging numerous violations of his civil rights by police and the towing company. He maintained that police knew the charges against him were false yet kept him in jail more than 10 hours without allowing him to call a lawyer.

His case was dismissed by the trial judge, who ordered him to pay \$853.48 in costs. The judge said some of the claims came close to having merit, but others were totally frivolous. Vairo said the ruling, which was upheld by a federal appeals court, warns against the "kitchen sink" approach to lawsuits.

Weinstein is involved in his own fight with the U.S. Court of Appeals in a case that could help to spell out guidelines for sanctions. The Court of Appeals reversed Weinstein's decision and ordered him to make a construction firm pay legal fees to the City of New York for bringing a frivolous suit. The firm, Eastway Construction Corp., had been barred from participating in a city housing-rehabilitation program after it defaulted on \$8 million in loans from the city. Eastway fought the ban in state courts, but lost, then tried to sue in federal court.

Weinstein dismissed the suit as meritless, but refused to impose sanctions against Eastway or its attorneys. The city appealed and won. The appeals court warned that judges should be careful not to "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law," but at the same time said that Eastway and its attorneys should pay the city's costs because they should have known they had no chance of winning.

The case was sent back to Weinstein, who then determined the city had spent \$52,000 on the case. But Weinstein ordered Eastway to pay \$1,000.

"I complied with the order," Weinstein said. "I set out the criteria in great detail and applied those criteria."

Weinstein said judges should take into account some subjective considerations when deciding whether to make lawyers and their clients pay for

frivolous suits. He said judges should determine whether the lawyers believed they were correct in taking the course they did; whether there was vindictiveness or a desire to punish an opponent; whether the lawyer is a "neophyte who needs education," a repeat offender, or someone with a reputation for being ethical; whether the lawyer or client is able to pay the fine; the degree of frivolousness of the action; and the dangers in chilling the particular kind of litigation involved.

The city has again appealed in the Eastway case. Weinstein said he hopes the appeals court will incorporate his guidelines criteria into the developing case law on Rule 11 sanctions.

In a separate case, the appeals court recently overturned the \$5,000 fine against civil-rights attorney Graseck, who has brought at least 79 suits against Suffolk County officials. The appeals court ruled that Judge Jacob Miahler had used too broad an approach in deciding to fine Graseck in the case, which involved a number of individual defendants and claims. The appeals court warned that judges should "avoid hindsight" and resolve all doubts in favor of the lawyer.

It is a decision that has provoked Ashare, the Suffolk County attorney, to predict "open season" for lawsuits against the county. Ashare has said he will appeal the ruling to the U.S. Supreme Court.

Ashare notes the case of Sassower as another example of the need for strong sanctions. The county has already run up an \$80,000 bill to defend various officials against Sassower's suits. Sassower has been filing lawsuits, appeals and motions for the last seven years in state and federal courts, which have ordered him to cease litigating over the estate case.

"The courts were literally under seige," said Robert Calica, who was hired to handle the Sassower litigation in 1984. "He at one time was suing us in eight different courts," Calica said. "He was able to serve blizzards of paper that confounded his adversaries." Calica said. "He would move so fast that by the time they would sort the mail the matter would be over. He was confounding the courts."

Last year, a state appellate division grievance committee brought formal disciplinary charges against Sassower for alleged professional misconduct including the filing of almost 200 lawsuits, motions and proceedings in violation of court orders to stop litigating. The committee charged, among other things, that Sassower willfully ignored a State Supreme Court justice's order to cease litigating in a particular case in Brooklyn and that he had filed "frivolous and vexatious" lawsuits against a number of lawyers and public officials. Sassower had been found in criminal contempt of court for violating that order and could ultimately lose his license to practice law.

"I only sue people I think have done wrong," Sassower said. He said every federal and state judge is "throwing the book" at him because he has evidence of judicial corruption, which he is attempting to expose. "You get one crooked judge and you get 50 of them. That's the problem. There are no whistle-blowers."

Regarding the disciplinary proceeding, he said: "I don't care. I'd rather be honest and have them take my license. I can't tolerate out-and-out corruption."

The increased use of sanctions in federal court has prompted New York officials to begin considering assessing penalties in state courts. George F. Carpinello, a professor at Albany Law School, was on a state bar association committee last year that proposed the Legislature adopt provisions similar to Rule 11 to apply to all state court cases.

The Legislature recently adopted a more limited provision that would permit fines of up to \$10,000 for the filing of frivolous personal injury claims. But, the provisions do not apply to frivolous motions within a case, Carpinello said.

Meanwhile, the state Court of Appeals is expected to rule soon on an Appellate Division case involving repeated litigation of a mortgage-foreclosure dispute in Levittown that resulted in sanctions. The Appellate Division said the courts have inherent power to slap the attorney and his client with a fine in addition to costs to deter frivolous action, even though there is no specific state law.

Carpinello, who is the chairman of the state court advisory committee on civil practice, warned that the courts must move cautiously on the sanctions issue. The federal rule allowing judges to penalize lawyers for frivolous suits "is creating a side circus of litigation," Carpinello said.

"It's the new frivolous activity — Rule 11 claims. It's the ultimate irony."