HB

31

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 31

Revision Date:
Title: "...relating to civil liability. . .; amending Rule 13(e) and 82(b), Alaska Rules of Civil Procedure..."
Sponsor: Representative Mulder
Requester: House Labor & Commerce Committee

Dept. Affected: Department of Law
BRU: Criminal Division, Civil Division
Component: Criminal Division, General Legal Services
COMPONENT SERIAL NO. 2085/2087

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	322.5	322.5	322.5	322.5	322.5	322.5
TRAVEL	19.2	19.2	19.2	19.2	19.2	19.2
CONTRACTUAL	123.0	123.0	123.0	123.0	123.0	123.0
SUPPLIES	6.3	6.3	6.3	6.3	6.3	6.3
EQUIPMENT	32.5					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	503.5	471.0	471.0	471.0	471.0	471.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	243.6	227.4	227.4	227.4	227.4	227.4
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other - Interagency Receipts	259.9	243.6	243.6	243.6	243.6	243.6
TOTAL	503.5	471.0	471.0	471.0	471.0	471.0

Estimate of any current year (FY97) cost: $ 0.0

POSITIONS

FULL-TIME	3.0	3.0	3.0	3.0	3.0	3.0
PART-TIME	2.0	2.0	2.0	2.0	2.0	2.0
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill creates several new causes of action similar to but broader than common-law abuse of process, and makes some such causes of action compulsory claims and counterclaims in the underlying lawsuit. Claims against the opposing attorney would be filed in a separate, parallel suit. As drafted, this bill would have substantial fiscal impacts on the Department of Law, not because it would authorize claims against the state that would have merit, but rather by encouraging a large number of unfounded claims that would increase litigation costs.

The department handles a disproportionate volume of pro se litigation, much of it initiated by prisoners. We anticipate that many pro se litigants would assert that state filings and defenses violated this provision, would assert new claims on this basis in the main action, and would also file parallel suits against the state attorneys. This would complicate and increase the cost of handling litigation, and in some instances would force the state to hire private counsel to defend the state attorneys in the spin-off litigation. While the state could counterclaim on its own behalf under the provisions of HB 31, many of these litigants are judgment proof.

Prepared by: Joan M. Kasson — Phone: 465-5370
Division: Administrative Services Division — Date: 1/31/97

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 1/31/97
Agency: Department of Law

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ANALYSIS CONTINUATION:

HB 31 would also complicate other litigation and increase state expenses. For example, we anticipate that the federal government would attempt to use these new causes of action as a defensive tool in suits the state has filed or will file against the United States or federal officials, and would seek to have the spin-off claims adjudicated by sympathetic federal judges. At a minimum, the state's legal costs would increase. (The increased defensive burden would fall solely on the state, since the United States is immune to liability under this provision, not having waived its sovereign immunity). Another potential source of expense would be suits by private citizens against troopers or other state employees. The Department of Law currently defends these suits under provisions of the collective bargaining agreements, but does not provide free representation for countersuits; these are left to the employee to bring through private counsel after the case is over. By making some such suits compulsory counterclaims in the main action, this bill could force the state to assert some claims of this type on the employee's behalf or, alternatively, lead the employee to hire private counsel to participate in the main action. Either eventuality would add complication and expense.

Overall, the department estimates that HB 31 would increase the cost of litigation by about four percent in the civil division, and increase the cost of prisoners' rights litigation in the criminal division by about 12.5 percent. Based on the current number of equivalent positions handling civil litigation, this will result in an increase of two and one-half attorney positions in the civil division, and one-half of an attorney position in the criminal division.

The department's weighted cost for an attorney position is $127,000 per year, plus $6,500 for one-time new position equipment. The weighted cost includes clerical support, communications, space, supplies, data processing, and all other normal overhead expenses. It does not include direct, out-of-pocket case costs such as experts, court reporters, and case travel. Thus, the department's in house staff cost would be $317,500 for the civil division (37.5% GF and 62.5% IAR) and $70,000 in general funds for the criminal division. Additionally, due to conflicts, $60,000 in outside counsel costs will probably be incurred by the civil division (37.5% GF and 62.5% IAR), and $15,000 in outside counsel GF costs will be incurred by the criminal division. Likewise, $12,500 will be needed by the civil division for case travel (37.5% GF and 62.5% IAR), and $2,500 GF will be needed for case travel costs in the criminal division.

Finally, new positions include two PFT Attorney IV's, one PPT Attorney IV, and one PFT legal secretary in the civil division, and one PPT Attorney IV in the criminal division. Please also note that although no clerical support position is being added in the criminal division, proportionate support position funding is included in the standard attorney cost schedule to reduce clerical support vacancy so that the new part-time attorney's clerical burden can be handled. One-time equipment costs are added for the civil division secretary position as such costs are not included in tne standard attorney cost schedule.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 31

Revision Date:
Dept. Affected: Alaska Court System
Title: Civil liability for improper litigation
BRU: Trial Courts
Component:
Sponsor: Rep. Mulder
Requestor: House Labor & Commerce
COMPONENT SERIAL NO. 768

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES	25.0	25.0	25.0	25.0	25.0	25.0
TRAVEL						
CONTRACTUAL	12.5	12.5	12.5	12.5	12.5	12.5
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	37.5	37.5	37.5	37.5	37.5	37.5
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	37.5	37.5	37.5	37.5	37.5	37.5
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	37.5	37.5	37.5	37.5	37.5	37.5

Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel Phone: 264-8228
Agency: Alaska Court System Date: 01/30/97

Approved by: Arthur H. Snowden, II, Administrative Director Date: 01/30/97
Agency: Alaska Court System

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04:52 PM
Rev 1/37

Alaska Court System
Fiscal Analysis
HB 31

HB 31 creates civil liability for actions which it describes as false claims and improper practice in civil cases. It does this by adding AS 09.65.190(a) - (g) to the Code of Civil Procedure.

Proposed AS 09.65.190(a), (b), (c), and (e) essentially codify Civil Rule 11, with two primary differences. First, CR 11 gives a judge the discretion to impose monetary or non-monetary sanctions for improper practice on motion by the aggrieved party. HB 31, on the other hand, allows an aggrieved party to file an action for compensatory damages. The action must be part of the same action in which the injury arose if the action is the result of an act or omission by a party. However, the action must be asserted as a separate action if the injury is the result of an act or omission by a nonparty (such as an attorney). Handling the issue of frivolous practice as a separate claim in a civil suit, or as a separate civil suit entirely, is more time consuming (and thus more expensive) than handling it as a motion.

Second, by allowing a civil action for improper practice, HB 31 essentially makes financial sanctions (in the form of compensatory and punitive damages) for such behavior mandatory. This differs from CR 11, which gives the judge discretion in imposing sanctions (these might include financial sanctions, exclusion or admission of disputed evidence, extension or limitation of discovery, etc.). The federal courts began requiring mandatory sanctions for improper practice in 1983. This rule generated a dramatic increase in claims, and as a result, the federal courts repealed the requirement in 1993. Federal sanctions are once again discretionary.

Proposed AS 09.65.190(d) and (f) codify the common law cause of action for malicious prosecution. It modifies the common law by allowing the civil action if the defendant acted without probable cause on a claim or defense, or acted primarily for an improper purpose. Under the current standard, the defendant must have acted without probable cause on a claim or defense, and acted primarily for an improper purpose. By making it easier to prove malicious prosecution, more prevailing litigants can be expected to file such claims.

Those proposing these changes believe that they will reduce frivolous litigation, and they may be correct. However, the legal standard for proving frivolous conduct is very high, and thus the actual percentage of claims which are frivolous as a matter of law is very small, notwithstanding the average defendant's view to the contrary. Most commonly such cases are filed by prisoners or other pro se litigants. Those

categories of plaintiff are generally unaware of the details of the Code of Civil Procedure, and are judgment-proof if they do violate its provisions.

While potentially beneficial for certain litigants in specific cases, we believe that this legislation will result in a net increase in the number of cases before the court system, as well as a lengthening of some existing cases. At the present time, approximately 95 percent of civil cases settle without trial, and the discovery phase of a lawsuit is spent attempting to convince the opposing party that it would be more financially advantageous to settle than to continue. Accordingly, litigants can be expected to use HB 31 as a new tool to pressure the opposing party into settling a case. In FY 95, there were 16,306 civil cases filed in superior court, and 8,005 civil cases (not counting small claims) filed in district court. If only one percent of those cases resulted in a civil action for frivolous practice (either by the defendant alleging frivolous prosecution, or the plaintiff alleging frivolous defense, or both), there would be 243 new cases or new claims in existing cases. This fiscal note assumes additional judicial time, clerical costs and jury fees.

HB 31

"Pleadings" how construed
depo transcript used as exhibit
narrowly – complaint, answer
motion? Not affidavit
targets – attys & pro se litigant

[Something in HB58?
signing

§ 44 See Rules version

→ Rule 95 Cty
(C) Party PI prop charged
enter, grant agst party

verification

PHONE MESSAGE | DATE 2/6 | TIME 4:30 A.M. P.M.

FOR Lisa
M Denny DeWitt is sending me
OF
PHONE ( ) 21647 EXT.
FAX MOBILE PAGER ( )
MESSAGE
Re: Scheduling HB31

- URGENT
- X PHONED
- RETURNED YOUR CALL
- X PLEASE CALL BACK
- WILL CALL AGAIN
- WAS IN
- WANTS TO SEE YOU

SIGNED KT

AVERY

HB31

Susan Cox

a(2) applic.

factual aff – my suppos

lay person – existg law etc

how do you apply

~~Gail Voisinlander~~

Thurs. 1pm

Susan Cox 4169 Gail 269-5100

cs

exception for prisoners

– incarceration

Not by people re:

PHONE MESSAGE | DATE 4/25 | TIME 12:10 A.M. P.M.

FOR Lisa

M Jessica Mellet

OF North Carolina

PHONE ( ) (888) 536-0126 EXT.

FAX MOBILE PAGER ( )

MESSAGE Re: HB 31 - Status

Another RS

- URGENT
- X PHONED
- RETURNED YOUR CALL
- X PLEASE CALL BACK
- WILL CALL AGAIN
- WAS IN
- WANTS TO SEE YOU

AVERY

SIGNED KT

2/5/97

Cox

HB 31 left L&C yesterday

Frivolous - v/o of Rule 11

Attys personally liable

out of House Labor & Commerce

—— exempted state last year

Gail V.

Bob Minta code

"Slap suits" environmental suits considered frivolous

Public Int. group immunity no good bec sue atty.

Court Sys 37K fiscal note

Chris thought State exempted so now note coming

L & C Rokeberg Chair

[task force increased fee under Rule 11

0-LS0193\H
Ford
4/29/97

CS FOR HOUSE BILL NO. 31( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MULDER, Cowdery

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for certain false allegations in a civil pleading or proceeding, for certain improper acts relating to signing a civil pleading, for making an intentional false statement of a material fact; amending Rule 82(b), Alaska Rules of Civil Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.190. Civil liability for false claims and improper practice. (a) A person may not

(1) sign a civil complaint, answer, or other civil pleading that contains false allegations that are material to the claims asserted in the civil action with the intention of asserting allegations that are false; or

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and

is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(b) If the trier of fact determines that a party to a civil action has knowingly made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this section shall apply only to those claims to which the false statement relates.

(c) A party who is injured by a violation of

(1) (a)(1) of this section may bring an action for compensatory and punitive damages against the person who signed the civil pleading; and

(2) (a)(2) of this section may bring an action for recovery of compensatory damages against the person who signed the pleading; compensatory damages awarded under this paragraph may not exceed the actual reasonable costs and attorney fees that were incurred, in the action in which the violation of (a)(2) of this section occurred, by the party who was injured by the violation of (a)(2) of this section, but that were not awarded to that party.

(d) If a party brings an action under (c) of this section, the court shall award actual reasonable attorney fees to the prevailing party regardless of whether the prevailing party is the plaintiff or defendant.

(e) This section does not apply to an action

(1) brought by a person incarcerated by the state;

(2) involving divorce or dissolution; or

(3) involving adoption, custody, support, or visitation of a child.

(f) In this section, "civil pleading" includes motions and affidavits.

* **Sec. 2.** AS 09.65.190(d), enacted in sec. 1 of this Act, has the effect of amending Rule 82(b), Alaska Rules of Civil Procedure, by allowing the award of actual reasonable attorney fees in certain civil actions.

* **Sec. 3.** APPLICABILITY. This Act applies to an action that accrues on or after the effective date of this Act.

*** Sec. 4.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

*** Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

...-president and secretary of a ...hich had repossessed trucks in ...sued the buyer for a deficiency ... an interest in trucks because it ...s sufficient to justify the trial ...tion for directed verdict on the ... not the real party in interest. ...ompany, Op. No. 535, 452 P2d ...

... for the survivorship of those ...ld before death, cannot be used ...v as the real party in interest in ... for wrongful interference with ...reserve the body of a deceased. ... Chapel, Op. No. 773, 495 P2d ...

...retion to determine whether in ...f the litigation a waiver of a real ...ccurred. **Burns v. Anchorage** ..., 495 P2d 70 (Alaska 1972).

...uperior court's jurisdiction was ...nature and complaint would be ... **A.R.C. Industries v. State**, Op. ...ka 1976).

...uld not have been barred if state ...er within time set by court rule, ...ntable estoppel from asserting ...hen answer was filed at end of ...tipulation. **State v. Reefer King** ... P2d 56 (Alaska 1976).

...damages for lack of full perfor... did not seek to avoid its obliga...oint to its counterclaim or to its ...dequately raising the issue of ...ska Protection Service v. Fron...0, 680 P2d 1119 (Alaska 1984).

...ly pleaded issue of plaintiff's ...r, defendant waived issue for ...ssue to trial court's attention by ... **Committee for Honest and** ...o. 4269, 903 P2d 1055 (Alaska

...f Pleadings.

...nes of Parties. Every plead...ion setting forth the title of ... the judicial district in which ... title of the action, the file ...n as in Rule 7(a). In the ...ne action shall include the ..., but in other pleadings it is ...me of the first party on each ...dication of other parties.

... Separate Statements. All ... defense shall be made in ...he contents of each of which ...as practicable to a statement ...umstances; and a paragraph ... number in all succeeding ... founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference — Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) **Conformity With Rule 76.** All pleadings shall be prepared and filed in conformity with the provisions of Rule 76.

(Adopted by SCO 5 October 9, 1959)

Note: AS 10.06.915, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 10 by requiring that certain documents be attached to a complaint that appeals the disapproval of a writing under AS 10.06.915 by the commissioner of commerce and economic development.

Annotations

Cases

A complaint for additional payment of work done under a construction contract was skillfully and artfully drawn where plaintiff pleaded the contract, its own performance, acceptance by defendant of what it claimed to be tender of part payment, and then in separate paragraphs for each item for which additional compensation was claimed set out (a) that a certain amount of work was performed under pertinent terms of contract each pertinent item pleaded as separate exhibit, (b) that defendant had received payment for specific portion of the work performed, (c) that plaintiff's claim for payment of the balance had been rejected. **Stock & Grove, Inc. v. City of Juneau**, Op. No. 292, 403 P2d 171 (Alaska 1965).

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(Adopted by SCO 5 October 9, 1959; amended by SCO 743 effective December 15, 1986; by SCO 1009 effective January 15, 1990; and by SCO 1153 effective July 15, 1994)

Note: AS 10.06.628, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 11 by requiring that a complaint for an involuntary dissolution of a corporation under AS 10.06.628 be verified.

Annotations

Cases

Sanctions for failure to sign a pleading are a matter in the discretion of the trial court. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

Where appellants did not draw the trial court's attention to the failure of counsel to sign the complaint and made no motion to strike under this rule, and it was not contended that counsel's failure to sign was anything other than an oversight, the trial court had no opportunity to pass on the matter and failure to comply with this rule was not considered the first time on appeal. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

The purpose of this rule requiring signature of counsel as plainly set out in its present wording has been to insure the good faith of counsel by holding them strictly accountable for all the allegations contained in the complaint. **Sanulta v. Common Laborer's and Hod Carriers Union**, Op. No. 290, 402 P2d 199 (Alaska 1965).

Imposition of attorney fees and monetary sanctions against defense attorney in criminal case for filing frivolous, unnecessary and legally deficient pleadings was error requiring remand where attorney was not given notice of the charges against him nor a hearing on the issue of sanctions. **Weldner v. Superior Court, Third Judicial Dist.**, Op. No. 589, 715 P2d 264 (Alaska App. 1986).

Attorney had no right to jury trial on issue of whether sanctions should be imposed against him for filing frivolous, unnecessary and legally deficient pleadings in a criminal case. **Weldner v. Superior Court, Third Judicial Dist.**, Op. No. 589, 715 P2d 264 (Alaska App. 1986).

Attorney was not entitled to discovery at hearing on sanctions for filing frivolous, unnecessary and legally deficient pleadings in a criminal case, since notice requirements, in conjunction with any affidavits filed by the prosecution, would alert him to the issues. **Weldner v. Superior Court, Third Judicial Dist.**, Op. No. 589, 715 P2d 264 (Alaska App. 1986).

Attorney was not entitled to a change of judge as a matter of right at hearing on sanctions for filing frivolous, unnecessary and legally deficient pleadings in a criminal case. **Weldner v. Superior Court, Third Judicial Dist.**, Op. No. 589, 715 P2d 264 (Alaska App. 1986).

Where the complaint mentioned this rule only in the context of an abuse of process claim and the plaintiffs did not

Sat

Representative Joe Green

Lisa,
Talked w/ Mulder last night about HB 21. He claims problem with lawyers v lawyers now is that it must be Court initiated ?? Says we should talk w/ Mrs Denny Dewitt on this point. (Say WHOA! Mr Dewitt should talk with us.

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HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 13, 1997 **FURTHER REFERRALS:** **Judiciary**
Finance

Date of Committee Action: 2/3/97

The LABOR AND COMMERCE Committee considered: **HB 31**

HOUSE BILL NO. 31 **CIVIL LIABILITY FOR IMPROPER LITIGATION**

"An Act relating to civil liability for certain false allegations or material misstatements of fact in a civil pleading or proceeding, for certain improper acts relating to signing a civil pleading, for certain improper acts relating to civil pleadings or proceedings, for making an intentional false statement of a material fact, for acting on a civil claim or defense without probable cause, or for acting for a purpose other than proper adjudication of a civil claim; amending Rules 13(e) and 82(b), Alaska Rules of Civil Procedure; and providing for an effective date."

recommends it be replaced with the following committee substitute _____ [ ] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[X] fiscal note(s) LAW, Court [ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____ [ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Sen Sanders	✓			
Rep Brice			✓	
Rep Ryan	✓			
Rep Hudson			✓	
Rep Coghill	✓			

CHAIR'S SIGNATURE John J Coghill 2-3-97

Official Business

COMMITTEE:

HOUSE LABOR AND COMMERCE

DATE: February 3, 1997

SIGN-IN

Subject of meeting:

HB 31 - CIVIL LIABILITY FO RIMPROPER LITIGATION

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
Charles E. Cole	406 Cushman St. Fx	907-452-1124	self	yes!
Jeff Bush	POB 110800, Juno 99811	465-2500	Administration	yes
Jody Kennedy	P.O. Box 22151 Juneau 99801	463-3366	Alaska Enviro Cobby	NO
Chrystal Smith	PO Box 110300 Juneau, AK 99801	465-2432	Dept of Law	to answer questions
Pam LaBolle	217 Second St #201 Juneau	586-2323	AK State Chamber	Yes

Although good time statute entitles prisoner to deduction for good time and, in so doing, carves out exception to prohibition against otherwise reducing minimum term, this exception, by its own definition, applies only when minimum term is reduced as result of deducting good time credit from sentence that prisoner actually received. AS 12.55.125(f)(3), 33.20.010(a).—Id.

Alaska App. 1989. According to plain meaning of amended good-time credit statute, persons incarcerated before April 9, 1986, but sentenced afterwards, are entitled to a one-third deduction from their entire sentences. AS 33.20.010, 33.20.010(a, b).—Helton v. State, 778 P.2d 1156.

Statute limiting retrospective application of statutes did not bar application of amended good-time credit statute to time served by defendants prior to sentencing cutoff date specified in such statute, as statute conferred additional rights, augmenting the benefits previously accrued by defendants prior to the amendment, and did not extinguish right accrued under former law. AS 01.10.100(a).—Id.

Two defendants, both resentenced after April 9, 1986, were entitled to have one-third of their entire sentences deducted for good-time credit, assuming they complied with institutional rules, according to amended good-time statute, where State failed to meet burden of proving that legislature intended amendments to be interpreted other than as plain meaning suggested, and term "sentenced," as used in the amendment, referred to defendant's original date of sentencing, unless defendant's sentence was reversed and resentencing took place. AS 33.20.010.—Id.

⇐15(4). Computation of credit.

Alaska App. 1995. Consecutive sentences do not expire independently of another, and do not have separate mandatory release dates; rather, good time and parole release dates are to be calculated based on composite sentence. A.S. §§ 33.20.030, 33.20.040(a).—Callan v. State, 904 P.2d 856.

Alaska App. 1994. Former statute governing computation of good-time credit for sentence reductions required block method, rather than accrual method, for computing such good-time credit. AS 33.20.010 (1960).—State v. McCallion, 875 P.2d 93.

⇐15(5). Forfeiture before release.

Alaska App. 1992. Good time which defendant had forfeited while serving sentence originally imposed remained forfeited when defendant was resentenced following a successful appeal and retrial; while defendant was entitled to receive good time based on his entire term of imprisonment, he was subject to having that good time forfeited during his entire term of imprisonment. A.S. 33.20.010(a), 33.20.050.—Briggs v. Donnelly, 828 P.2d 1207.

Alaska App. 1990. Department of Corrections' application of revised regulation on restoration of good time forfeited as result of disciplinary infraction did not violate ex post facto clause; regulation was applied to prisoner's infraction in prison after effective date of regulation. U.S.C.A. Const. Art. 1, § 9, cl. 3, 10, cl. 1.—Souza v. State, 792 P.2d 289.

⇐15(7). Procedure and review.

Alaska App. 1994. Inmate's sole procedural mechanism for challenging Department of Corrections' disciplinary decisions, which resulted in loss of good time credit, was administrative appeal, and he was not entitled to pursue petition for writ of habeas corpus or for postconviction relief, even though restoration of good time credit would allegedly have resulted in his immediate release from prison on mandatory parole. Rules Crim.Proc., Rule 35.1(b).—Higgins v. Briggs, 876 P.2d 539.

Alaska App. 1994. Substitution of judgment standard of review, rather than rational basis test, was applicable to judicial review of propriety of Department of Corrections' method of computing good-time credit for sentence reductions. AS 33.20.010 (1960).—State v. McCallion, 875 P.2d 93.

PRIZE FIGHTING

See CRIMINAL LAW, ⇐45.55

PROCESS

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

Library references

C.J.S. Process §§ 2 et seq., 11 et seq.

⇐1. Nature of process in general.

Alaska 1988. Service of process is preliminary requirement to court's obtaining personal jurisdiction over party, and satisfies notice requirement essential to due process of law. U.S.C.A. Const. Amends. 5, 14.—Beam v. Adams, 749 P.2d 366.

II. SERVICE.

(B) SUBSTITUTED SERVICE.

Library references

C.J.S. Process § 43 et seq.

⇐78. —— Leaving copy at residence or other place.

Alaska 1988. Service of process at mortgagor's former wife's residence was improper; residence was not mortgagor's dwelling house or usual place of abode, there was no indication that mortgagor frequented residence after he moved out six months prior to service of process, and there was no indication that mortgagor had expressly or impliedly made his former wife his agent for service of process. Rules Civ.Proc., Rule 4(d)(1).—Beam v. Adams, 749 P.2d 366.

⇐79. —— Leaving copy with member of family or other person.

Alaska 1988. Service of process at mortgagor's former wife's residence was improper; residence was not mortgagor's dwelling house or usual place of abode, there was no indication that mortgagor frequented residence after he moved out six months prior to service of process, and there was no indication that mortgagor had expressly or impliedly made his former wife his agent for service of process. Rules Civ.Proc., Rule 4(d)(1).—Beam v. Adams, 749 P.2d 366.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

Library references

C.J.S. Process § 92 et seq.

⇐153. Defects and irregularities in service or return or proof thereof.

Alaska 1990. Mere service of process on party rather than on party's attorney in violation of civil rule will not render judgment void, but will instead subject judgment to possible reversal based on particular circumstances of individual case. Rules Civ.Proc., Rules 5(b, e), 55(c)(1).—Murat v. F/V Shelikof Strait, 793 P.2d 69.

IV. ABUSE OF PROCESS.

Library references

C.J.S. Process § 106 et seq.

⇐168. Nature and elements of cause of action.

C.A.9 (Alaska) 1988. Abuse of process cause of action could not be based on filing of notice of lis pendens under Alaska law.—City of Angoon v. Hodel, 836 F.2d 1245.

Alaska 1991. Judgment debtor imprisoned for civil contempt for refusing to answer questions in judgment debtor's examination failed to establish abuse of process claim against attorney for state, who contended that he initiated judgment debtor examination to collect unpaid judgment and did not intend to intice debtor into committing civil contempt; not only was requisite ulterior motive missing, but debtor failed to show that any acts undertaken by attorney were not steps required to take process to its authorized conclusion.—Denardo v. Michalski, 811 P.2d 315.

Alaska 1988. Mere filing or maintenance of lawsuit, even for improper purpose, is not "abuse of process"; plaintiff must plead some willful act taken by defendant in addition to filing of complaint.—Kollodge v. State, 757 P.2d 1024.

⇐171. Actions.

Alaska 1988. Mere filing or maintenance of lawsuit, even for improper purpose, is not "abuse of process"; plaintiff must plead some willful act taken by defendant in addition to filing of complaint.—Kollodge v. State, 757 P.2d 1024.

Alaska 1988. Allegations that police entered property without justification under pretext of investigating possible robbery and searching for two suspects, arrested occupant without probable cause for driving while intoxicated and resisting a police officer, and acted with malice, could be fairly read to state claim for abuse of process.—Jenkins v. Daniels, 751 P.2d 19.

Three-year statute of limitations for actions against peace officers acting in their official capacity, not two-year tort statute of limitations, applied to arrestee's suit against police officers for abuse of process. AS 09.10.060(a), 09.10.070(1).—Id.

PRODUCTS LIABILITY

I. SCOPE IN GENERAL.

(A) PRODUCTS IN GENERAL.

Library references

C.J.S. Products Liability §§ 2 et seq., 7 et seq., 35 et seq., 49 et seq.

⇐3. What law governs.

D.Alaska 1993. Under Alaska choice of law principles, Alaska law applied to Louisiana worker's diversity negligence and products liability action against fuel supplier where worker was injured in Alaska when allegedly contaminated fuel was ingested by crane's engine which stopped and released beam which struck worker, supplier was incorporated in Alaska, and relationship between worker and fuel supplier, as well as other potential concurrent tort-feasors, was centered around Alaska construction project.—Carriere v. Cominco Alaska, Inc., 823 F.Supp. 680.

⇐8. Nature of product and existence of defect or danger.

Alaska 1992. Product may be defective because of manufacturing defect, defective design, or failure to contain adequate warnings.—Shanks v. Upjohn Co., 835 P.2d 1189.

Alaska Supreme Court declined to formally adopt Restatement (Second) of Torts, § 402A comment k, pertaining to unavoidably unsafe products.—Id.

Alaska 1991. Focus in strict product liability case is on product, not on conduct of defendant; if defendant knew that one individual consumer could not safely use its product, that defendant may be negligent; however, that defendant will not be

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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FAX: (907)465-6735

TELECOPIER TRANSMITTAL LETTER

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Lisa Kirsch

LOCATION: House Judiciary Comm.

TELECOPIER NUMBER: 4316

COMMENTS: Here's a little background on Alaska law re abuse of process & malicious prosecution, with pattern jury instructions from Calif. Have fun! S

TOTAL NUMBER OF PAGES 9 INCLUDING COVER LETTER.

DATE: 3/19/97 TIME: 1:00 A.M./P.M.

FROM: Susan Cox
AGO-JUNEAU

RE:

ANY PROBLEMS, PLEASE CALL: _____ AT (907) 465-3600.

PLEASE READ: THIS TRANSMITTAL IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS TRANSMITTAL IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY LISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THIS AND ALL PAGES FOLLOWING TO THE ADDRESS ABOVE VIA U.S. POSTAL SERVICE. THANK YOU FOR YOUR COOPERATION.

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788 P.2d 960, 57 Wash
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Court has inherent pow
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trators, Inc. v. Roundy,
2 Wash.App. 771.

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Maddix, 703 P.2d 1062,
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600 P.2d 614, 24
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abuse of process

PROCESS ⇐168

For references to other topics, see Descriptive-Word Index

⇐167. Cure of defects by subsequent proceedings.

Library references
C.J.S. Process § 100

Or.App. 1985. Defendant who received actual notice of action from substituted service could not be heard to complain that incomplete substituted service without mailed notice was not reasonably calculated to apprise him of pendency of action and to afford him reasonable opportunity to defend; thus, court acquired jurisdiction over defendant by substituted service on December 12, 1982, and because that service occurred within 60 days after filing complaint, legal malpractice action was commenced timely on November 19, 1982, when complaint was filed. ORS 12.020(2).

Korgan v. Gantenbein, 702 P.2d 427, 74 Or.App. 154.

Wash. 1987. Trial court's order granting plaintiffs leave to service third amended complaint on counsel for all defendants appearing in action, but which did not provide for service of summons, did not fall within scope of rule providing that service could be made in any manner prescribed by court order, and did not negate original defective service. CR 4(d)(5), (e)(1), 12(b).

Haberman v. Washington Public Power Supply System, 744 P.2d 1032, 109 Wash.2d 107, reconsideration denied, amended 750 P.2d 254, appeal dismissed 109 S.Ct. 35, 488 U.S. 805, 102 L.Ed.2d 15, Wood Dawson Smith & Hellman v. Haberman, 109 S.Ct. 35, 488 U.S. 805, 102 L.Ed.2d 15 and American Express Travel Related Services Co., Inc. v. Washington Public Power Supply System, 109 S.Ct. 35, 488 U.S. 805, 102 L.Ed.2d 15.

IV. ABUSE OF PROCESS.

⇐168. Nature and elements of cause of action.

Library references
C.J.S. Process §§ 106–111.

Alaska 1991. Judgment debtor imprisoned for civil contempt for refusing to answer questions in judgment debtor's examination failed to establish abuse of process claim against attorney for state, who contended that he initiated judgment debtor examination to collect unpaid judgment and did not intend to entice debtor into committing civil contempt; not only was requisite ulterior motive missing, but debtor failed to show that any acts undertaken by attorney were not steps required to take process to its authorized conclusion.

Denardo v. Michalski, 811 P.2d 315.

Alaska 1988. Mere filing or maintenance of lawsuit, even for improper purpose, is not "abuse of process"; plaintiff must plead some willful act taken by defendant in addition to filing of complaint.

Kollodge v. State, 757 P.2d 1024.

Ariz.App. 1987. Where lawful end is pursued by appropriate process, incidental motives of spite or greed are not actionable in abuse of process claim.

Pankratz v. Willis, 744 P.2d 1182, 155 Ariz. 8.

Ariz.App. 1986. Seeking advantage in litigation over single incident by filing complaint or counterclaim is not misuse of process.

Bradshaw v. State Farm Mut. Auto. Ins. Co., 758 P.2d 1312, 157 Ariz. 410, vacated 758 P.2d 1313, 157 Ariz. 411.

Ariz.App. 1986. Liability for the tort of abuse of process requires willful act in the use of judicial process for an ulterior purpose not proper in the regular conduct of the proceedings.

Morn v. City of Phoenix, 730 P.2d 873, 152 Ariz. 164.

Abuse of process claim will not lie on ground litigation was continued without justification.

Morn v. City of Phoenix, 730 P.2d 873, 152 Ariz. 164.

Even if police officers had shown that claimant filed action against officers without justification and continued that suit without justification, such proof of improper motive in filing of suit would not have validated the officers' abuse of process claim based on the filing of that suit.

Morn v. City of Phoenix, 730 P.2d 873, 152 Ariz. 164.

Ariz.App. 1982. Word "process" as used in the tort of abuse of process is not restricted to the narrow sense of that term but has been interpreted broadly and encompasses the entire range of procedures incident to the litigation process and the tort is not restricted to utilization of process in the nature of attachment, garnishment or warrants of arrest. A.R.S. § 1–215, subd. 26.

Nienstedt v. Wetzel, 651 P.2d 876, 133 Ariz. 348, 33 A.L.R.4th 635.

For purpose of tort of abuse of process, "process" included noticing of depositions, entry of defaults and utilization of various motions such as motions to compel production, for protective orders, for change of judges, for sanctions and for continuances.

Nienstedt v. Wetzel, 651 P.2d 876, 133 Ariz. 348, 33 A.L.R.4th 635.

To establish a claim for abuse of process there must be a showing that defendant has

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AK - malicious prosc.

hold that the superior court abused its discretion in dismissing Hazen's false arrest and malicious prosecution claims and in instructing the jury that the officers had probable cause for the arrest. Hazen is therefore entitled to a new trial on the false arrest and malicious prosecution claims against the police officers and the municipality.[3] We further hold that Hazen's customer lists are not relevant to the subject matter of Hazen's remaining claims for relief, and are therefore not discoverable under Alaska R.Civ.P. 26(b)(1).

[4] We recognize that the discovery rules are to be broadly construed and that relevance for purposes of discovery is broader than for purposes of trial.[4] However, even under this broad concept of relevance the information sought still must be relevant to the subject matter of the action. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2008 at 42 (1970); 4 J. Moore, Moore's Federal Practice § 26.56[1] (2d ed. 1984).

[5, 6] Any information gleaned from Hazen's customer lists would concern activities at The Body Shop. Such information could bear on whether The Body Shop was a house of prostitution and whether sex could be obtained even if not explicitly offered. Such information, however, is not relevant to the subject matter of this case. This is a false arrest and malicious prosecution case, not a prostitution case. The elements of a false arrest claim are: (1) a restraint upon plaintiff's freedom (2) without proper legal authority. W. Prosser, Law of Torts § 11 (4th ed. 1971). *See City of Nome*, 570 P.2d at 169. The elements of a malicious prosecution claim are: (1) malice, (2) want of probable cause, and (3) termination of the proceeding in favor of the plaintiff. *Id. See Industrial Power v. Western Modular Corp.*, 623 P.2d 291, 298 (Alaska 1981).

The subject matter of these actions, therefore, concerns specifically what happened between Hazen and the police officers on the night of March 22, 1977. Information concerning the general activities at The Body Shop is irrelevant to this case and is therefore not discoverable.[5]

A. *Jury Verdicts on the Claims for Alteration of the Arrest Tape.*

[7, 8] The jury found Bailey and the municipality not liable on claims that they altered the arrest tape in order to impede Hazen's civil action. Hazen argues that the establishment order holding that there was probable cause was prejudicial error, affecting the jury's deliberations as to whether the tape was altered with the intent to impede her civil litigation.[6] We agree and hold that the verdicts must be

3. The superior court also directed a verdict against Hazen's civil rights claims arising out of the arrest on the grounds that probable cause was a complete defense to these charges and that the discovery sanction established probable cause. Since the sanction was erroneous, this would ordinarily mean that the claims could be maintained on retrial. At oral argument in conjunction with this appeal, however, Hazen's counsel conceded that all claims on retrial would be brought under state law. We need not determine whether a cause of action should be implied under the Alaska Constitution for these alleged civil rights violations because Hazen has common law causes of actions for false arrest and malicious prosecution that provide her a complete remedy for the alleged violations. *See State v. Haley*, 687 P.2d 305, 318 (Alaska 1984).

4. Alaska R.Civ.P. 26(b)(1) provides that it is not a ground for objection that the information sought in discovery will be inadmissible at trial "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

5. Such information would be relevant if Hazen's reputation were involved here. Hazen is not bringing a defamation cause of action, however, and Hazen's attorney stated at oral argument before this court that Hazen would not seek damages for injury to reputation and loss of business.

Appellees' attorney also contended at oral argument that the information could be used to impeach potential testimony by Hazen that sex never occurred at The Body Shop. Such testimony, however, would also have no relevance to the present claims for relief.

6. Since no special interrogatories were used, it is uncertain whether the jury found the defendants not liable on these grounds or on the grounds that Hazen should have discovered the tape alteration before April 22, 1980.

For later cases see same Topic and Key Number in Pocket Part

ther inference of malice. U.S.C.A. Const. Amend. 4.

Turngren v. King County, King County Dept. of Public Safety, 686 P.2d 1110, 38 Wash.App. 319, review granted, reversed 705 P.2d 258, 104 Wash.2d 293.

⇦33. Inference from result of prosecution.

Library references

C.J.S. Malicious Prosecution or Wrongful Litigation § 41.

Wash.App. 1990. Dismissal or termination of criminal proceeding may establish a prima facie case of malice, for purposes of claim of malicious prosecution.

Banks v. Nordstrom, Inc., 787 P.2d 953, 57 Wash.App. 251, reconsideration denied, review denied 797 P.2d 511, 115 Wash.2d 1008.

IV. TERMINATION OF PROSECUTION.

⇦34. Necessity.

Library references

C.J.S. Malicious Prosecution or Wrongful Litigation § 51.

Alaska 1981. Fact that counts for disparagement of title and credit by reason of defects in claims of title were not maintainable by defendant contractor as counterclaims did not mean that defendant contractor could not maintain an action for malicious prosecution if litigation was terminated favorably to it and malice on part of plaintiff supplier and lack of probable cause for claim asserted were pleaded and proven. AS 08.18.151, 34.35.070(f).

Industrial Power & Lighting Corp. v. Western Modular Corp., 623 P.2d 291.

Ariz.App. 1984. Malicious prosecution action does not accrue until prior proceedings have terminated in defendant's favor.

Moran v. Klatzke, 682 P.2d 1156, 140 Ariz. 489.

If action for malicious prosecution is filed prior to favorable termination of proceedings, action is premature and subject to dismissal.

Moran v. Klatzke, 682 P.2d 1156, 140 Ariz. 489.

Ariz.App. 1981. To be actionable, prosecution claimed to be malicious must terminate in favor of complaining party.

Hansen v. Stoll, 636 P.2d 1236, 130 Ariz. 454.

Cal. 1979. Action for malicious prosecution must be supported by favorable termination of previous underlying suit.

Lackner v. LaCroix, 602 P.2d 393, 159 Cal.Rptr. 693, 25 C.3d 747.

Colo.App. 1981. Malicious prosecution action based on criminal prosecution will not lie unless underlying criminal action was terminated in plaintiff's favor, generally meaning determination of not guilty or dismissal of charges, and termination resulting from negotiation, compromise, settlement or agreement is not considered favorable termination.

Land v. Hill, 644 P.2d 43.

Colo.App. 1981. Successful termination of criminal proceedings is a condition precedent to right to recover in a malicious prosecution action.

Carroll v. Regional Transp. Dist., 638 P.2d 816.

Hawaii 1987. Favorable outcome on underlying charge is element of malicious prosecution claim.

Kalilikane v. McCravey, 737 P.2d 862, 69 Haw. 145.

Hawaii App. 1989. There are three essential elements in a claim for malicious prosecution: (1) that the prior proceedings were terminated in the plaintiff's favor, (2) that the prior proceedings were initiated without probable cause, and (3) that the prior proceedings were initiated with malice.

Wong v. Panis, 772 P.2d 695, 7 Haw.App. 414.

The plaintiff in a malicious prosecution suit has satisfied the first element of the tort if the termination was in his favor and in such a manner that it cannot be revived. The requirement is met when there has been an adjudication in the plaintiff's favor on the merits, or the termination reflects on the merits.

Wong v. Panis, 772 P.2d 695, 7 Haw.App. 414.

Kan. 1986. Action for malicious prosecution cannot be brought if original action is still pending and undetermined.

Pancake House, Inc. v. Redmond By and Through Redmond, 716 P.2d 575, 239 Kan. 83.

Kan. 1980. Claim for malicious prosecution was precluded, where element of favorable termination of the proceeding complained of was lacking.

Porter v. Stormont-Vail Hospital, 621 P.2d 411, 228 Kan. 641.

Kan. 1980. Action for malicious prosecution cannot be brought if the original action is still pending and undetermined.

Nelson v. Miller, 607 P.2d 438, 227 Kan. 271, appeal after remand 660 P.2d 1361, 233 Kan. 122.

Kan.App. 1985. Favorable termination of underlying civil proceedings is an essential

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BAJI -- Calif. pattern jury instructions

H. ABUSE OF PROCESS

Analysis

Abuse of Process—Essential Elements .....
Abuse of Process—Defined .....
Abuse of Process—Mere Ill Will Is Not Improper Motive ...

BAJI 7.70

ABUSE OF PROCESS—ESSENTIAL ELEMENTS

The plaintiff _____ [also] seek cover damages based upon a claim of a process.

The essential elements of such claim ar

1. That the defendant used a legal proc wrongful manner, not proper in the regular of a proceeding, to accomplish a purpose f it was not designed;

2. That the defendant acted with an ulte tive;

3. That a willful act or threat was comm defendant, not authorized by the process proper in the regular conduct of the proce

4. That the defendant's misuse of the leg ess was a cause of injury, damage, loss of the plaintiff.

COMMENT

Restatement, Torts, § 682.

5 Witkin, Summary of Calif.Law (9th ed.), Torts, §§ 46 Equipment Corp. v. Nelson (1980) 110 Cal.App.3d 868, 16 361.

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BAJI 7.71

ABUSE OF PROCESS—DEFINED

An abuse of process is the misuse of the power of the court. It is an act done in the name of the court and under its authority by means of use of a legal process not proper in the conduct of a proceeding for the purpose of perpetrating an injustice.

COMMENT

The term "process" as used in the tort "abuse of process" has been broadly interpreted to encompass the entire range of procedures incident to litigation.

Younger v. Solomon (1974) 38 Cal.App.3d 289, 296, 113 Cal.Rptr. 113, 117 (recognizing that the use of interrogatories constitutes the use of process).

Definition is based on Woodcourt II Limited v. McDonald Co. (1981) 119 Cal.App.3d 245, 252, 173 Cal.Rptr. 836, 840 (holding that the recordation of a lis pendens cannot constitute an abuse of process because it is filed without intervention of the judicial authority and brings neither the property nor the parties before the court. Since there is no process, there can be no abuse of process.)

Generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason mere vexation or harassment are not recognized as objectives sufficient to give rise to the tort. Younger v. Solomon (1974) 38 Cal.App.3d 289, 297, 113 Cal.Rptr. 113, 118.

The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself. Christensen v. Gobar (1975) 47 Cal.App.3d 613, 618–619, 120 Cal.Rptr. 923, 925; Spellens v. Spellens (1957) 49 Cal.2d 210, 231–232, 317 P.2d 613, 626 (holding evidence was sufficient to establish an abuse of process where title to property was at issue in the main separate maintenance action and defendant caused a claim and delivery writ to issue and had the sheriff serve it on plaintiff to coerce the plaintiff into dropping the main action).

Ordinarily, the mere filing of a lawsuit will not suffice. Seidner v. 1661 Greenfield Owners Assn. (1980) 108 Cal.App.3d 896, 904, 166 Cal.Rptr. 803, 807 (failure to state a cause of action for abuse of process based on the filing of a second lawsuit by a homeowner's

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BAJI 7.73

ABUSE OF PROCESS—MERE ILL WILL IS NOT IMPROPER MOTIVE

Mere ill will against the adverse party in the proceeding in which the legal process was used does not constitute an ulterior or improper motive. Mere vexation or harassment are not sufficient objectives to constitute abuse of process.

COMMENT

Younger v. Solomon (1974) 38 Cal.App.3d 289, 297, 113 Cal.Rptr. 113, 118; Kyno v. Eustice (1963) 215 Cal.App.2d 627, 632, 30 Cal.Rptr. 391, 395; Pimentel v. Houk (1951) 101 Cal.App.2d 884, 886, 226 P.2d 739, 740.

Library References:

C.J.S. Process §§ 106–111, 114.

West's Key No. Digests, Process ⟸168, 171.

WESTLAW Topic No. 313.

Cal. Prac. Guide: Civ. Pro. Before Trial (TRO), Ch. 1

ATTY GEN OFFICE JUNEAU ID:907-465-6735 MAR 19'97 12:19 No.001 P.08

C. MALICIOUS PROSECUTION OF CRIMINAL ACTION OR CIVIL PROCEEDING

Analysis

	Inst. No.
Malicious Prosecution—Essential Elements	7.30
Favorable Termination	7.32
Probable Cause for Criminal/Civil Prosecution	7.33
"Malice" and "Malicious" Defined	7.34
Probable Cause for Prosecution—Advice of Counsel	7.36

BAJI 7.30

MALICIOUS PROSECUTION—ESSENTIAL ELEMENTS

The plaintiff _____ [also] seeks to recover damages based upon a claim of malicious prosecution.

The essential elements of a claim for malicious prosecution are:

1. The defendant initiated or was actively instrumental in [procuring the arrest] [the prosecution of the plaintiff in a criminal action] [the commencement or maintenance of a civil proceeding against the plaintiff];

2. The [arrest proceeding] [criminal action] [civil proceeding] against the plaintiff terminated in plaintiff's favor;

3. The defendant acted without probable cause in [initiating or procuring the arrest or prosecution of the plaintiff in the criminal action] [commencing or maintaining the civil proceeding]; and

4. The defendant acted with malice; and

5. The malicious actions of the defendant caused plaintiff to suffer injury, damage, loss or harm.

USE NOTE

Plaintiff has the burden of proving each of the elements. Restatement Second, Torts, § 672.

COMMENT

Malicious prosecution generally. 5 Witkin, Summary of Calif.Law (9th ed.), Torts, §§ 418–454.

A public employee is not liable for injury caused by instituting or prosecuting any judicial or administrative proceeding within scope of his employment. Govt.Code, § 821.6. No comparable immunity for false arrest and imprisonment. Milliken v. South Pasadena (1979) 96 Cal.App.3d 834, 839, 158 Cal.Rptr. 409, 411. Govt.Code, § 820.4.

The test is whether defendant was actively instrumental in causing the prosecution. Sandoval v. Southern California Enterprises, Inc. (1950) 98 Cal.App.2d 240, 247, 219 P.2d 928, 933; Rupp v. Summerfield (1958) 161 Cal.App.2d 657, 663, 326 P.2d 912, 915.

Knowingly giving false information to the police which results in a criminal prosecution in which the defendant is acquitted may be the basis for an action of malicious prosecution. Williams v. Hartford Insurance Co. (1983) 147 Cal.App.3d 893, 897, 195 Cal.Rptr. 448, 450.

See Restatement, Second, Torts, §§ 653, 655, 674.

The Restatement of Torts, § 674 states that California law is unclear as to whether or not a person is liable merely for the "continuation" of a malicious civil action. See Restatement of the Law of Torts, Second, Appendix (1981 Ed.) § 674, p. 438. However, the author of the Restatement cites Bertero v. National General Corp. (1974) 13 Cal.3d 43, 53, 118 Cal.Rptr. 184, 191, 529 P.2d 608, 616, as supporting Restatement, § 674, which uses the word "continuation."

The term "prosecution" applies to either criminal or civil actions and when applied to a civil action it "includes every step in action, from its commencement to its final termination." Black's Law Dictionary, 5th Ed. (1979).

A letter of complaint against a doctor by a doctor to the Board of Medical Quality Assurance is absolutely privileged in a defamation action but not in a malicious prosecution action. Hogen v. Valley Hospital (1983) 147 Cal.App.3d 119, 123, 195 Cal.Rptr. 5, 7.

Alaska State Legislature

House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

MEMORANDUM

Date: April 19, 1997

To: Mike Ford, Legislative Legal

From: Lisa Kirsch, House Judiciary Committee

Re: Proposed CS for HB 31

FIVE PAGES INCLUDING THIS MEMO

Attached please find the marked up version of Mintz' draft. There are four things that still need to be addressed:

1) Have we lowered the standard for punitives? Knowingly signing a document seems like a lesser standard to me--I tried to get them to go for knowing that it is material to the case, but they refused to go that far. Mintz says that knowing is all that is ever required.

2) Mintz says he intended "civil pleading" to include anything filed in the case. I asked if he intended to include deposition testimony transcripts that a party signs, GAL reports, letters from experts, etc. He agreed to include only pleadings, motions and supporting affidavits.

3) In regard to the severability section. If they can't get 2/3 vote for the rule change, and subsection (d) falls out, do we really have a conflict between section (d) authorizing full fees in circumstances ordinarily following CR 82? Do we really need a rule change, or should we just say this falls under 82(a) "except as otherwise provided by law."

Thanks for your help. Call me if any questions.

CS FOR HOUSE BILL NO. 31

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE – FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MULDER, Cowdery

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for certain false allegations in a civil pleading or proceeding, for certain improper acts relating to signing a civil pleading, for making an intentional false statement of a material fact; amending Rule 82(b), Alaska Rules of Civil Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

***Section 1.** A.S. 9.65 is amended by adding a new section to read:

Section 09.65.190. Civil liability for false claims and improper practice

(a) A person may not

(1) ~~[intentionally or recklessly]~~ KNOWINGLY sign a civil complaint, answer, or other civil pleading that contains false allegations that are material to the claims asserted in the civil action knowing that the allegations are false.

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and is

INCLUDING MOTIONS & SUPPORTING AFFIDAVITS

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(b) If the trier of fact determines that a party to a civil action has KNOWINGLY ~~intentionally~~ made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this section shall apply only to those claims to which the false statement relates.

(c) A ~~person~~ PARTY who is injured by a violation of

THIS PROXIMITY OF SUB SECTION REFERENCE ~~(1)~~ IS PROBLEMATIC (a)(1) of this section may bring an action for compensatory and punitive damages against the person who signed the ~~document~~ CIVIL PLEADING AS DEFINED IN (a)(1) and

(2) (a)(2) of this section may bring an action for recovery of compensatory damages against the person who signed the pleading: in this paragraph, "compensatory damages" IN THIS SUBSECTION* ~~[means]~~ shall not exceed the actual reasonable costs and attorney fees that were incurred, in the action in which the ~~[pleading was submitted]~~ violation of (a)(2) occurred by the ~~[person]~~ party who was injured by the violation of (a)(2) of this section, but that were not awarded to that ~~[person]~~ party.

(d) If a ~~person~~ PARTY brings an action under (c) of this section, the court shall award actual reasonable attorney fees to the prevailing party, regardless of whether the prevailing party is the plaintiff or defendant.

IN THE DERIVATIVE ACTION

* THIS CAP DOES NOT APPLY TO "COMPENSATORY" IN (C)(1). (C)(1) DAMAGES ARE APPARENTLY UNLIMITED.

*Sec. 2. AS 09.65.190(d), enacted in sec. 1 of this Act, has the effect of amending Rule 82(b), Alaska Rules of Civil Procedure, by allowing the award of actual reasonable attorney fees in a civil action for ~~false claims or improper civil practice~~ VIOLATION OF (a) OR (b)

*Sec. 3. SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

*Sec. 4. This Act takes effect ~~immediately~~ under AS 01.10.070(c).

WE DISCUSSED APPLICATION TO ONGOING CASES.
I SUGGESTED IT APPLY ONLY TO CASES FILED AFTER THE EFFECTIVE DATE.
DOES THIS NEED TO BE CLARIFIED? WHAT IS THE DEFAULT RESULT IF THE BILL IS SILENT?

HB 31

PUNITIVE – same std?

(a)(1) & (a)(2)
Is this the right way to draft assumed disjunctive?

civil pleading
wants to include off.

Severability
What happens if rule chg falls out?

Then do we have conflict w/ Rule 82 btwn. 9:65.190(d)?

SB15 list of actions excluded
– like carve out here

CS FOR HOUSE BILL NO. 31

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE – FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE MULDER, Cowdery

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for certain false allegations in a civil pleading or proceeding, for certain improper acts relating to signing a civil pleading, for making an intentional false statement of a material fact; amending Rule 82(b), Alaska Rules of Civil Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

***Section 1.** A.S. 9.65 is amended by adding a new section to read:

Section 09.65.190. Civil liability for false claims and improper practice

(a) A person may not

(1) [intentionally or recklessly] knowingly sign a civil complaint, answer, or other civil pleading that contains false allegations that are material to the claims asserted in the civil action knowing that the allegations are false.

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and is

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(b) If the trier of fact determines that a party to a civil action has intentionally made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this section shall apply only to those claims to which the false statement relates.

(c) A person who is injured by a violation of

(1) (a)(1) of this section may bring an action for compensatory and punitive damages against the person who signed the document; and

(2) (a)(2) of this section may bring an action for recovery of compensatory damages against the person who signed the pleading; in this paragraph, "compensatory damages" [means] shall not exceed the actual reasonable costs and attorney fees that were incurred, in the action in which the [pleading was submitted] violation of (a)(2) occurred by the [person] party who was injured by the violation of (a)(2) of this section, but that were not awarded to that [person] party.

(d) If a person brings an action under (c) of this section, the court shall award actual reasonable attorney fees to the prevailing party, regardless of whether the prevailing party is the plaintiff or defendant.

*Sec. 2. AS 09.65.190(d), enacted in sec. 1 of this Act, has the effect of amending Rule 82(b), Alaska Rules of Civil Procedure, by allowing the award of actual reasonable attorney fees in a civil action for false claims or improper civil practice.

*Sec. 3. SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

*Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

what about ongoing / retroactivity

~~for~~ violation of (a) or (b)

carve out
- family
- prisoner suits

Memo

Carr Gottstein Properties

Date: April 17, 1997

To: Lisa Kirsch
Fax 907-465-4931

From: Bob Mintz
Fax 907-272-3695 → 223-2000 voice mail
Home # 344 3035

Subject : House Bill 31

4 pages total.

F:\cgp\gl\MINTZFAX.DOC

HB 31

Rule 11

Counterclaim agst opposing party same case

Counterclaim agst atty - Sep suit

Strategy

What is std.? Who is at fault < either both

now 3 attys ~~would~~ instead of one

Rule 11
ARPIRG Comm — ACLU
primarily

to the extent

Mintz No false allegations
No claim even under this bill
190(a) from rule 11

Alaska Legal Service

Pub Int. litigants + Cty rule 82

Task Force — left out — but put more meat in penalty rule
10K fine
lying II — then give ct exclusion on or

§5 effective immed.
Causes of action — Current cases retroactivity problems
should be filed after effective date

OPPOSE HB 31 -- THE RETALIATORY LAW SUIT BILL

- HB 31 threatens the rights of all Alaskans who want their valid claims considered in a court of law. The bill creates several new "causes of action" that will enable anyone who is sued to sue the other person back--it doesn't matter who won the original lawsuit.

- HB 31's sponsor claims this measure will decrease "boilerplate" litigation against insurance companies and other "deep pockets," by discouraging "liars" from bringing false claims. However, the bill will enable anyone with abundant resources to get back at someone who has brought a court claim against them.

- Insurance companies support this bill because they know it is a tool that could be used to discourage all court claims against them, meritorious or not, by raising in every case the chilling possibility of a retaliatory lawsuit. After watching our neighbors face a few of these retaliatory lawsuits, most of us will begin to think twice before challenging an insurer's denial of a couple of thousand dollar claim.

- Big business likes this bill for the same reasons the ACLU opposes it. For example, a few years ago the AkCLU represented a man who went to court to defend his right to carry a political sign in an Anchorage shopping mall. He ultimately prevailed in court. Under HB 31, in a case like this the mall could have turned around and sued the guy who brought the case, even though he won. Anti-discrimination claimants who bring cases against employers likewise will be made vulnerable by this legislation. Courageous "Davids" who step forward to defend all of our rights should not be subjected to strategic retaliatory lawsuits filed by wealthy "Goliaths." HB 31 would have the bizarre effect of giving the Goliaths the right to retaliate even where they have been found to be acting in violation of the law.

- Under HB 31 it matters not who was wrong or right in the eyes of the jury or who the jury thought should be compensated. A citizen can be sued just as easily for filing a valid claim as for filing a frivolous one.

- There already exist plenty of disincentives against filing bogus lawsuits. Losers in litigation (or "liars," as the bill's sponsor likes to call them) generally end up paying a good chunk of the winning party's attorneys fees and/or costs. Also, under existing Rule 11, if a claim is truly frivolous, the other side can ask the judge to sanction the filing party. Finally, there is another significant deterrent to filing bogus lawsuits--many lawyers take cases on a contingency basis, and are compelled by the bottom line not to waste their time litigating non-starter lawsuits.

- Big business and insurance companies like to complain about how much money they spend settling claims, but the fact is they only settle those they figure they can't win in court. It is not because they have been victimized by liars, but simply that companies pay up before going to trial when they can see the evidence is going to prove the plaintiff's claim against them.

- The whole idea of keeping "liars" out of court is ill-conceived. After all, courts exist to try facts. This is not a new concept--courts have been sorting through opposing allegations of fact since man invented the wheel and it rolled into the unlucky person who happened to be standing in front of it. These days, the driver says the brakes on the car failed; the insurance company says the driver was drunk. Thus a dispute arises about who should pay the driver in front who got whiplash. This is why we have courts.

- HB 31 is destined to plug up the judicial system with retaliatory litigation while depriving many honest and deserving citizens access to a fair hearing.

——For more information on how to fight HB 31, call the Alaska Civil Liberties Union at 907-258-0044.——

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

CHAIR,
LEGISLATIVE COUNCIL

CO-CHAIR,
HOUSE SPECIAL COMMITTEE
ON MILITARY AND
VETERANS' AFFAIRS

CO-CHAIR,
MILITARY AFFAIRS FOR
ANCHORAGE CAUCUS

REPRESENTATIVE ELDON MULDER
DISTRICT 23 MULDOON-FT. RICHARDSON

SPONSOR STATEMENT

House Bill 31

The Frivolous Lawsuit Prevention Act

House Bill 31 will prevent frivolous lawsuits by requiring parties to lawsuits to be truthful and responsible in their pleadings. This bill discourages false statements in litigation and encourages responsibility by all parties and their attorneys. It requires more careful and focused preparation and presentation of pleadings.

This bill creates an obligation for litigants and attorneys to make reasonable efforts to assure that claims have a probability of succeeding. If the claim is knowingly or recklessly false, both the attorney and the party can be assessed damages. Currently, there is no effective way of holding parties responsible for frivolous pleadings. Frivolous pleadings increase the costs of litigation for the parties involved. They also increase the cost of our judicial system.

HB 31 requires attorneys as well as their clients to research their claims to assure they are factually supported before filing a suit. This bill will help eliminate "boiler plate" pleadings in lawsuits and encourage responsible and focused pleadings. "Boiler plate" pleadings include everything anyone could ever imagine could have happened rather than focusing on those specific issues that actually did happen. These extraneous pleadings are expensive to work through and are most often thrown out. They simply cause one party, and the court system, to expend significant dollars to pare filing down to real issues.

ALASKA STATE CAPITOL; JUNEAU, AK 99801-1182 • PHONE (907) 465-2647 • FAX (907) 465-3518
716 W. 4TH AVENUE; ANCHORAGE, AK 99501-2133 • PHONE (907) 258-8193 • FAX (907) 258-3511

Many suits are often less expensive to settle than litigate, regardless of their merit. This bill does not affect suits filed in good faith. It will, however, have a significant deterrent effect on those without merit. A system that allows deceit to be rewarded must be changed. This is not why we have and support a judicial system.

This bill assigns financial liability to those who:

- File suits without probable cause,
- Provide false information,
- Use claims and cross claims to cloud the issues and
- File unsuccessful claims on the hope of finding someone, somewhere willing to settle rather than spend the dollars to fight the suit.

The trier of fact, usually a jury, will make the determination whether the untrue information presented was intentional and material. If honest errors are made, there will be no sanctions.

A jury <u>can</u> make these decisions. The deterrent effect of this bill will reduce those cases that are inappropriate without inhibiting the filings of cases believed to have merit.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

'907) 465-3867 or 465-2450
\X (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 24, 1997

SUBJECT: Sectional Summary of HB 31
(Work Order No. 20-LS0193\A)

TO: Representative Eldon Mulder
Attn: Denny DeWitt

FROM: Michael F. Ford
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Prohibits a person from knowingly or recklessly filing civil pleadings that contain false allegations or misstatements of fact, from signing a civil pleading before making a determination that the claim is factually based and warranted by existing law or a good faith argument for modification of existing law, and from raising a claim or defense for the purpose of delay or harassment. Requires that judgment be entered against a party making an intentional and material mistatement of fact in a civil action. Imposes civil liability if a person in a civil action acts without probable cause or primarily for a purpose other than that of securing the proper adjudication of a civil claim. Allows a person who is injured by a violation of (a) of this section to recover compensatory damages and requires the claim be brought in the same action if the person is a party. Allows a person who is injured by a violation of (d) of this section to recover both compensatory and punitive damages and requires that final judgment be entered in the civil action in which the violation occurred. If a person obtains judgment for damages allowed under this section, the court is required to also award actual reasonable attorney fees to the prevailing party.

Section 2. Court rule change section for Civil Rule 13(e).

Section 3. Court rule change section for Civil Rule 82(b).

Section 4. Severability clause.

Section 5. Effective date.

MFF:jdr
97-045.jdr

Robert A. Mintz

550 W. 7TH AVENUE, STE. 1540
ANCHORAGE, AK 99501
(907) 278-2277/fax 272-3695

January 31, 1997

Representative Eldon Mulder
State Capitol
Juneau, AK 99801-1182

RE: HB 31

Dear Representative Mulder:

HB 31 is important legislation which will reduce frivolous and unnecessary civil litigation. It will save private litigants and, in the long run, the State time and money currently spent to address frivolous and unnecessary claims and allegations.

The basic purpose of House Bill 31 is to give injured parties effective remedies for bad faith civil litigation. Essentially, the Bill enables people who actually suffer harm due to abuse of the civil justice system to be compensated for their injuries. The Bill accomplishes this goal by creating a cause of action against people who abuse the civil justice system.

The Bill establishes standards of conduct, violation of which constitute an abuse of the civil justice system:

1. Intentionally, maliciously or unreasonably asserting false allegations and claims, and

2. Asserting claims and allegations without first making an effort to determine if they have a reasonable basis.

The standards of conduct embodied in House Bill 31 are similar to existing standards of conduct, such as Civil Rule 11 and the common law tort of malicious prosecution. A significant aspect of the bill is that it empowers victims of bad faith civil litigation, not the legal community, to be rule enforcers. House Bill 31 is an addition to the existing system of self-regulation of the legal profession. It gives victims of unscrupulous attorneys and their clients the ability to be compensated in cases of what ordinary people will consider to be outrageous conduct.

One section of the Bill provides that a person, and that can either be a client or an attorney, shall not knowingly or recklessly file a pleading that contains false or misleading misstatements of fact or allegations. A person cannot get in trouble by making a simple mistake. Rather, they have to intentionally make a misstatement. Or, they have to make a misstatement where they already have a reason to believe it is untrue and a reasonable person would have made additional investigations before he cast a stone, so to speak.

HB 31 imposes reasonable consequences on attorneys for violating familiar standards of conduct. One section of the Bill is very similar to Civil Rule 11 in terms of the standard of conduct that is utilized. It requires each claim and defense (so it goes both ways), to be well grounded in fact and supported by existing law. Another section of the Bill is a variation of the existing malicious prosecution common law action. Currently, under the common law, a person who is a victim of a malicious lawsuit has to prove both that the lawsuit was brought maliciously and that the conduct of the party bringing the lawsuit was unreasonable. HB 31 uncouples these and allows a person to bring an action for malicious prosecution if conduct is either malicious or if somebody conducted themselves unreasonably.

Again, the key to this Bill and the difference between this Bill and existing law is that the client and the attorney will be held personally liable for all damages caused by their conduct.

If the Bill is enacted, most attorneys will experience a minor inconvenience. Because of the potential personal liability for

themselves and their client, even scrupulous attorneys will be forced to do better investigation up front and document the basis for claims and allegations prior to asserting them. However, the effect of this bill will be devastating for less scrupulous attorneys and their clients. If an attorney or client knowingly lies to drag somebody into court, "bulks up" a complaint with frivolous claims, asserts claims without checking to see if those claims have a reasonable basis before they are filed, or files a case maliciously and tries to extort money because it would be cheaper for the defendant to settle than to fight, then those attorneys and their clients will be personally liable to pay damages to the person wrongfully sued. Currently there are insufficient adverse economic consequences associated with such abuses of the legal system. House Bill 31 is designed to fix that.

Very truly yours,

Robert A. Mintz/by gl

Robert A. Mintz

LESSMEIER & WINTERS
ATTORNEYS AT LAW

MICHAEL L. LESSMEIER
GREGORY W. LESSMEIER
SHELDON E. WINTERS
MARGARET A. DOWLING*
*WASHINGTON STATE BAR

ONE SEALASKA PLAZA
SUITE 303
JUNEAU, ALASKA 99801-1249

TELEPHONE: (907) 586-5912
FACSIMILE: (907) 463-3020

VIA FACSIMILE AND HAND-DELIVERED

February 3, 1997

Representative Eldon Mulder
Room 501
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Mulder:

I am writing to you on behalf of State Farm regarding HB 31. At the outset, we thank you for introducing a bill that in our view will fundamentally change civil litigation by placing increased responsibility on those involved in civil litigation. This bill contains two concepts that are unique. The first and most important concept is the emphasis on truth set forth in 9.65.190(b) of this bill. In essence, this provision provides that if a party lies to further their claim or defense, they lose. At the present time there is no such existing disincentive in our system.

There can be little doubt that there is a problem in our system with truth. I am enclosing herewith a press release from the Insurance Research Council which describes a new study that found17 to 20 percent of total injury claim payments can be attributed to fraud and/or claim buildup. Although this is a significant problem in automobile bodily injury claims, it is a problem that is in no way limited to just insurance claims. It is also a problem that imposes a tremendous cost on our civil justice system.

We have seen false statements in virtually every kind of case we have been involved in. At the present time, the only risk a party takes in telling a false statement is the damage their credibility may suffer. This bill would change that, for the consequences of making a false statement would be predictable, certain and meaningful.

One of the most significant benefits from this provision is that it would force lawyers to explain the consequences of lying to every client and hopefully would at the outset limit those claims which are false or exaggerated. Those that are trying to tell the truth will have nothing to fear from this bill, as it would only apply if the trier of fact finds that a party has made an intentional, false, statement of material fact. Since the bill applies to all parties, it is hard to see how one can argue it is unfair.

The second aspect of this bill are those provisions which impose liability on parties and/or attorneys who misuse the litigation process, recklessly or knowingly file false pleadings or sign pleadings without making a reasonable inquiry and determining the claims are warranted. Anyone who has been involved in a lawsuit knows the financial and emotional cost of defending frivilous claims. To those who claim that such a cause of action would result in an explosion of secondary litigation, one only need to look to Subsection (g), which provides that actual reasonable attorney fees will be awarded to the prevailing party in such an action. Given such serious consequences, I doubt very much whether such claims would be made often or made without considerable thought.

Certainly this bill will raise the level of responsibility of attorneys, regardless of which side they represent. It is difficult to see how this would not benefit our civil justice system.

Sincerely,
LESSMEIER & WINTERS

By: _____
for Michael L. Lessmeier

MLL
enclosure

IRC
INSURANCE
RESEARCH
COUNCIL

NEWS RELEASE

For more information contact:
Terrie E. Troxel
(630) 871-0255

For Immediate Release

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LESSMEIER & WINTERS

Claim Fraud May Appear in More Than One-Third of All Auto Bodily Injury Claims, Study Finds

WHEATON, IL—More than one-third of all bodily injury insurance claims associated with car crashes appear to involve some element of fraud.

A new study shows that while three of every 100 bodily injury liability claims appear to be based on premeditated criminal acts such as staged accidents, another 33 of every 100 claims appear to involve opportunistic acts by doctors, lawyers and/or claimants who take advantage of accidents to cheat the system.

In other words, according to the Insurance Research Council (IRC) which conducted the study, "Of claims with the appearance of fraud and buildup, the vast majority involve the exaggeration of the claim as a result of a real accident. Very few claims involve a fake or staged accident."

"Auto insurance policyholders countrywide pay the tab for these continuing scams in the form of ever higher insurance premiums," said Terrie Troxel, executive director of IRC.

In fact, the excess dollars in these claims represent between 17 and 20 percent of total injury claim payments, meaning that 17 to 20 cents of every injury claim payment dollar for automobile accidents can be attributed to fraud and/or claim buildup (padding).

IRC estimates that between $5.2 and $6.3 billion is added each year to the bill of American auto insurance policyholders because of outright fraud and/or injury claim padding. The bulk of these excessive payments (90%)

211 S Wheaton Ave.
Suite 410
Wheaton, IL 60187

Phone: 630.871.0255
Fax: 630.871.0260

are due to opportunistic fraud and/or buildup resulting from a real accident and just 10% to staged accidents. Troxel noted that fraudulent claims involving property damage losses also contribute significantly to rising auto insurance costs, but only injury claims are included in the latest study.

Findings from the study, entitled *Fraud and Buildup in Auto Injury Claims: Pushing the Limits of the Auto Insurance System*, are drawn from an in-depth review of 15,000 closed injury claims. Twenty-eight insurance companies reviewed their claim files for the IRC, a not-for-profit research organization of the property-casualty insurance industry. Nine states were examined: Arizona, California, Connecticut, Illinois, Michigan, Missouri, New York, South Carolina and Texas.

The study also demonstrates that the level and type of fraud and buildup vary conspicuously across the United States. For instance, claims involving fraud and buildup appear to be more prevalent in California and Texas than in the other states in this study. States with relatively few claims involving fraud and buildup are Michigan and Missouri. Within states, fraud and buildup are more prevalent in major cities than in other types of communities. For example, 67 percent of the claims in Los Angeles have the appearance of buildup and/or fraud, or about double the levels seen in the entire nine-state sample (36 percent appear to involve buildup and/or fraud).

Some of the key objective factors associated with the appearance of fraud and/or buildup in injury claims, according to the study, include:

- Sprain or strain injuries
- Attorney hired in connection with the claim
- Moderate medical, wage and other losses ($2,000 to $15,000)
- No disability associated with the injury, and
- High numbers of visits to medical professionals.

Several trends in claiming behavior have been documented in recent IRC reports. More

declining. Many of these additional injury claims are for relatively minor injuries, such as sprains and strains. Medical expenses and insurance payments for auto injuries are climbing rapidly. People are more likely to hire an attorney to help with an insurance claim. The latest IRC study backs previously-published research by analyzing multiple dimensions of these claiming patterns and providing an empirical demonstration of the ways in which some claims affect the automobile insurance system in the United States.

Copies of *Fraud and Buildup in Auto Injury Claims: Pushing the Limits of the Auto Insurance System* are available for purchase from the Insurance Research Council, Inc., 211 S. Wheaton Avenue, Wheaton IL 60187, telephone 630.871.0255.

###

Variation Across States and Cities In Suspicion of Fraud and Buildup for Paid Bodily Injury Claims

State/City	Percent of bodily injury claims with the appearance of fraud and/or buildup
California	45%
Los Angeles	67%
San Francisco/Oakland	34%
San Diego	22%
Texas	36%
Houston	54%
Dallas/Fort Worth	47%
New York	31%
New York City	34%
Arizona	30%
Phoenix	36%
Connecticut	28%
South Carolina	28%
Illinois	25%
Chicago	37%
Michigan	21%
Detroit	33%
Missouri	20%
Total sample	**36%**

Source: Insurance Research Council, *Fraud and Buildup in Auto Injury Claims: Pushing the Limits of the Auto Insurance System*, 1996.

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General Manager

THE ALLIANCE

4220 'B' Street, Suite 200 • Anchorage, Alaska 99503-5911
Phone (907) 563-2226 • Fax (907) 561-8870

Lisa,
from Denny, I gave Joe a copy.

April 24, 1997

Representative Eldon Mulder
Alaska State Legislature
State Capital (MS 3100)
Juneau, Alaska 99801-1182

Dear Representative Mulder:

The Alaska Support Industry Alliance (the Alliance) is a trade association representing over 300 members engaged in business within the oil and gas industries. Our mission is to foster and promote the safe and environmentally sound development of natural resources.

The Alliance supports the intent of House Bill 31. We believe parties to lawsuits should be required to be truthful and responsible in their pleadings. This bill discourages false statements on litigation and encourages responsibility by all parties and their attorneys.

We endorse the concept of assigning financial liablity to those who:

- File suits without cause.
- Provide false information.
- Use claims and cross claims to cloud issues and
- File unsuccessful claims on the hope of finding someone, somewhere willing to settle rather than spend the dollars to fight a suit.

Please keep the Alliance advised on the movement of the bill.

Sincerely,

John Wheatley
Vice President - Policy

MEMORANDUM

Date: April 19, 1997

To: Joe Green

From: Lisa Kirsch

Re: **HB 31 Frivolous lawsuit prevention**

Some additional potential problems and unintended consequences of HB 31 have come to my attention.

This bill may increase the number of lawsuits filed. This is because it provides for many new causes of action. This means that anyone disgruntled by the outcome of a lawsuit will have yet another alternative sword to use against their opponent. As you probably are aware, the state is concerned about the potential of prisoners bringing claims that the state acted frivolously.

The number of suits may increase because the range of people who can sue and who can be sued is greatly expanded. A "person injured" by a violation of (a) may sue for compensatory and punitive damages. "Person injured" is not restricted in any way, and potentially includes anyone, not just a party or attorney involved in the suit. It is conceivable that relatives, children of divorcing couples, public interest groups who file amicus briefs, witnesses, or anyone who is affected by the suit would have a claim.

This varied group could sue and could also be sued themselves under subsection (a)(3) which holds anyone who "interposes" in the action for an "improper purpose" is liable. Judges, police officers, corrections officers, public interest groups and court appointed guardians may have immunity, but a disgruntled participant in a suit could still sue them under this proposed section (probably unsuccessfully).

The standard for punitive damages may be lowered by this bill. I assume that this was not the intention of the sponsor. Currently the standard for punitives is rather high and includes

several steps a party must prove before the fact finder may award punitives. The way it is currently written, this bill appears to reduce these steps to proof of only one of five simple, easy to prove, standards. In subsection (a) in subsection you need only prove one of the following to get punitives,

1) file a complaint that has misstatements of fact,
2) sign a pleading without making a reasonable inquiry to determine the accuracy of the facts in it, or
3) interpose in an action for an improper purpose. (to the best of my knowledge, "interpose" has no legal definition.)

In subsection (d) the standards are that the person,

4) "acts without probable cause" **or**
5) "for a purpose other than adjudication of the claim[.]"

These single step proofs could allow punitive damages in many cases where punitives were not available before. I can think of very few cases that would not have a potential claim under one or several of these simple proofs. Divorces in particular would be fertile ground for these actions. I am certain that the majority of divorces would include a claim, if not competing claims by each spouse, that attorneys or parties misstated facts. It would be incumbent upon attorneys to bring these potential remedies to their client's attention. The attorney then has a duty to bring these actions if the client chooses to pursue them. An attorney can always advise against an action, but the client makes the decision.

The new cause of action against opposing counsel will drive a wedge between attorneys and clients. It will destroy the attorney client privilege, because attorneys will have to testify against their clients and vice versa. Attorneys will have to investigate their clients to be sure that their clients have not misled them. It could increase the costs of legal services because of the additional steps that attorneys will have to take to verify their clients claims. Malpractice insurance costs will no doubt increase to pay for more attorneys to represent the attorney in claims against the insured attorney by "injured" persons.

The implicit argument that most settlements are ransom paid by defendants is not borne out by my experience--in reality, most settlements are difficult compromises for both plaintiff and defendant. The settlement process is what mediation is based upon--the concept that the parties should sit down and work their

problems out and come up with a mutual understanding as to what a claim is worth. If the claim is truly meritless and the plaintiff utterly unreasonable in their demands, the defendant will go to trial because the defendant has everything to gain at trial under those circumstances.

Likewise, **the fact that the cost of trial is part of the settlement calculus is not an indication that the plaintiff's claim is meritless or frivolous.** Trial costs are paid by both parties (even if there is an attorney fee award it is only partial fees--actual or full fee awards are extremely rare). Both plaintiff and defendant must weigh the strength of their case against trial costs and the risk of losing the case. The cost of trial is a reality check for an otherwise reasonable client who may be honestly righteous, but has gotten carried away with the attitude that, "it is the principle of the thing." Settlement is the means of making clients aware of all the possible outcomes and forcing them to look at the "big picture" realistically. The settlement figure is directly related to the strength or weakness (or frivolity) of a case.

We already have Civil Rule 11 for false pleadings as well as the action for abuse of process. The sponsor may feel that these are inadequate based on anecdote. Yet a lack of sanctions may simply be a result of failure to prove a these highly subjective claims. For example, it is common that both parties to a case strongly and honestly believe that their interpretation of the facts is correct. However, reasonable minds may differ on the interpretation of a given set of facts. Maybe a client sincerely believes he has been wronged, but cannot back it up with credible evidence of harm.

There are some wrongs that a court cannot correct, either because both parties have behaved badly (the unclean hands doctrine) or because the necessary proof of a cognizable wrong is lacking. Unfortunately, my analysis indicates this bill will not address these wrongs and potentially creates a wave of new claims.

HB31

Bob Mintz case

2 cases

P - AK Housing & Finance Corp

SK harass - disch'g

one P $100K → Mun'

pd off 1 million

other P had outside personal issues

21 claims & her husband - loss of consort

Delos Helene - Dona Cody

4 wk bench T @ Dana Fabe

374K damages - constructive disch'g

husb. owed fees

P prevailed on one ct. agst corp.

None of the indiv.

Chief Exec

Chief Finance - bad actor

Chair of Bd. { Mintz - Jeff Feldman

summary jdgmt

fully ∆ and no personal expense

Wanted to file counter action

huge briefs - collectable at least

Showed up last year - 0

→ Abuse of Process =

— $ to litigant (unlike Rule 11)

encourage more frivolous litig.

Zeroed vote →

{ Dept of Law - have to have AAGs do rep other AAG

exception for the state - No exception this yr

This year in sep case due to last yrs.

Bob Mintz

Employment - sexy myst
settlement
Transcribed of dir, known nts
additional $ - enhance settlement
value
doesn't settle It could screw
one vigorously 2/3 ct court of
bogus claims
SJ resolves .25 atty fees
Opening in civil law that allows
bogus claims for settlement value
form claims, form defenses

CS

existing conduct std - Rule 11
injured party to enforce
not ct.
Environmental community - pub int lit
chilling effect - CS - sign pldgs only CS

AG - Prisoners using agst
Release state
Bd AIDC
made Party of ongoing suit
22 Ct. - 3 claims colorable
breach of duty
sex harassment -

Bob Mintz
278-2277

Ultimately 18 of them
last SJ - moved to dismiss
250K for AK to Δ

Carve out prisoner / domestic

2 stds
① intentional / reckless ly. inj
② rule 11 - investigation - neg.
— actual attys fee

Robert A. Mintz

550 W. 7TH AVENUE, STE. 1540
ANCHORAGE, AK 99501
(907) 278-2277/fax 272-3695

February 17, 1997

Representative Joe Green
Chairman of the House Judiciary Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Re: House Bill 31

Dear Representative Green:

Two provisions of HB 31 are, indeed, similar to existing Civil Rule 11 and the common law action for malicious prosecution. But, there are important differences between the court rules, the existing common law, and the statutory causes of action created by HB 31.

Section 1(a)(2) of HB 31 utilizes the standard of conduct contained in Civil Rule 11 but changes the manner in which the standard of conduct is enforced. Civil Rule 11 essentially requires that attorneys certify that claims they are asserting in civil litigation have been investigated and that there is good reason to bring the claim. Under the Civil Rule, a judge has discretion to impose a fine on an attorney who violates the standard of conduct.

HB 31 expands the obligation to include allegations as well as claims. Also, under HB 31, an injured party has the right to collect damages from an attorney who violates the standard of conduct. HB 31 gives the power of enforcement of the rule to the person most likely to use that power, the person who is injured by the attorney's misconduct. Under HB 31, an attorney who failed to do the required investigation or who asserted a claim or allegation without any basis can be held responsible for all damage caused by such conduct, including reimbursing the actual cost of defending against a frivolous claim or allegation. Under the current Civil Rule 11, someone against whom frivolous claims and allegations are asserted has no way to be made whole.

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Section 1(d) of HB 31 is identical to the Restatement of Torts summary of the common law action for malicious prosecution with one important difference. Under the common law, an attorney must both act unreasonably AND have malicious intention. Under the statutory standard created by HB 31, either unreasonable conduct OR malicious intention will form the basis of an action against an attorney.

To illustrate the difference, let's assume that Person A has a reasonable claim against Person B but so far has not chosen to assert it in a lawsuit. Say that Person B is scheduled to give deposition testimony in a related case. Now assume that the attorney for Person A calls up Person B and says that if Person B's sworn testimony is unfavorable to his client, Person A, then he will bring a lawsuit against Person B. Under common law there is no basis for malicious prosecution action since the attorney's conduct is not unreasonable, as defined in common law, because there is a basis for the claim. Under common law, it is not enough that you can prove actual malicious intent. HB 31 changes the common law so that malicious intent or unreasonable conduct alone will provide a basis for a malicious prosecution action.

The fiscal note by the Attorney General addresses the cost of defense against possible prisoner claims. An amendment offered by Representative Mulder, but rejected by the House Labor and Commerce Committee, will exempt the State. The intent of HB 31 is to make it more risky and more expensive for private civil attorneys to file frivolous claims and allegations. The bill is intended to "cut the heart out" of attorneys who file unfounded claims to extort settlements for their private gain. Clearly, the economic incentives for this kind of conduct are absent where an attorney is representing the State or a nonprofit agency.

Very truly yours,

Robert A. Mintz, by gl

Robert A. Mintz

cc: Representative Eldon Mulder

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Alaska State Legislature

House of Representatives

House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

Date: January 13, 1997

To: Representative Eldon Mulder

From: Representative Joe Green
Chairman, House Judiciary Committee

Subject: HB 31

It has come to my attention that some of the provisions of HB 31 may already be covered by existing Court Rules and the common law action for malicious prosecution.

Could you explain how this bill addresses the problem of frivolous litigation differently, and why this approach is necessary? The fiscal analysis provided by the court system seems to imply that if enacted HB 31 might actually result in an increase in suits by prisoners and pro se litigants.

Lisa

MEMORANDUM

Date: February 17, 1997

To: Joe Green

From: Lisa Kirsch

Re: **HB 31**

Regarding actions against counsel for filing frivolous claims:

The information you received is incorrect. Civil Rule 11 sanctions **may** be court initiated, but they may also be initiated by the opposing party. The way it is ordinarily done is by motion within the underlying case. One of the problems with Mulder's bill is that the action against an attorney would be a new, entirely separate case. (This is one reason for the high fiscal note).

Let me know if you want me to research this further or if you would like me to get in touch with this Denny DeWitt. -no-
let Denny respond to our
letter. Thanks
J

Denny DeWitt
2647

0-LS0193\F
Ford
4/23/97

Post-it® Fax Note 7671	Date 4/25	# of pages ▶ 2
To SUSAN COX	From LISA KIRSCH	
Co./Dept. DEPT of LAW	Co. HOUSE JUD.	
Phone #	Phone # 465 4990	
Fax # 465-6735	Fax # 465-4316	

CS FOR HOUSE BILL NO. 31( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MULDER, Cowdery

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for certain false allegations in a civil pleading or proceeding, for certain improper acts relating to signing a civil pleading, for making an intentional false statement of a material fact; amending Rule 82(b), Alaska Rules of Civil Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.190. Civil liability for false claims and improper practice. (a) A person may not

(1) sign a civil complaint, answer, or other civil pleading that contains false allegations that are material to the claims asserted in the civil action with the intention of asserting allegations that are false; or

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and

is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(b) If the trier of fact determines that a party to a civil action has knowingly made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this section shall apply only to those claims to which the false statement relates.

(c) A party who is injured by a violation of

(1) (a)(1) of this section may bring an action for compensatory and punitive damages against the person who signed the civil pleading; and

(2) (a)(2) of this section may bring an action for recovery of compensatory damages against the person who signed the pleading; compensatory damages awarded under this paragraph may not exceed the actual reasonable costs and attorney fees that were incurred, in the action in which the violation of (a)(2) of this section occurred, by the party who was injured by the violation of (a)(2) of this section, but that were not awarded to that party.

(d) If a party brings an action under (c) of this section, the court shall award actual reasonable attorney fees to the prevailing party regardless of whether the prevailing party is the plaintiff or defendant.

(e) In this section, "civil pleading" includes motions and affidavits.

*** Sec. 2.** AS 09.65.190(d), enacted in sec. 1 of this Act, has the effect of amending Rule 82(b), Alaska Rules of Civil Procedure, by allowing the award of actual reasonable attorney fees in certain civil actions.

*** Sec. 3.** APPLICABILITY. This Act applies to an action that accrues on or after the effective date of this Act.

*** Sec. 4.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

*** Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

Fax

Carr Gottstein Properties

550 WEST 7TH AVENUE, SUITE 1540

ANCHORAGE, ALASKA (907)278-2277 FAX (907) 272-3695

To: Kevin Jardell, Rep. Joe Greene's office

From: Sheryl Snyder

Date: January 22, 1998

Subject: House Bill #31 documents for review

Please review the attached documents before your meeting with Bob Mintz on Wednesday, January 28th, @ 10:30 a.m.

If you wish to speak with Bob beforehand, please call him at his office (907) 278-2277.

Thanks, Kevin.

Number of pages to be transmitted: 7

Alaska State Legislature

Representative Joe Green

State House District 10

Address: State Capitol Building, Juneau, Alaska 99801

Telephone (907) 465-4931 Fax (907) 465-4316

Facsimile Cover Sheet

TO: Mike Ford **FAX: 2029**

FROM: Kevin Jardell, 4990

SUBJECT: HB 31

MESSAGE: Mike, please incorporate the following amendments into the latest version of HB 31. This is not a priority. Thanks for your help.

Kevin

(h) reference added to C(1) or C(2)

Section 1 (g) a person may not bring a civil action to recover damages under (c) or (h) of this section unless final judgment has been entered in the civil action described in (a) or (h) of this section.

(h) a person shall not, on the person's own behalf or as a representative of a party, take part in the initiation, defense, continuation, or procurement of a civil action against another if the person acts (1) without probable cause on a claim or defense; or (2) primarily for a purpose other than that of securing the proper adjudication of a claim or defense involved in the civil action.

(i) a person may not bring a civil action to recover damages under (c) of this section unless (1) in the civil action described in (a) or (h) of this section, they serve as provided in Civil Rule 5, but not file or present to the court, a notice of the specific conduct alleged to violate (a) and/or (h) of this section and (2) the challenged conduct is not appropriately corrected within 21 days after service.

(C) (3) (h) of this section may bring an action for compensatory and punitive damages against the person who took part in the initiation, continuation, defense or procurement of the civil action.

Robert A. Mintz

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ANCHORAGE, AK 99501
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February 18, 1998

Robert A. Mintz

CARR GOTTSTEIN PROPERTIES

550 W. 7th Avenue, Suite 1540 Anchorage, AK 99501
telephone (907) 278-2277 facsimile (907) 272-3695

House Judiciary Committee
Representative Joe Green
State Capital Suite 118
Juneau, Alaska 99801

Attention: Kevin Jardell
Judiciary Committee Aide

Dear Kevin,

Enclosed find Sections (g), (h), (i) and (c) (3) to be added to the current working draft of House Bill No. 31. I believe these amendments address the issues that you and I discussed the week before last. I have no pride of authorship and look forward to discussing these with you at your earliest convenience.

Section (g) delays commencement of any action to recover damages for violation of the HB31 Standards of Conduct until after the underlying action is over.

Section (i) is based upon Federal Rules of Civil Procedure 11C (1) (a) and makes prior notice and an opportunity to cure conditions precedent to bringing an action to recover damages for violation of the HB31 Standards of Conduct.

Sections (h) and (c) (3) use the common law malicious prosecution action as a model for establishing a new standard of conduct. This statutory version is different than the common law because it applies to claims and defenses, rather than just actions, and it makes either lack of probable cause or improper motive actionable, rather than requiring both.

Finally, enclosed find a copy of 43 Kansas Law Review 207, Frivolous Litigation, Discretionary Sanctioning and a Safe Harbor: The 1993 Revision of Rule 11. This comment has a good discussion of the history of Federal Rules of Civil Procedure Rule 11 litigation spawned by the 1983 version of the rule. Note that a key reason for the proliferation of litigation concerning the 1983 revision of

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Rule 11 was the fact that different circuits interrupted the rules differently. In fact, Alaska rule of civil procedure is based upon the 1983 federal rule, not the more current 1993 version, and there has been no analogous proliferation of litigation to interrupt the Alaska rule. I mention this point because the opposition to HB 31 has used "proliferation of litigation" as an argument against the bill.

Sincerely,

Robert A. Mintz
Cc: Representative Eldon Mulder
Enclosures as noted

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theory of the corporation on which such regulation is based. Moreover, the political underpinnings of these mandatory rules support the argument that such speech should be subject to the highest level of First Amendment protection.

Forcing investors in all firms to accept the same mandatory rules regarding corporate governance speech is both bad policy and, in some respects, unconstitutional. Constitutional constraints on mandatory federal regulation would free the capital markets of unnecessary regulation and improve the resource-allocation function of these markets.

COMMENTS

Frivolous Litigation, Discretionary Sanctioning and a Safe Harbor: The 1993 Revision of Rule 11*

I. INTRODUCTION

Throughout the last two decades, the legal community has been the subject of much criticism due to the public's perception that the law tolerates too many claims, with lawyers and their clients hoping to attain large monetary awards through claims having little merit.[1] The legal community responded to this criticism in the 1980s through various measures.[2] In 1983, an amended version of Rule 11 of the Federal Rules of Civil Procedure[3] was enacted as one means of deterring abusive litigious behavior.[4] From its original enactment in 1938 until the 1983 amendment, courts had rarely invoked Rule 11.[5] In fact, the first reported Rule 11 motion was not made until 1950.[6]

Rule 11 was initially enacted to promote honesty in pleading.[7] The primary purpose of the 1983 amended Rule 11 was to deter frivolous litigation.[8] Though these two purposes are possibly two sides of the same coin, the revision of the Rule forced the legal community to pay attention to both the broader certification provisions and the mandatory

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* Karen Kessler Cain. I would like to thank Professor Robert Casad for his assistance with this Comment.

Editor's Note: For the reader's convenience, the full text of the 1993 version of Rule 11 is included as Appendix A of this Comment.

1. *See* Chief Justice Warren E. Burger, Agenda for 2000 A.D.—A Need for Systematic Anticipation, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *in* 70 F.R.D. 83, 91 (1976).

2. *See* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1033-37 (1989) (discussing use of FED. R. CIV. P. 12(b)(6) motions, summary judgment motions and Rule 11 sanctions).

3. Fed. R. Civ. P. 11, 28 U.S.C. app. (1988) (amended 1993) [hereinafter 1983 Rule].

4. 1983 Rule, *supra* note 3, at advisory committee's notes.

5. *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-37 (1976) (listing cases that applied Rule 11 during the period between 1938-1976).

6. *Id.* at 35.

7. *See* 1983 Rule, *supra* note 3, at advisory committee's notes. "Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings." *Id.*

8. *Id.*

sanctioning outlined in the 1983 Rule. Between 1983 and 1989 there were approximately one thousand reported cases involving Rule 11 motions.[9]

Over the last decade, Rule 11 has received unprecedented attention as evidenced by an exponential increase in Rule 11 motions,[10] extensive commentary on the 1983 amendments[11] and the resulting controversy which surrounds the Rule.[12] In 1991, the Advisory Board of the Federal Rules of Civil Procedure responded by proposing a revision of the Rule to address difficulties that had arisen with the 1983 revision.[13] After discussion, hearings and an invitation for comments, the Advisory Board received an amendatory order from the Supreme Court[14] and the revision was promulgated, becoming effective in December of 1993.[15]

This Comment will focus on Rule 11. Part II will outline the Rule's history. Part III will cover the provisions of the 1993 Rule regarding both certification and sanctioning, as well as foreseeable difficulties in the interpretation of the Rule. Part IV will address the likely impact of the 1993 Rule on Kansas courts and on section 60-211 of the Kansas Statutes Annotated,[16] which is aimed at frivolous litigation.

II. HISTORICAL BACKGROUND

A. The 1938 Rule

The original Federal Rules of Civil Procedure included the 1938 version of Rule 11.[17] The 1938 Rule placed certification requirements

9. *See* Townsend v. Holman Consulting Corp., 881 F.2d 788, 792 (9th Cir. 1989), *amended by* 929 F.2d 1358 (9th Cir. 1990) (discussing Rule 11 and its interpretation).

10. *See id.*

11. *See* ADVISORY COMMITTEE ON THE CIVIL RULES, CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES, AS AMENDED IN 1983 (July 24, 1990), *reprinted in* 131 F.R.D. 344, 350-59 (1990) [hereinafter CALL FOR COMMENTS] (providing an extensive bibliography of books and articles addressing the amended Rule).

12. *See id.*

13. *See* Fed. R. Civ. P. 11 advisory committee's notes (proposed 1991), *reprinted in* 137 F.R.D. 74, 77 (1991) [hereinafter 1991 Proposed Rule 11].

14. Order of the Supreme Court of the United States Adopting and Amending Rules (Order of Apr. 22, 1993), 28 U.S.C.A. app. (Supp. 1994).

15. FED. R. CIV. P. 11. Subsequent cites to FED. R. CIV. P. 11 that do not specify a year refer to the current version of Rule 11, which became effective December 1, 1993. The text of the 1993 version is codified at 28 U.S.C.A. app. (Supp. 1994). For the reader's convenience, the full text of the 1993 version of Rule 11 is included in Appendix A of this Comment.

16. KAN. STAT. ANN. § 60-211 (Supp. 1993).

17. Fed. R. Civ. P. 11 (original version) [hereinafter 1938 Rule], *reprinted in* SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION, SANCTIONS: RULE 11 AND OTHER POWERS app. at 136 [hereinafter SANCTIONS] (Edna S. Epstein et al. eds., 1986).

on pleadings that required the attorney to have good grounds to support a claim.[18] The narrow scope of the Rule addressed only the initial pleadings.[19] Good faith was the standard for determining whether the Rule had been violated: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the *best of his knowledge, information, and belief* there is good ground to support it . . . ."[20] This good faith standard made possible the defense that has been critically labeled "pure heart, empty head."[21] The Rule did not require sanctions and did not suggest what sanctions were appropriate.[22] As applied by the courts, the Rule required a finding of bad faith before the court could consider sanctions.[23] The judge, however, had discretion even when an attorney had willfully violated the rule: "For a wilful violation of this rule an attorney *may* be subjected to appropriate disciplinary action."[24] The practical effect of the 1938 Rule has been described as placing only a "moral obligation on attorneys to satisfy themselves that good grounds existed for the action or defense."[25]

The Rule was used infrequently. From 1950 to 1976 only nineteen Rule 11 motions were reported.[26] When civil procedure reform began in the 1980s, the infrequent use of Rule 11 was a subject of concern. Nearly five decades after its inception, Rule 11 was re-evaluated in light of the increasing criticism of the legal community and increasing activity in the courts.

18. 1938 Rule, *supra* note 17.

19. *Id.*

20. *Id.* (emphasis added); *see also* Fisher Bros. v. Cambridge-Lee Indus., 585 F. Supp. 69, 71 (E.D. Pa. 1983) (stating that the test is subjective).

21. *See, e.g.*, William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 186-87 (1985) (stating that the "pure heart, empty head" defense was no longer available after the 1983 revision of Rule 11); Debbie A. Wilson, Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and a Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343, 343 (1988). The title alone indicates that such a defense was commonly used to justify an attorney's actions.

22. *See* 1938 Rule, *supra* note 17.

23. Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980).

24. 1938 Rule, *supra* note 17 (emphasis added).

25. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 190 (1988).

26. Risinger, *supra* note 5, at 34-36.

B. The 1983 Rule

The civil procedure reform of the eighties served as an impetus for the 1983 revision of Rule 11 that was directed at deterring frivolous litigation as a whole, not merely dishonesty in pleading.[27] The huge increase in cases involving Rule 11 motions that followed the 1983 amendment suggests that two of the goals of the Advisory Committee were met: (1) Reducing the court's reluctance to sanction attorneys for Rule 11 violations; and (2) providing a standard that is not as difficult to implement as subjective bad faith. To meet these goals, the Advisory Committee amended the Rule significantly.

1. Certification Provisions

The 1983 Rule maintained and broadened the certification provision. The scope of certification was expressly expanded to include "[e]very pleading, motion, and other paper" submitted to the court.[28] The substance of the certification provision also changed significantly—merely reading the pleading was no longer sufficient. Under the 1983 Rule, a signature certified not only that an attorney had read the paper, but also that there had been, prior to signing, "reasonable inquiry" into both the facts and the law.[29] Even "reasonable inquiry" was not satisfactory unless the paper met three additional requirements outlined in the Rule: (1) The paper was well grounded in fact; (2) it was warranted either by law or a good faith argument for the extension, modification or reversal of existing law; and (3) it was brought for a proper purpose.[30]

The strict certification provisions in the 1983 Rule, in effect, threw out the "empty head, pure heart" defense to a Rule 11 motion.[31] The standard changed drastically from requiring merely good faith to requiring justification by reference to a hypothetical reasonable attorney, resulting in sanctions based on negligent conduct.[32]

27. *See* 1983 Rule, *supra* note 3, at advisory committee's notes.

28. 1983 Rule, *supra* note 3.

29. *Id.* Courts have used the more precise standard of "reasonableness under the circumstances" as suggested in the Advisory Committee's notes. *See, e.g.*, Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 444-45 (5th Cir. 1992) (attorney's investigation was reasonable under the circumstances); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985) (applying standard of reasonableness under the circumstances).

30. 1983 Rule, *supra* note 3.

31. Lancellotti v. Fay, 909 F.2d 15, 19 (1st Cir. 1990) ("Put bluntly, a pure heart no longer excuses an empty head.").

32. *See, e.g.*, Lloyd v. Schlag, 884 F.2d 409, 412-13 (9th Cir. 1989) (holding that careless counsel had not made reasonable inquiry even though mistake was described as both innocent and with good faith).

2. Sanctioning Provisions

Although the 1983 revision outlined a more complex certification provision, the most significant change was the amended sanctioning provision that required a mandatory sanction when the court found a Rule 11 violation.[33] The Rule did not address the type of sanction or, in the case of monetary sanctions, the amount.[34] The court, therefore, had discretion to determine an appropriate sanction based on the particular facts of the case. Eventually, the Tenth Circuit, in *White v. General Motors Corp.*,[35] outlined factors that must be considered in determining the monetary amount of a sanction. Some factors are: ability to pay; reasonableness of the amount requested; amount necessary to deter a wrongdoer; and the offending party's history.[36]

3. Application of the 1983 Rule

Although the basic goal of increasing the court's use of Rule 11 to deter frivolous litigation was being met, the 1983 Rule prompted extensive discussion and concern. Some praised Rule 11 for the deterrence it generated, while others condemned the Rule for the arbitrary manner in which it was applied.[37]

The deterrent effect was apparent from empirical research.[38] This research demonstrated that the legal community had adopted a "stop and think" mentality. Lawyers had become more concerned with the sanctioning provisions. As expected, attorneys who had been personally exposed to Rule 11 sanctions experienced the greatest deterrent effect.[39]

33. *See* 1983 Rule, *supra* note 3; *see also* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 876 (5th Cir. 1988) (express language of Rule 11 mandates imposition of sanctions when Rule is violated); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir.) (Rule 11 violation requires that sanctions of some sort be imposed), *cert. denied*, 472 U.S. 1017 (1985).

34. 1983 Rule, *supra* note 3.

35. 908 F.2d 675 (10th Cir. 1990).

36. *Id.* at 684-85; *see also* Yagman v. Baden, 796 F.2d 1165, 1184-85 (9th Cir. 1986).

37. *See* Randall Samborn, *Rule 11 Sanctions Examined. A Rollback's Unlikely, But Changes May Occur*, NAT'L L.J., May 20, 1991, at 1 (describing the controversy surrounding Rule 11 as "one of the hottest topics of debate in the legal profession").

38. Lawrence C. Marshall et al., *Public Policy: The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 960-61 (1992). A table is provided showing the specific reactions of attorneys and their exposure to Rule 11. *Id.* at 980.

39. *See id.* at 980-81.

The 1983 Rule prompted entire law firms to establish guidelines regarding the filing of papers and motions for Rule 11 sanctions,[40] even though law firms could not be sanctioned under the 1983 Rule.[41] Thus, although the drafters' effort to force attorneys to conduct investigations and substantiate facts and legal theories prior to filing was successful, the means to this end were fervidly questioned. Three primary concerns were consistently voiced in the commentary: (1) The 1983 Rule encouraged satellite litigation;[42] (2) it encouraged fee shifting;[43] and (3) it had a chilling effect on attorney creativity and the zealous representation of clients.[44]

The 1983 Rule encouraged two types of satellite litigation: litigation to determine the meaning of the various certification requirements[45] and litigation concerning the type and magnitude of sanctions imposed under Rule 11.[46] Litigation involving certification improved over time as terms such as "reasonable inquiry" began to develop a consistently applied meaning.[47] The second type of satellite litigation, however, remained problematic. The type and magnitude of sanctions imposed were necessarily inconsistent as a result of the courts' weighing of various factors under the particular circumstances of each case.[48]

40. *See* Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147, 149-50 (1990).

41. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 125 (1989).

42. *See* Meeting of Section of Antitrust Law at the Annual Meeting for the American Bar Association, 55 U.S.L.W. 2120 (Aug. 26, 1986).

43. *See* Letter from Sam C. Pointer, Jr., Chairman of Advisory Committee on Civil Rules, to Robert E. Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure, Attachment D at 3 (May 1, 1992), *reprinted in* 146 F.R.D. 519, 523 (1993) (outlining support and criticism of 1983 Rule 11).

44. *See* Marshall et al., *supra* note 39, at 961-62.

45. *See, e.g.*, Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990), *cert. denied*, 498 U.S. 1050 (1991).

46. *See, e.g.*, Mariani v. Doctors Assocs., Inc., 983 F.2d 5, 8 (1st Cir. 1993).

47. Although the circuit courts have used different terminology to describe the standard that violates Rule 11, the standards applied are consistent. *See, e.g., Vukadinovich*, 901 F.2d at 1445 (holding that sanctions can be imposed for any suit that is frivolous); Dura Systems, Inc. v. Ruthbury Inv., Ltd., 886 F.2d 551, 556 (3d Cir. 1989) (stating that sanctions may be imposed when claim is patently unmeritorious or frivolous), *cert. denied*, 493 U.S. 1046 (1990); Saltany v. Reagan, 886 F.2d 438, 440 (D.C. Cir. 1989) (holding that sanctions may be imposed when suit is filed with no hope whatsoever of success), *cert. denied*, 495 U.S. 932 (1990); Official Publications, Inc. v. Kable News Co., 884 F.2d 664, 670 (2d Cir. 1989) (stating that Rule 11 is violated when it is patently clear plaintiff has absolutely no chance of success); INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 401 (6th Cir.) (stating subject of sanctions will be measured by objective standard of reasonableness under the circumstances), *cert. denied*, 484 U.S. 927 (1987); Bartel Dental Books Co. v. Schultz, 786 F.2d 486, 490 (2d Cir.) (holding sanctions may be imposed when suit is clearly without merit and frivolous), *cert. denied*, 478 U.S. 1006 (1986).

48. *See, e.g., Mariani*, 983 F.2d at 8 (50% of attorneys' fees was reasonable); International Bhd. of Teamsters v. Association of Flight Attendants, 864 F.2d 173, 178 (D.C. Cir. 1988) (all attorneys' fees and costs affirmed on appeal); Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 212 (9th Cir. 1987) (imposing sanction of double costs and attorneys' fees on appeal).

Eastway Construction Corp. v. City of New York[49] established that a district court has the discretionary power to impose sanctions, even after a case has been voluntarily dismissed.[50] The *Eastway* decision allows continuing satellite litigation even after an original complaint has been withdrawn, thereby establishing a potential Rule 11 violation whenever a party voluntarily withdraws a complaint.

The *Eastway* decision is questionable for two important reasons. First, encouraging honesty in pleading is the foundation of Rule 11,[51] and *Eastway* provides a disincentive for a party to withdraw a claim when the party realizes the claim is not meritorious. An attorney who has read the *Eastway* decision may sacrifice honesty in hopes of avoiding a potentially costly sanction. Second, an underlying purpose of the 1983 Rule, as part of the integrated package of civil reform, was to streamline litigation.[52] *Eastway* runs contrary to this purpose by encouraging Rule 11 litigation after the original claim has been withdrawn.[53]

In addition to encouraging satellite litigation, the application of the 1983 Rule encouraged fee shifting by allowing the imposition of attorneys' fees on the losing party. When Rule 11 was originally enacted in 1938, the Rule was consistent with the common law adoption of the "American Rule," which prevents litigants from recovering attorneys' fees, even though the losing party may be assessed other costs.[54] The "American Rule" has been described as ensuring unhin-

49. 762 F.2d 243 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

50. *Id.* at 254 (satellite litigation over sanctions imposed).

51. *See* 1991 Proposed Rule 11, *supra* note 13; *see also* Whittington v. Ohio River Co., 115 F.R.D. 201, 210 (E.D. Ky. 1987) (imposing sanctions on party who sought voluntary dismissal on grounds that litigation was too expensive to pursue would "violate spirit of Rule 11" by going beyond its intent); Summers v. TRG, Inc., 863 F.2d 20, 21 (6th Cir. 1988) (sanctions are not appropriate when plaintiff did not oppose motion to dismiss, but instead voluntarily dismissed).

52. McMahon v. Shearson/American Express, Inc., 896 F.2d 17, 21 (2d Cir. 1990).

53. For cases in which sanctions were imposed after voluntary dismissal, see Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990); Bolivar v. Pocklington, 975 F.2d 28, 31 (1st Cir. 1992); Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988); and Kunstler v. Britt, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991).

54. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 759 (1980) (discussing the American Rule); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (same).

dered access to the courts[55] while the "English Rule," which allows the imposition of attorneys' fees on the losing party, creates a heightened risk of liability and, therefore, streamlines the judicial process by keeping some claims out.[56] Although streamlining litigation was a primary goal of the civil reform of the 1980s, the question arises whether streamlining should be done by hindering access to the courts with the exorbitant liability a party may incur through Rule 11 sanctions. In *White v. General Motors Corp.*,[57] the Tenth Circuit affirmed the district court's imposition of a $50,000 sanction based on the rationale that it was the minimum sanction necessary to deter future misconduct of the party.[58] Large sanctions may have a general deterrent effect that dissuades some parties from bringing novel claims that are legitimate.

The Advisory Committee delineated the purpose of the 1983 Rule as deterring abusive litigious behavior.[59] The application of the 1983 Rule has been more consistent with the three-fold purpose advanced in a study of the federal judiciary: (1) Punishing the offending party; (2) deterring future abusive conduct; and (3) compensating the injured party.[60] A court's view of the purpose of Rule 11 will inevitably affect its application of sanctions.[61] Courts, by circuit, reflect different philosophies and sanctioning practices.[62] Empirical research, however, shows that attorneys' fees have been imposed in over ninety percent of the cases involving successful Rule 11 motions.[63] The courts' application of the 1983 Rule created a clear incentive to file Rule 11 motions and attempt to have attorneys' fees shifted. The philosophy underlying the Rule seemed to shift from the "American Rule" to the "English Rule" even though the 1983 Rule did not mandate monetary sanctions.[64]

55. Kenneth W. Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 191-92 (1987).

56. *See id.* at 189-91.

57. 977 F.2d 499 (10th Cir. 1992).

58. *Id.* at 502.

59. 1983 Rule, *supra* note 3, at advisory committee's notes.

60. *See* Saul M. Kassin, *An Empirical Study of Rule 11 Sanctions*, *in* RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION 473, 491 (PLI Litig. & Admin. Practice Course Handbook Series No. 330, 1987).

61. *Id.* at 482.

62. *See* Marshall et al., *supra* note 39, at 981-84. For an independent analysis of each circuit's application of 1983 Rule 11, see generally SANCTIONS, *supra* note 17.

63. *See* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1333 (1986) (indicating that monetary awards were employed in 96% of the cases in which sanctions were imposed).

64. 1983 Rule, *supra* note 3. For examples of other types of sanctions imposed by the courts, see Green v. Dorrell, 969 F.2d 915, 916 (10th Cir. 1992) (affirming sanction of dismissal of claim with prejudice), *cert. denied*, 113 S. Ct. 1336 (1993); Joiner v. Delo, 905 F.2d 206, 207 (8th Cir. 1990) (dismissing related claims as sanction); *In re* Martin-Trigona, 795 F.2d 9, 12 (2d Cir. 1986) (imposing permanent injunction and threat of future monetary sanctions due to lack of effectiveness of regular injunction as sanction); and Piazza v. Carson City, 652 F. Supp. 1394, 1395 (D. Nev. 1987) (disbarment never contemplated as an "appropriate sanction" under Rule 11).

The third concern voiced in commentaries was that the 1983 Rule had a chilling effect that hindered attorney creativity in developing new legal theories and threatened zealous representation of clients. In 1983, the Advisory Committee cautioned that, "[t]he rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[65] Empirical research indicates, however, that the application of the Rule did hinder attorneys' pursuits of certain types of claims.[66] Plaintiffs, in general, were affected more adversely because Rule 11 is disproportionately directed at complaints rather than "other papers."[67] There was a disparate impact based upon the type of litigation, with civil rights plaintiffs affected most adversely.[68] In addition, attorneys reported that they were less likely to pursue litigation involving novel claims and that they had turned clients away as a result of the 1983 Rule 11.[69]

In sum, the courts' application of the 1938 Rule 11 and the 1983 Rule appear to reflect philosophies which contradict one another. While the philosophy behind the 1938 Rule, arguably, was to provide ready access to the courts and an opportunity for the silent to be heard, the philosophy behind the 1983 Rule, arguably, was to enable speedy disposition to help control the judicial workload. The 1983 philosophy backfired. Courts were flooded with satellite Rule 11 motions[70] because the potential for fee shifting provided an incentive for filing Rule 11 motions. Parties with novel claims and those fearful of costly sanctions, however, were shut out because of the chilling effect resulting from the application of the Rule as a fee-shifting device. When the 1983 Rule was analyzed, the primary focus became maintaining the deterrent effect

65. 1983 Rule, *supra* note 3, at advisory committee's notes.

66. *See* Marshall et al., *supra* note 39, at 960-61, 973.

67. Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 267 (1991).

68. Marshall et al., *supra* note 39, at 965-67.

69. *Id.* at 960-61, 965-67, 973.

70. *See* Townsend v. Holman Consulting Corp., 881 F.2d 788, 792 (9th Cir. 1989), *amended by* 929 F.2d 1358 (9th Cir. 1990) (approximately 1,000 published opinions on Rule 11 motions reported from 1983 to 1989).

while trying to avoid chilling zealous advocacy and restricting access to the courts.

III. THE 1993 RULE

The 1993 Rule was enacted after three years of discussion, drafting and debate by all facets of the legal community. The Advisory Committee for the Federal Rules of Civil Procedure called for comments on the 1983 Rule in July of 1990.[71] The forthcoming comments were divided. Judges tended to express support for the 1983 Rule, while practitioners criticized it.[72] In 1991, the Advisory Committee proposed an amendment to Rule 11 "to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule."[73] The amendments proposed in 1991 were revised and fine-tuned to meet the needs expressed in hearings and through comments on the 1983 Rule. On April 22, 1993, the Supreme Court promulgated the proposed amendments to become effective on December 1, 1993, absent action of Congress to the contrary.[74] Congress took no action and the 1993 amendments became effective December 1, 1993.[75]

The 1993 Rule is clearer than prior versions of the Rule. There are four subdivisions: (a) Signature requirements; (b) certification requirements; (c) procedures for sanctioning; and (d) the express limitation that Rule 11 is inapplicable to discovery.[76] The signature requirements remain largely the same as the 1983 Rule. Some wording has been changed for clarity, and the express requirement of reading the papers prior to signing has been eliminated. An implicit reading requirement is absolutely clear due to the certification provisions in subdivision (b) of the Rule. Subdivision (d) makes express the limitation that Rule 11 does not apply to discovery, which is governed by Rules 26[77] and 37.[78] No interpretive problems or difficulties with application should stem from this provision. The significant changes to the Rule, which will impact both interpretation and application, are found in subdivisions (b) and (c).

71. CALL FOR COMMENTS, *supra* note 11.
72. Carl Tobias, *Rule Revision Roundelay*, 1992 WIS. L. REV. 236, 236-37 (1992).
73. 1991 Proposed Rule 11, *supra* note 13, at advisory committee's notes.
74. Order of the Supreme Court Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), *in* 146 F.R.D. 404 (1993).
75. FED. R. CIV. P. 11.
76. *Id.*
77. FED. R. CIV. P. 26.
78. FED. R. CIV. P. 37.

A. *The Certification Provision*

Though the "reasonable inquiry" standard is maintained in the 1993 amendment,[79] the certification provision has been changed in several fundamental ways. All members of the legal community need to be aware of these changes, especially those who present a pleading, written motion or other paper to the court.[80] Under subdivision (b), the certification requirements apply not only to one who has signed a paper, but also to anyone who presents that paper to the court, "whether by signing, filing, submitting, or later advocating."[81] Cases under the 1983 Rule show that local counsel has never been considered beyond the reach of Rule 11.[82] Out-of-state primary counsel who have not signed papers might now be sanctioned more frequently than in the past. In fact, in *Coburn Optical Industries, Inc. v. Cilco, Inc.*,[83] the district court, applying the 1983 Rule, imposed sanctions on both out-of-state primary counsel who had not signed the pleadings and on local counsel.[84] Although *Coburn Optical* was an anomoly under the 1983 Rule, it reflects the type of result that can be expected under the 1993 Rule. In addition, the use of "presenting" rather than "signing" places a duty of candor upon each party.[85] Sanctions may be appropriate when a party maintains a position after it is no longer tenable. A party's obligations no longer end when a paper is submitted to the court. Obligations arise whenever a position is reaffirmed or advocated to the court.[86] There is

79. The 1993 amendment defines the standard as "reasonable under the circumstances." This is the same terminology which has been used by the courts although the 1983 Rule defined the standard as "reasonable inquiry." *See* cases cited *supra* note 30.
80. FED. R. CIV. P. 11(b).
81. *Id.*
82. *See* Val-Land Farms, Inc. v. Third Nat'l Bank, 937 F.2d 1110, 1117 (6th Cir. 1991) (local counsel who rely on assertions of outside counsel without independent inquiry may be sanctioned when pleadings violate Rule 11); Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 n.1 (N.D. Cal. 1984) (local counsel must ensure that paper complies with applicable requirements prior to signing), *rev'd and remanded on other grounds*, 801 F.2d 1531 (9th Cir. 1986). *But see* CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 579 (3d Cir. 1991) (when local counsel was hired less than 24 hours before the filing deadline, the court will not impute knowledge of party and primary attorney to local counsel), *cert. denied*, 113 S. Ct. 328 (1992).
83. 610 F. Supp. 656 (M.D.N.C. 1985).
84. *Id.* at 660-61.
85. *See* FED. R. CIV. P. 11 and advisory committee's notes.
86. FED. R. CIV. P. 11 advisory committee's notes. Under the 1983 Rule, courts did not impose a continuing duty on the signer. *See, e.g.*, MGIC Indem. Corp. v. Moore, 952 F.2d 1120, 1121 (9th Cir. 1991) (holding that Rule 11 applies only to initial signing and imposes no continuing duty on the signer); Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990)

no duty to withdraw frivolous claims, but a party may be sanctioned for later advocating claims or defenses that are no longer supportable or meritorious.[87]

The three other requirements for a "reasonable inquiry" found in the 1983 Rule are retained in the 1993 Rule with the addition of a fourth requirement which applies to denials.[88] The format of the 1993 Rule emphasizes these requirements by providing a separate subsection for each. The improper purpose provision outlined in subsection (1) is almost identical in form to the 1983 Rule.[89] This clause has been useful in extending Rule 11 sanctions to unusual abuses of the litigation process, such as attempting to manipulate the court through motions for recusal or motions to disqualify counsel.[90] The other three clauses have been amended or, in the case of subsection (4), added to the Rule.

The second clause, the "warranted by law" clause, differs from the 1983 version in three ways. First, the clause begins, "the claims, defenses, and other legal contentions therein . . . ."[91] These words address specific components within a paper rather than the paper as a whole. Though there was division under the 1983 Rule on whether sanctions were available when a particular claim was unsupported by fact or law but the paper as a whole had merit, most courts were willing to sanction for a frivolous argument contained in a meritorious paper.[92]

(holding that Rule 11 does not impose continuing duty to update or correct papers that did not violate rule when signed or filed); Sheets v. Yamaha Motors Corp., 891 F.2d 533, 536 (5th Cir. 1990) (holding that court should not use hindsight but should focus on time when paper was signed to determine if Rule 11 has been violated); Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc., 877 F.2d 938, 943 (11th Cir. 1989) (Rule does not impose continuing duty on counsel to amend previous pleadings when their factual or legal basis dissolves), *cert. denied*, 493 U.S. 1079 (1990). *But see* Woodfork v. Gavin, 105 F.R.D. 100, 104 (N.D. Miss. 1985) (holding that Rule 11 obligates signer to continually review his position as facts come to light and re-evaluate the earlier certification if necessary).

87. FED. R. CIV. P. 11 advisory committee's notes

88. FED. R. CIV. P. 11(b); *see supra*, text accompanying note 31.

89. Subsection (1) states: "it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1).

90. INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 402 (6th Cir.) (motion to recuse filed for improper purpose), *cert. denied*, 484 U.S. 927 (1987). For examples of other purposes which have been deemed improper and in violation of Rule 11, see Healey v. Chelsea Resources, Ltd., 947 F.2d 611, 622 (2d Cir. 1991) (deliberate attempt to blackmail defendants); Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1157 (9th Cir. 1987) (harassment), *appeal after remand*, 898 F.2d 684 (1990); Hewitt v. City of Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986) (delay); Quin v. United States, 652 F. Supp. 454, 455 (D.P.R. 1987) (attempt to delay deportation); and Leogrande v. Leogrande, 799 F. Supp. 1354, 1364 (E.D.N.Y. 1992) (perpetuating acrimony of the action).

91. FED. R. CIV. P. 11(b)(2).

92. *See, e.g.*, Bay State Towing Co. v. Barge American 21, 899 F.2d 129, 133 (1st Cir. 1990)

The new clause clearly provides for sanctions based on portions of a paper. Second, the term "good faith" is replaced in the 1993 clause by "nonfrivolous."[93] Although this change in terms may result in litigation to determine its meaning, most cases involving Rule 11 motions already speak in terms of "frivolous" rather than "good faith." Good faith connotes a subjective standard, which has not been appropriate in the context of Rule 11 since the application of the 1938 Rule. "Nonfrivolous" connotes an objective standard, which is consistent with the application of the Rule since 1983. Finally, the 1993 "warranted by law" clause adds a provision for the establishment of new law. The new clause pertains to claims "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the *establishment of new law*."[94] This addition appears to be a response to the chilling effect that has been reported as reducing attorneys' enthusiasm for bringing novel claims.[95]

The third clause, the "well grounded in fact" clause, also contains a significant change.[96] This provision allows for certification of "allegations and other factual contentions" which either "have evidentiary support" or "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[97] When evidentiary support is needed, which may require further discovery, a party may include that allegation in a claim, as long as it is identified, without being subject to a Rule 11 sanction.[98] The advisory notes state, however, that "if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention."[99] Under the 1983 Rule, the Seventh Circuit took this same

(holding that sanctions are proper when a document basically violates the Rule though a minor portion of the document meets the requirements of Rule 11); Melrose v. Shearson/American Express, Inc., 898 F.2d 1209, 1216 (7th Cir. 1990) (holding that where a substantial part of the motion was based on arguments which violated Rule 11, sanctions were proper). *But see* Layman v. Combs, 981 F.2d 1093, 1103 (9th Cir. 1992) (any frivolous claims may be sanctioned even if the complaint also contains nonfrivolous claims).

93. FED. R. CIV. P. 11(b)(2).

94. FED. R. CIV. P. 11(b)(2) (emphasis added).

95. *See supra* notes 67-71 and accompanying text.

96. FED. R. CIV. P. 11(b)(3).

97. *Id.*

98. *Id.* at advisory committee's notes.

99. *Id.*

approach in *Samuels v. Wilder*[100] when it held that a sanction was not appropriate when plaintiffs had conducted reasonable inquiry but were unable to determine that claims were baseless until discovery had been conducted.[101] Under the 1983 version, papers were restricted to those claims which were supportable by facts and law at the time they were submitted to the court.[102] The 1993 Advisory Committee notes clarify the provision further:

> That summary judgment is rendered against a party does not necessarily mean . . . that it had no evidentiary support for its position. On the other hand, if a party has evidence . . . that would suffice to defeat a motion for summary judgment . . ., it would have sufficient "evidentiary support" for purposes of Rule 11.[103]

This clause, along with the "warranted by law" clause, is positioned to thaw the chilling effect created by the 1983 version by providing the flexibility necessary to avoid unnecessary Rule 11 motions based on mere technicalities.

The fourth clause in subdivision (b) addresses denials made by the defendant and accordingly, is consistent with the third clause. The Advisory Committee notes indicate that subsections (b)(3) and (b)(4) together are intended to equalize the burden on plaintiffs and defendants.[104] Under the 1983 Rule, plaintiffs were subjected to sanctions in a disproportionate number of cases.[105] Plaintiffs may have been more susceptible to sanctions simply because the 1983 Rule did not specifically address denials. Defendants may now only present defenses which are "warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."[106] This provision affirmatively indicates that the Rule is intended to apply equally to defendants' denials.

100. 906 F.2d 272 (7th Cir. 1990).

101. *Id.* at 274; *see also* City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 49-50 (2d Cir. 1988) (holding that plaintiff should have dropped claims after discovery).

102. *See* 1983 Rule, *supra* note 3.

103. FED. R. CIV. P. 11(b)(3) and advisory committee's notes. For case law under the 1983 Rule consistent with the Advisory Committee's position, see Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409, 1422 (9th Cir. 1988) and Bennett v. Corroon & Black Corp., 845 F.2d 104, 107 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989). For a case contrary to the advisory notes, see Healey v. Chelsea Resources, Ltd., 133 F.R.D. 449, 453 (S.D.N.Y. 1990) (holding that denial of defendant's motion for summary judgment does not shield plaintiff's attorney from Rule 11 sanctions), *rev'd in part, vacated in part*, 947 F.2d 611 (1991).

104. FED. R. CIV. P. 11 advisory committee's notes.

105. Stempel, *supra* note 68, at 267.

106. FED. R. CIV. P. 11(b)(4).

B. The Sanctioning Provision

The sanctioning provision has expanded from one sentence in the 1983 Rule to a subdivision with three subsections in the 1993 Rule. Sanctioning ran rampant under the 1983 Rule, and many believed the situation had gotten out of control.[107] The 1993 Rule clearly outlines new provisions including notice requirements, a discretionary standard, the procedure for initiating Rule 11 sanctions the nature of sanctions to be imposed and requirements for court ordered sanctions.[108]

Perhaps the most significant changes are the notice requirements and the discretionary power given to the court. The Advisory Committee notes to the 1983 Rule state that "[a] party seeking sanctions *should* give notice to the court and the offending party promptly upon discovering a basis for doing so."[109] Decisions between 1983 and 1993 indicate that courts often did not address notice or provide the offending party an opportunity to withdraw or cure the problem. Contrary to this pattern, however, the District of Columbia Court of Appeals, in *Adams v. Pan American World Airways*,[110] found no abuse of discretion when the trial court refused to impose sanctions on the plaintiff after the defendant called an inaccuracy in the plaintiffs' complaint to the attention of plaintiffs' counsel, who then removed the inaccuracy a short time later.[111] Under the 1983 Rule, the defendant in *Adams* was, in effect, penalized for giving notice to the offending party, assuming the inaccuracy would have been worthy of sanctioning if it had not been withdrawn.

Subdivision (c) of the 1993 Rule expressly provides the offending party with the opportunity to either withdraw or cure the defect.[112] In addition, the procedural guidelines of subsection (c)(1)(A) provide a twenty-one day safe harbor which allows parties with deficient claims to withdraw or cure the claims upon notification of the insufficiency without threat of a Rule 11 violation.[113] This new provision should

107. *See* Townsend v. Holman Consulting Corp., 881 F.2d 788, 792 (9th Cir. 1989) (stating that there were approximately 1,000 published opinions on Rule 11 motions between 1983 and 1989), *amended by* 929 F.2d 1358 (9th Cir. 1990).

108. FED. R. CIV. P. 11(c).

109. 1983 Rule, *supra* note 3, at advisory committee's notes (emphasis added).

110. 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 and *cert. denied*, 485 U.S. 961 (1988).

111. *Id.* at 31-32.

112. FED. R. CIV. P. 11 (c)(1)(A).

113. *Id.*; *see supra* notes 52-54 (cases discussing voluntary withdrawal under the 1983 Rule).

reduce the satellite litigation following voluntary withdrawal of a complaint. This is true even though *Eastway Construction Corp. v. City of New York*[114] established that the court has discretionary power to sanction after a case has been voluntarily dismissed.[115]

Subdivision (c) also indicates that the court may, in its discretion, impose a sanction upon finding a Rule 11 violation. The Rule states that "[i]f . . . the court determines that subdivision (b) has been violated, the court *may* . . . impose an appropriate sanction . . . ."[116] The Rule expressly provides that the court may impose a sanction on attorneys, law firms or parties that either violated subdivision (b) or are responsible for the violation.[117] In *Pavelic & LeFlore v. Marvel Entertainment Group*,[118] the Supreme Court held that the 1983 Rule 11 did not authorize imposition of sanctions against the law firm of the signing attorney because of the express language in the rule—"person who signed."[119] Prior to the *Pavelic* decision, some law firms had been sanctioned.[120] The express language in the 1993 Rule overrules the holding of *Pavelic* as it relates to Rule 11. Subsection (c)(1)(A) states that "[a]bsent exceptional circumstances, a law firm *shall* be held jointly responsible for violations committed by its partners, associates, and employees."[121] Because the empirical research based on the 1983 Rule showed a deterrent effect on law firms,[122] this new provision should further heighten the sensitivity of law firms not only to the importance of honesty but also to the importance of meritorious complaints and defenses. In addition, the 1993 Rule provides a potential "deep pocket" when a truly egregious violation has occurred.

The nature of the sanction was left to the court's discretion in the 1983 Rule. Though still discretionary in scope, it is outlined more precisely in the 1993 Rule. When a party makes a Rule 11 motion, the court, "[i]f warranted, . . . may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in

114. 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).
115. *Id.* at 254.
116. FED. R. CIV. P. 11(c) (emphasis added).
117. *Id.*
118. 493 U.S. 120 (1989), *cert. denied*, 114 S. Ct. 1829 (1994).
119. *Id.* at 126-27.
120. *See, e.g.*, Calloway *ex rel.* LMN Prod., Inc. v. Marvel Entertainment Group, 854 F.2d 1452, 1479-80 (2d Cir. 1988) (sanctions may be imposed on signer's firm as well as on signer), *rev'd in part by* 493 U.S. 120 (1989); Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467, 481 (N.D. Cal. 1985) (sanctions imposed jointly and severally against defendant's law firm and against individual attorneys), *aff'd in part, vacated in part*, 836 F.2d 1156 (9th Cir. 1987).
121. FED. R. CIV. P. 11(c)(1)(A) (emphasis added).
122. *See* Nelken, *supra* note 41, at 149-50.

presenting or opposing the motion."[123] This provision was necessary to clarify the division among courts regarding whether attorneys' fees and costs incurred in bringing a Rule 11 motion should be included in a monetary sanction.[124]

Under subsection (c)(2)(A), however, monetary sanctions cannot be awarded against a party—a person other than the attorney—for violations of subdivision (b)(2), the "warranted by law" clause.[125] Courts had generally taken this same approach under the 1983 Rule because knowledge of the law and decisions concerning legal arguments advanced cannot fairly be imputed to parties who are not attorneys.[126]

Further restrictions on the court's power to impose sanctions are provided in subsection (c)(2). Subsection (c)(2) upholds the purpose of the 1983 amendment, expressly stating that "[a] sanction imposed for violation of this rule shall be limited to *what is sufficient to deter repetition* of such conduct or comparable conduct by others similarly situated."[127] The provision then lists several examples of sanctions such as nonmonetary sanctions, penalties paid to the court and monetary sanctions in the amount of the movant's reasonable attorneys' fees and other expenses.[128] The advisory notes contain a list of factors to consider when deciding whether to impose a monetary or nonmonetary sanction.[129] Monetary sanctions of attorneys' fees are subject to further requirements: they must be imposed by motion[130] and they must be warranted for effective deterrence.[131] The Advisory Committee notes further provide that an award of attorneys' fees to another party "should

123. FED. R. CIV. P. 11(c)(1)(A).
124. *Compare* Mike Ousley Prods., Inc. v. WJBF-TV, 952 F.2d 380, 383-84 (11th Cir. 1992) (sanction may include cost of pursuing Rule 11 motion) *and* Brandt v. Schal Assocs., Inc., 960 F.2d 640, 646 (7th Cir. 1992) (attorneys' fees and expenses incurred in establishing Rule 11 violation may be included in sanction) *with* Pan-Pacific & Low Ball Cable Television Co. v. Pacific Union Co., 987 F.2d 594, 597 (9th Cir. 1993) (district court erred by including in sanction the expenses and attorneys' fees incurred in prosecuting Rule 11 motion).
125. FED. R. CIV. P. 11(c)(2)(A).
126. *See, e.g.*, Borowski v. DePuy, Inc., 850 F.2d 297, 305 (7th Cir. 1988).
127. FED. R. CIV. P. 11(c)(2) (emphasis added).
128. *Id.* For examples of nonmonetary sanctions imposed by courts under the 1983 Rule, see *supra* note 65.
129. FED. R. CIV. P. 11 advisory committee's notes. The following are some of the factors included in the list: pattern of activity; willfulness of violator; whether entire pleading was effected; whether conduct was intended to injure; effect on the litigation process; and specific and general deterrence. *Id.*
130. FED. R. CIV. P. 11(c)(1)(A).
131. *Id.* § (c)(2).

not exceed the expenses and attorneys' fees for the services *directly* and *unavoidably* caused by the violation."[132] These provisions, though merely directive and not mandatory, may assist in clarifying the purpose of Rule 11 sanctions and resolving inconsistencies in the courts regarding "punishment" and "retribution" as appropriate purposes for imposing sanctions or increasing monetary sanctions. In *Elliott v. The M/V Lois B*,[133] the Fifth Circuit expressed the purpose of Rule 11 sanctions clearly and concisely: "[T]he primary purpose of Rule 11 is to deter groundless proceedings, and not necessarily to compensate wronged parties."[134]

IV. APPLICATION OF THE 1993 AMENDMENT TO RULE 11

The courts' forthcoming interpretations and applications of the 1993 amendment to Rule 11 should remedy at least some of the problems that were identified through interpretation and application of the 1983 Rule. Difficulties with the 1983 Rule were identified in Part II of this Comment,[135] and the primary changes to the Rule were identified in Part III.[136] Part IV will provide a comprehensive forecast of the likely interpretation and application of the 1993 Rule.

A. Satellite Litigation

The 1993 Rule changes the provisions and the form of Rule 11, but these changes are largely refinements of the original 1983 Rule and were developed to bring the application of Rule 11 in line with the purpose outlined in 1983—deterring frivolous litigation.[137] When the 1983 amendment was enacted; the standard for determining whether

132. *Id.* at advisory committee's notes (emphasis added).

133. 980 F.2d 1001 (5th Cir. 1993).

134. *Id.* at 1006-07 (citing Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 877 (5th Cir. 1988) (explaining why Rule 11 sanctions should not be assessed as substitute for tort damages); *See also* Weltz v. County of Lycoming, 974 F.2d 387, 390 (3d Cir. 1992) (primary goal is to deter repetition of improper conduct, and award of attorneys' fees or other monetary sanctions should not automatically be sanction of choice). Courts have expressed differences regarding whether the purpose of Rule 11 is punitive. *Compare* Cheek v. Doe, 828 F.2d 395, 397 (7th Cir.) (Rule 11 is designed to punish and deter frivolous law suits), *cert. denied*, 484 U.S. 955 (1987) *with* Magnus Elecs., Inc. v. Masco Corp., 871 F.2d 626, 634 (7th Cir.) (abuse of discretion to tack on arbitrary sum to fees requested by opposing counsel in order to penalize offending counsel), *cert. denied*, 493 U.S. 891 (1989).

135. *See supra* notes 17-72 and accompanying text.

136. *See supra* notes 73-109 and accompanying text.

137. FED. R. CIV. P. 11 advisory committee's notes.

Rule 11 had been violated changed from a subjective standard to an objective standard.[138] Much satellite litigation resulted to determine the meaning of the objective "reasonable inquiry" standard.[139] Because the 1993 Rule, rather than changing the tone of the Rule, merely refines the Rule by outlining the provisions more clearly and providing procedural guidelines for implementation, the satellite litigation that will result should be much more limited.

Subsection (b)(2) replaces the term "good faith" from the 1983 Rule with "nonfrivolous" as the standard for determining whether an "argument for the extension, modification, or reversal of existing law or the establishment of new law" exists.[140] Courts have commonly used an objective standard, relying on factors such as whether the claim involves an area of law not yet well-settled;[141] whether state law directly precluded the claim;[142] whether the attorney acknowledged existing adverse law;[143] and whether the attorney investigated the legal basis for the claim.[144] This change, therefore, should result in limited satellite litigation. Likewise, the addition of "establishment of new law" should not result in satellite litigation because it merely brings such arguments within the scope of the Rule.

Subsections (b)(3) and (b)(4) add a new dimension to Rule 11 by allowing claims or denials to be included in a certified paper even though the claims or denials do not yet have factual support.[145] This provision may prompt litigation over whether parts of a paper are labeled appropriately. The notice provision in subsection (c)(1)(A) should minimize litigation on this issue because once notice is given, the offending party has a duty to correct.[146] If notice is not given, the offending party will not be sanctioned[147] unless the sanction falls under

138. *See supra* notes 32-33 and accompanying text.

139. *See supra* note 30 and accompanying text.

140. FED. R. CIV. P. 11 advisory committee's notes.

141. *E.g.*, Securities Indus. Assn. v. Clarke, 898 F.2d 318, 321-22 (2d Cir.), *cert. denied*, 493 U.S. 1070 (1990); Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1199-1200 (5th Cir. 1988); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1022 (1st Cir.), *cert. denied*, 488 U.S. 821 (1988); Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987).

142. Knight v. Sharif, 875 F.2d 516, 518 (5th Cir. 1989).

143. Smith v. National Health Care Servs., 934 F.2d 95, 96-97 (7th Cir. 1991).

144. International Bhd. of Teamsters v. Association of Flight Attendants, 864 F.2d 173, 176 (D.C. Cir. 1988).

145. FED. R. CIV. P. 11(b)(3), (4).

146. FED. R. CIV. P. 11 (c)(1)(A).

147. *Id.*

(c)(1)(B).[148] The Advisory Committee notes, however, indicate that (c)(1)(B) sanctions will be appropriate only in extreme circumstances.[149]

The other kind of satellite litigation, regarding the type and magnitude of sanctions imposed, will continue to be problematic. Although the 1993 Rule provides sanctioning guidelines, the nature of the sanction is still largely discretionary and requires the court to look at factors specific to each case.[150] Subsection (c) extends liability for a Rule 11 violation to any "attorneys, law firms, or parties that have violated [the certification provision] or *are responsible for the violation*."[151] This last clause, undoubtedly, will be a source of litigation if courts impose sanctions based on it. The expansion of liability, in general, may bring about satellite litigation to determine the scope and standard for determining who may be sanctioned appropriately and under what circumstances. Subsection (c)(3) may help limit satellite litigation over the type and magnitude of sanctions because it requires that the court describe the conduct which violated Rule 11 and explain the basis for the sanction imposed.[152] Some appellate decisions have required that the district court make findings to support decisions on Rule 11 motions, but in other cases the reported decisions do not require the specificity which (c)(3) mandates.[153]

B. Fee Shifting

The limitations found in (c)(2) on awards of attorneys' fees and the Advisory Committee notes indicate that Rule 11 is not intended to be used as a fee-shifting device in every Rule 11 violation case. In fact, fee shifting is expressly discouraged.[154] The sanctioning provisions, however, are still largely discretionary, and the standard of review will continue to be abuse of discretion.[155] Courts, therefore, maintain much discretion in determining the type of sanction and, if monetary, the amount of the sanction. When the 1983 Rule was being evaluated,

148. *Id.* § (c)(1)(B) (providing for sanctions on court's initiative).
149. *See id.* at advisory committee's notes.
150. *Id.* § (c)(2).
151. *Id.* § (c) (emphasis added).
152. *Id.* § (c)(3).
153. *Compare* Bodenhamer Bldg. Corp. v. Architectural Research Corp., 989 F.2d 213, 218 (6th Cir. 1993) (when circumstances and record do not clearly reflect reasons for court's disposition of Rule 11 motion, district court must make findings of fact concerning frivolousness of nonmovant's complaint) *with* Lloyd v. Schlag, 884 F.2d 409, 413 (9th Cir. 1989) (district court need not make explicit findings to support Rule 11 award of sanctions).
154. *See* FED. R. CIV. P. 11 advisory committee's [illegible].
155. *See, e.g.*, Burkhart v. Kinsley Bank, 852 F.2d [illegible] (10th Cir. 1988) (the appropriate standard of review for Rule 11 motions is abuse of discretion).

judges reported satisfaction with the Rule.[156] Courts seem to prefer monetary sanctions. Empirical research indicates that under the 1983 Rule, monetary sanctions were assessed in ninety-five percent of the cases in which sanctions were imposed.[157] It is difficult to forecast whether judges will begin to consider nonmonetary sanctions more frequently. Rule 11 will probably continue to be used as a fee-shifting device, but due to the notice provisions in (c)(1)(A), sanctionable violations should occur much less frequently.

C. Chilling Effect

The 1993 Rule should significantly thaw the "chilling effect" which resulted from the 1983 Rule.[158] The notice provisions in subsection (c)(1)(A) will provide offending parties with opportunities to correct errors quickly and efficiently without placing an undue burden on either the parties or the judicial system. A party who chooses to ignore the notice may face a potential sanction, but not without being forewarned. Parties who are concerned with sanctions may voluntarily withdraw without fear of further sanctions.[159] Other sanctioning provisions should further reduce the chilling effect. The Rule indicates under (c)(2) that sanctions should be limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[160] It is unclear in what situation the court would choose not to impose a sanction.

The important sanctioning provision, though, is the list of the types of sanctions possible: "directives of a nonmonetary nature, an order to pay a penalty into court, *or* . . . an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a *direct result* of the violation."[161] This provision limits sanctioning in two ways. First, the Rule uses "or" to indicate that only one type of sanction may be selected.[162] It would therefore be inappropriate for a court to impose a sanction including both payment

156. Tobias, *supra* note 73, at 237; *see also*, Sambom, *supra* note 38, at 1.
157. *See* Marshall et al., *supra* note 39, at 956-57.
158. *See supra* notes 66-71 and accompanying text.
159. FED. R. CIV. P. 11(c)(1)(A).
160. *Id.* § (c)(2).
161. *Id.* (emphasis added).
162. *Id.*

of the opponent's attorneys' fees and payment of a penalty to the court. Second, the clause regarding attorneys' fees specifically states "some or all."[163] Sanctions doubling attorneys' fees would appear to be prohibited by the plain language of the Rule. In addition, the clause regarding attorneys' fees requires that the fees and other expenses be incurred as a "direct result" of the violation,[164] further limiting the amount of a monetary sanction to what has actually been spent by opposing counsel responding to the conduct that violated Rule 11. In light of these provisions, parties with novel claims or creative pleadings should feel more comfortable under the 1993 Rule because they can avoid sanctions by curing any defects for which opposing counsel has given them notice. If they are sanctioned, any monetary sanction must be limited to the confines of the Rule.

V. KANSAS STATUTES ANNOTATED SECTION 60-211

Kansas has two separate statutes to address abusive litigation practices. Section 60-211 of the Kansas Statutes Annotated was amended in 1986 to mirror the 1983 Rule 11 of the Federal Rules of Civil Procedure.[165] Prior to this amendment, courts had discretion to impose sanctions only when an attorney had willfully, knowingly and with bad faith violated the statute.[166]

Consistent with the 1983 version of Federal Rule 11, section 60-211 mandates the imposition of sanctions when the statute is violated.[167] The Kansas appellate courts, like the federal courts, apply the abuse of discretion standard when reviewing the amount of a monetary sanction and refuse to disturb the trial court's decision absent such abuse.[168]

The second statute addressing abusive litigation practices is section 60-2007 of the Kansas Statutes Annotated.[169] The purpose of section 60-2007 is not to "prevent a party from litigating bona fide claims or defenses, but to protect litigants from harassment and expense in clear

163. *Id.*
164. *Id.*
165. KAN. STAT. ANN. § 60-211 (Supp. 1993) (compare with 1983 Rule, *supra* note 3).
166. Fankhauser v. Bank IV Emporia, 251 Kan. 217, 219, 833 P.2d 1002, 1004 (1992) ("[P]rior to the 1986 amendment of K.S.A. 60-211, a court was empowered to levy sanctions against an attorney who willfully violated the statute but only where the attorney was found to have acted knowingly and in bad faith.").
167. KAN. STAT. ANN. § 60-211.
168. Rood v. Kansas City Power & Light Co., 243 Kan. 14, 23, 755 P.2d 502, 508 (1988) (citing Cornett v. Roth, 233 Kan. 936, 945, 666 P.2d 1182, 1190 (1983)).
169. KAN. STAT. ANN. § 60-2007 (1983).

cases of abuse."[170] Two conditions must be met before section 60-2007 may be applied—the claim must have no reasonable basis in fact, and the claim must not have been asserted in good faith.[171]

While section 60-211 is designed to deter frivolous litigation, section 60-2007 is designed to penalize willful misuse of the judicial process.[172] These two sections tend to be used conjunctively by the Kansas courts. The Kansas Supreme Court speaks of the two sections almost interchangeably and often fails to mention under which section the sanctions are actually imposed.[173] When the offending party has acted in good faith, however, the court distinguishes the two statutes by indicating that the sanction is imposed under Section 60-211.[174] The rationale for maintaining two very similar statutes which are both designed to deter abusive practices is unclear. Section 60-2007 seems quite similar to the "improper purpose" clause in section 60-211; yet, under section 60-211, a sanction may be imposed without a finding of bad faith.[175]

Section 60-211 has had limited application in reported cases. Only fourteen cases addressing section 60-211 are listed in the Kansas Statutes Annotated.[176] Whether frivolous litigation occurs less in Kansas than in the federal courts or whether sanctions are not as frequently appealed in Kansas courts is unclear.

In the past, Kansas followed the lead of the Federal Rules of Civil Procedure in outlining section 60-211.[177] The Kansas revision of section 60-211, however, did not come until three years after the 1983 revision of Federal Rule 11.[178] By retaining section 60-2007, which requires willful misconduct, Kansas appears committed to having a statute that allows courts to sanction based on bad faith.[179] The

170. *Id.* § 60-2007(d).
171. *Id.* § 60-2007(b); *see also Rood*, 243 Kan. at 24, 755 P.2d at 509.
172. *See* Southgate Bank v. Fidelity & Deposit Co., 14 Kan. App. 2d 454, 459-60, 794 P.2d 310, 315 (1990).
173. *See* Summers v. Montgomery Elevator Co., 243 Kan. 393, 398-99, 401, 757 P.2d 1255, 1259-61 (1988) (failing to expressly indicate whether sanctions were imposed under § 60-211 or § 60-2007).
174. Fankhauser v. Bank IV Emporia, 251 Kan. 217, 221, 833 P.2d 1002, 1005 (1992) ("The court further found that Berry had violated K.S.A. 1991 Supp. 60-211.").
175. KAN. STAT. ANN. § 60-211 (Supp. 1993).
176. *See id.*
177. *See Fankhauser*, 251 Kan. at 219, 833 P.2d at 1004.
178. KAN. STAT. ANN. § 60-211.
179. *Id.* § 60-2007.

importance of section 60-2007 is unclear, however, because section 60-211 empowers the court to sanction regardless of good or bad faith.[180]

VI. CONCLUSION

The revision of Rule 11 has been hotly debated over the last decade. Concern over excessive groundless litigation prompted the 1983 revision of Rule 11, and concerns with the courts' interpretation and application of the 1983 Rule prompted the 1993 revision. The Advisory Committee's 1993 revision provides guidelines which are direct and clear and, as a result, leave much less room for inconsistent interpretations of the Rule. In addition, the Advisory Committee notes specifically address the key areas in which the circuits were split under the 1983 Rule. Therefore, the 1993 Rule should not result in a decade of excessive commentary, debate and litigation clarifying the Rule. Rather, the Rule should be embraced by both judges and practitioners as a welcome addition to the Federal Rules of Civil Procedure.

Under the new Rule 11, judges are provided more discretion in sanctioning based on the particular circumstances of each case and are also provided guidelines and suggestions to facilitate consistent sanctioning. Practitioners are provided with much clearer guidelines concerning what is "sanctionable." Practitioners are also given the procedural fairness which a safe harbor will provide when a claim or defense, originally thought to be meritorious, is challenged by opposing counsel as frivolous. By necessity, courts will be required, through judicial application, to smooth any wrinkles which are found within the Rule. The framework, however, is solid and the 1993 Rule should withstand any forthcoming commentary or criticism and become a long-standing Rule, as the original 1938 Rule 11 was. Unlike the 1938 Rule, however, the 1993 Rule will be used frequently. Its application will become more consistent throughout the circuits, and commentary will be less extensive as the small amount of interpretative work that is needed is ironed out.

180. *Fankhauser*, 251 Kan. at 219, 833 P.2d at 1004.

APPENDIX A

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein 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;

(3) the 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

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but 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. If 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. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) 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.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993.)

The Use of Lower Court Judgments as Bargaining Chips: Should Courts Routinely Grant Vacatur When Parties Settle Pending Appeal?*

I. INTRODUCTION

The Supreme Court's failure to address the merits of *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.* (*Kaisha v. U.S. Philips Corp.*)[1] has breathed new life into the debate surrounding the controversial practice known as vacatur. Vacatur is the practice by which lower court judgments are stripped of their precedential value and preclusive effect when parties enter into postjudgment settlements and move the appellate court to vacate the lower court's decision.[2] Throughout the past several years, courts across the country have heralded vacatur as an incentive to settlement and the termination of litigation and, ultimately, the conservation of judicial resources.[3] After a trial on the

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* David M. Staker. Special thanks to Professor Casad, Thomas Cartmell and Scott Stuohm for all of their guidance and counsel.

Editor's Note: On November 8, 1994, the Supreme Court held that mootness by reason of settlement after an appeal is filed or certiorari sought does not justify, absent exceptional circumstances, vacatur by a federal appellate court of judgment under review. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 63 U.S.L.W. 4063 (U.S. Nov. 8, 1994).

1. The Supreme Court granted certiorari in the case of Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 113 S. Ct. 1249, *cert. dismissed*, 114 S. Ct. 425 (1993).

2. The controversy surrounding the propriety of vacatur is evident by the numerous articles and commentaries written on the subject in recent years. *See* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033 (1993); Elizabeth R.P. Bowen, *Routine Vacatur: The Supreme Court Strikes the Balance in Favor of Finality*, 3 FED. CIRCUIT B.J. 259 (1993); Mary A. Donovan & Marya L. Yee, *Letting the Chips Fall: The Second Circuit's Decision on* Toll House, 52 BROOK L. REV. 1029 (1986); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Kipp D. Snider, *The Vacatur Remedy for Cases Becoming Moot Upon Appeal: In Search of a Workable Solution for the Federal Courts*, 60 GEO. WASH. L. REV. 1642 (1992); William D. Zeller, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860 (1987); Elizabeth L. Anstaett, Comment, *Is Settlement Conditioned on Vacatur an Option? Should It Be?*, 84 J. DISP. RESOL. 87 (1991); Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233 (1989); Michael W. Loudenslager, Note, *Erasing the Law. The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 WASH. & LEE L. REV. 1229 (1993); Stuart N. Rappaport, Note, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731 (1987).

3. *See* Fisch, *supra* note 2, at 589-90. In fact, many settlement agreements are conditioned upon the appellate court's vacatur of the lower court judgment. *See generally* Loudenslager, *supra* note 2; Anstaett, *supra* note 2 (noting settlements conditioned upon appellate court's vacatur of lower judgment).

Jenkins' cause of action accrued upon his arrest on April 14, 1982. **See Gowin v. Altmiller,** 455 F. Supp. 743, 747 (D. Idaho 1978), **aff'd,** 663 F.2d 820 (9th Cir. 1981) ("cause of action for abuse of process accrues from termination of acts which constitute the abuse complained of"). He filed his action three years later, on April 15, 1985.[5] If the two-year tort statute of limitations governs Jenkins' cause of action, then the superior court was correct in dismissing his suit.

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A. **Abuse of Process**

The elements of the tort of abuse of process are, "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." W. Keeton, D. Dobbs, R. Keeton and D. Owen, **Prosser and Keeton on the Law of Torts** § 121, at 898 (5th ed. 1984). **Cf. J & L Diversified Enter. v. Municipality of Anchorage,** 736 P.2d 349, 351 n.3 (Alaska 1987) (although this court has not previously stated the elements of an abuse of process claim, the court cited with approval §§ 120-21 of **Prosser and Keeton).** For example, in **Hoppe v. Klapperich,** 224 Minn. 224, 28 N.W.2d 780, 784 (Minn. 1947) the plaintiff alleged that the warrant leading to her arrest was procured "knowingly, wrongfully, maliciously and without probable cause." The court found that plaintiff's allegations that defendants attempted to intentionally and maliciously intimidate her into surrendering certain documents by arresting and confining her, supported a claim for abuse of process. Similarly, Jenkins alleges that the police entered his property without justification, arrested him without probable cause and acted with malice. These allegations can be fairly read to state a claim for abuse of process.[7] **See Linck v. Barokas & Martin,** 667 P.2d 171, 173 (Alaska 1983) ("if, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient"). **See also** Restatement (Second) Torts § 136 comment d (1977) (abuse of privilege to arrest has same affect as an abuse of process).

There is no allegation that the police officers were not acting in their official capacity when they arrested Jenkins. Thus the action is one "against a peace officer . . . upon a liability incurred by the doing of an act in an official capacity . . . ." AS 09.10.060(a). Since AS 09.10.060(a) specifically provides that a three-year limitation period applies in cases such as this, the "residual" two-year statute is inapplicable. AS 09.10.070; **Anderson,** 358 F. Supp. at 978.

We also find persuasive the reasoning of **Barnes v. Massachusetts Bonding & Ins. Co.,** 89 Ore. 141, 172 P. 95 (Or. 1918). In that case the plaintiff sued a sheriff for wrongfully levying upon her property. **Id.** at 95. The court was faced with the question whether to apply a six-year statute of limitations for actions on a liability created by statute, or a three-year statute virtually identical to AS 09.10.060(a). Relying on the rule that a more specific statute governs over an otherwise applicable general statute, the court found:

It may be conceded that the act of the sheriff in levying upon property of a stranger to the writ by virtue of an execution in his hands constitutes a breach of his official bond and results in a liability created by statute for the execution of a writ in his hands is an act in his official capacity and in virtue of his office. If it were not for the provisions of section 7 [of the statute], the action might well be brought within six years from the wrongful taking of the property. Speaking broadly of the facts mentioned in the complaint before us, they give rise to a liability created by statute and might come within the general provisions of section 6, defining a limitation of six years, but they are more particularly mentioned in the short limitation of three years laid down in section 7.

The substance of this statute is that in general a statutory liability may be enforced within six

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years, **but where the accountability of a sheriff, coroner, or constable is involved the action to enforce it must be commenced within three years.**

Id. at 96 (emphasis added).[6]

Here, the two-year limitations period of AS 09.10.070(1) applies to "libel, slander, assault, battery, seduction, [and] false imprisonment" as well as generally to tort actions unless "specifically provided otherwise." We conclude that when an action is brought against a police officer or coroner acting in his or her official capacity, the three-year statute of limitations applies, because it is "specifically provided [for] otherwise," subject only to the escape exception contained in AS 09.10.060(a). **See** AS 09.10.080 (escape actions must be brought within one year). Abuse of process, when asserted against a peace officer or coroner, is a claim to which the three-year limitations period thus applies.

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3 The essence of the tort of abuse of process is "misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. Keeton, D. Dobbs, R. Keeton and D. Owen, **Prosser and Keeton on the Law of Torts** § 121, at 897 (5th ed. 1984). Abuse of process is not to be confused with related tort of malicious prosecution. The critical elements of malicious prosecution are (1) malice, (2) want of probable cause, and (3) termination of proceeding in favor of the plaintiff. **Hazen v. Municipality of Anchorage,** 718 P.2d 456, 461 (Alaska 1986).

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Keeton, 119 at 871 (footnote omitted; emphasis added). **See also** Restatement (Second) of Torts § 405, introductory note (Unjustifiable Litigation) (1977). Similarly, a plaintiff in an abuse of process action must prove that the defendant used legal process for an end other than that for which it was designed. Keeton, § 121 at 897. To hold that a plaintiff or prosecutor has a general duty of care toward defendants, regardless of the plaintiff's intent, would shift this balance sharply in favor of the individual interest at the expense of the community interest.

The possibility that an unsuccessful litigant can be held liable for the attorney's fees of the other is, we believe, a sufficient deterrent to negligently-brought litigation. Indeed, even in imposing the sanction of attorney's fees, we are careful to avoid discouraging or inhibiting parties from using the court system. In **Malvo v. J. C. Penney Co.,** 512 P.2d 575, 587 (Alaska 1973), we held that an unsuccessful plaintiff should not be liable for all of the defendant's attorney's fees absent a showing of bad faith. We stated:

If a successful litigant were to receive full reimbursement for all expenses incurred in the case with no requirement of justification and no consideration of the "good faith" nature of the unsuccessful party's claim or defense, there would be a serious detriment to the judicial system. For where in order to seek judicial remedies, a plaintiff must risk liability for the full amount of attorney's fees the other side sees fit to incur, it takes little imagination to foresee that the size of a party's bank account will have a major impact on his access to the courts.

Id. We also quoted approvingly the following language from a letter written by Benjamin Cardozo: "'I should not lay too heavy a burden upon the unsuccessful litigant. Some of the losses that are incidental to the establishment of rights and the redress of wrongs through the process of the courts should be allowed, as a matter of social engineering, to lie where they fall.'" **Id**. at 587-88, quoting G. Hellman, **Benjamin N. Cardozo** (1940).

Therefore, we hold that Stephens cannot show that the DOR breached a duty of care owed to him by deciding to attach his wages and bank account.[5] Accordingly, we hold that he does not set forth a negligence cause of action against the DOR. Because the pleadings and affidavits establish that there can be no state liability to Stephens in negligence, we need not determine the applicability of the state's statutory immunity.[6]

We have examined Stephens' other assignments of error, including his assertion that the trial court abused its discretion by denying his motion for reconsideration, and find them without merit. Accordingly, we AFFIRM.[7]

OPINION FOOTNOTES

1 Stephens has abandoned his claim for the 1977 state income tax refund; it is not raised in his arguments to the trial court, points on appeal, or in his briefs to this court.

2 Stephens does not argue a conversion theory on appeal.

3 AS 09.50.250 provides, in pertinent part, as follows:

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Actionable claims against the state. A person or corporation having a contract, quasi-contract or tort claim against the state may bring an action against the state in the superior court. . . . However, no action may be brought under this section if the claim (1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused;

. . .

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

4 Stephens' complaint alleges that the DOR wrongfully brought a civil, not criminal, action against him. Some authorities distinguish an action for "wrongful civil proceedings" from malicious prosecution. Keeton, 119 at 870-71; Restatement (Second) of Torts § 674 comment e (1977). The torts for which AS 09.50.250(3) provide immunity are specifically listed; "wrongful use of civil proceedings" is not among them. Thus, one might argue, although Stephens does not, that an action alleging a wrongful civil proceeding is not barred by the statute. We have not previously recognized such a distinction, **see** Industrial Power and Lighting v. Western Modular Corp., 623 P.2d 291, 298 (Alaska 1981), and we do not find the distinction significant for the purpose of AS 09.50.250(3).

5 We believe that, in general, the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them. To the extent that this contradicts our decision in Zerbe v. State, 578 P.2d 597, that case is overruled. There is no question that a person whose wages or bank account are wrongfully seized by the state must be provided a process to get his money back, with interest. Otherwise, there would be a taking. Here, though, the money already has been paid back with interest. This case is about tort damages, not the return of property.

6 Because he has no legal theory on which he can base recovery of damages, his claim of error in the entry of judgment dismissing his alleged loss due to the DOR's delay in processing his Permanent Fund dividend check is moot.

7 Stephens' claim for attorney's fees in the bankruptcy proceeding was properly brought before the bankruptcy court on his motion there for an order to show cause. Stephens' dismissal of that action renders the issue of attorney's fees there **res judicata**. **See** Shepherd v. Bering Sea Originals, 578 P.2d 587, 589 (Alaska 1978).

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0-LS0193\H
Ford
4/29/97

CS FOR HOUSE BILL NO. 31( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MULDER, Cowdery

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil liability for certain false allegations in a civil pleading or proceeding, for certain improper acts relating to signing a civil pleading, for making an intentional false statement of a material fact; amending Rule 82(b), Alaska Rules of Civil Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.190. Civil liability for false claims and improper practice. (a) A person may not

(1) sign a civil complaint, answer, or other civil pleading that contains false allegations that are material to the claims asserted in the civil action with the intention of asserting allegations that are false; or Comp + Punitive

(2) sign a civil pleading before making reasonable inquiry and determining that, to the best of the signer's knowledge, information, and belief, each claim, defense, and allegation contained in the pleading is well grounded in fact and

is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Even if it proves to be

(b) If the trier of fact determines that a party to a civil action has knowingly made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this section shall apply only to those claims to which the false statement relates.

(c) A party who is injured by a violation of

(1) (a)(1) of this section may bring an action for compensatory and punitive damages against the person who signed the civil pleading; and

(2) (a)(2) of this section may bring an action for recovery of compensatory damages against the person who signed the pleading; compensatory damages awarded under this paragraph may not exceed the actual reasonable costs and attorney fees that were incurred, in the action in which the violation of (a)(2) of this section occurred, by the party who was injured by the violation of (a)(2) of this section, but that were not awarded to that party.

(d) If a party brings an action under (c) of this section, the court shall award actual reasonable attorney fees to the prevailing party regardless of whether the prevailing party is the plaintiff or defendant.

(e) This section does not apply to an action

(1) brought by a person incarcerated by the state;

(2) involving divorce or dissolution; or

(3) involving adoption, custody, support, or visitation of a child.

(f) In this section, "civil pleading" includes motions and affidavits.

* **Sec. 2.** AS 09.65.190(d), enacted in sec. 1 of this Act, has the effect of amending Rule 82(b), Alaska Rules of Civil Procedure, by allowing the award of actual reasonable attorney fees in certain civil actions.

* **Sec. 3.** APPLICABILITY. This Act applies to an action that accrues on or after the effective date of this Act.

*** Sec. 4.** SEVERABILITY. Under AS 01.10.030, if any provision of this Act or the application of a provision of this Act to any person or circumstance is held invalid, the remainder of this Act and the application to other persons shall not be affected.

*** Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

Civil Rule 11 – Requires that the signer has read the pleading, motion or other paper, and that, to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or is a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose, such as harassment or unnecessary delay or expense or cost.

A violation of this rule can result in the pleading motion or document being stricken and sanctions being imposed.

Civil Rule 95 – Specifically provides that costs and/or attorney's fees may be assessed and in addition the court may punish an attorney for contempt.

Abuse of Process

1) An ulterior purpose.

2) Willful act in in the use of the process not proper in the regular conduct of the proceeding. *Denardo v. Michalski*, 811 P.2d 315 (Ak 1991). This contemplates some overt act done in addition to the initiating of the suit.... Id. At 317.

Kollodge v. State, 757 1024, 1026 (Ak 1988)

Malicious Prosecution –

Must prove that the initial proceeding

(1) was terminated in his/her favor,

(2) was brought without probable cause, and

(3) was initiated with malice. *Kollodge v. State,* 757 1024 (Ak 1988)

Pro Se litigants.

What if you request R.11 sanctions in the initial proceeding? If the Judge denies your request are you precluded from raising the issue in future litigation?

The action still has the very real potential of severing the attorney/client relationship.

Attorney Malpractice Insurance rates will rise.

Affidavits may become harder to come by due to the potential liability.

"Deep Pockets" can use this as another resource drain on the common person.

What if the Atty. makes the the statement in closing or any other part of the proceedings. The Judge must dismiss. What about during oral argument?

(g) **Limited Discovery; Expedited Calendaring.** In a civil action for personal injury or property damage involving less than $100,000 in claims the parties shall limit discovery to that allowed under Rule 1(a)(1), District Court Rules, and shall avail themselves of the expedited calendaring procedures allowed under Rule 4, District Court Rules.

*** Sec. 41.** Rule 41(a), Alaska Rules of Civil Procedure, is amended by adding a new paragraph to read:

(3) **Settlement Information.** If a voluntary dismissal under this rule is the result of compromise or other settlement of the parties, the parties shall submit to the Alaska Judicial Council the information required under AS 09.68.130. A notice of dismissal made under (1)[a] of this subsection must be accompanied by a certification signed by or on behalf of the plaintiff that the information required under AS 09.68.130 has been submitted to the Alaska Judicial Council. A stipulation of dismissal made under (1)[b] of this subsection must be accompanied by a certification signed by or on behalf of all parties who have appeared in the action. The requirements of this paragraph do not apply to the types of cases listed in AS 09.68.130(c).

*** Sec. 42.** Rule 72.1(g), Alaska Rules of Civil Procedure, is amended to read:

(g) **Discovery.** Except by leave of court, no discovery may be conducted until the report of the Panel has been filed or until **60** [80] days **after selection of the Panel** [HAVE ELAPSED FROM THE DATE THE CASE IS AT ISSUE], whichever is first to occur, unless discovery is further stayed for good cause by order of the court.

*** Sec. 43.** Rule 95(b), Alaska Rules of Civil Procedure, is amended to read:

(b) In addition to its authority under (a) of this rule and its power to punish for contempt, a court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing by the court, if requested, impose a fine not to exceed **$50,000.00** [$1,000.00] against any attorney who practices before it for failure to comply with these rules or any rules promulgated by the supreme court.

*** Sec. 44.** Rule 95, Alaska Rules of Civil Procedure, is amended by adding a new subsection to read:

(c) If the trier of fact determines that a party to a civil action involving

personal injury or property damage has intentionally made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this subsection shall apply only to those claims to which the false statement relates.

* **Sec. 45.** Rule 1(a)(1), District Court Rules of Civil Procedure, is amended to read:

(1) The procedure in civil actions and proceedings before district judges and magistrates shall be governed by the rules governing the procedure in the superior court to the extent that such rules are applicable. **However, in a civil action for personal injury or property damage, unless otherwise agreed by all parties or permitted by order of the court in exceptional cases and for good cause shown, discovery shall be limited to the disclosures required under Civil Rule 26(a) and to the taking by each party of the deposition of one or more opposing parties and of one additional person who is not a party.**

* **Sec. 46.** Rule 4, District Court Rules of Civil Procedure, is amended by adding a new subsection to read:

(b) In a civil action for personal injury or property damage, unless otherwise permitted by order of the court in exceptional cases and for good cause shown, all parties shall file a memorandum to set the case for trial, as set out in Civil Rule 40(b), no later than 180 days after service of the complaint on all parties to the case. The memorandum shall contain a certification that each party has exchanged the information described in Rule 26(a), Alaska Rules of Civil Procedure, and may state their separate positions if they do not agree concerning information or estimates to be provided in the memorandum. After the court satisfies itself that the information described in Rule 26(a), Alaska Rules of Civil Procedure, has been disclosed, the court shall set the case for trial as soon as practicable, but no sooner than 30 days after the court makes the determination regarding disclosure.

* **Sec. 47.** Rule 511, Alaska Rules of Appellate Procedure, is amended by adding a new subsection to read:

(c) **Settlement Information.** If a dismissal under (a) or (b) of this rule is the

4/16/97

Jessica Molay (Mole?)
HB 31
8:00 52C 012C

PHONE MESSAGE DATE 4/11 TIME 2:30 A.M. P.M.

FOR Lisa
M Bob Mentz
OF
PHONE ( ) 278-2277W EXT.
FAX MOBILE PAGER ( )
MESSAGE 341-3035 H
Re: HB 31
exclude Domestic Relations

- [ ] URGENT
- [x] PHONED
- [ ] RETURNED YOUR CALL
- [x] PLEASE CALL BACK
- [ ] WILL CALL AGAIN
- [ ] WAS IN
- [ ] WANTS TO SEE YOU

AVERY

SIGNED KT

0-LS0193\B
Ford
3/26/97

Post-it® Fax Note 7671	Date 7/9/97	# of pages ▶ 2
To KAREN	From JENNY	
Co./Dept.	Co.	
Phone #	Phone # 465-2647	
Fax # 561-8970	Fax # 465 3518	

CS FOR HOUSE BILL NO. 31( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MULDER, Cowdery

A BILL

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(b) If the trier of fact determines that a party to a civil action has intentionally made a false statement of a material fact in connection with the prosecution or defense of a civil action, the court shall enter judgment against the party making the false statement on the issue to which the false statement relates. If the civil action involves multiple claims and the false statement does not apply to all claims, the judgment required under this section shall apply only to those claims to which the false statement relates.

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(1) (a)(1) of this section may bring an action for compensatory and punitive damages against the person who signed the document; and

(2) (a)(2) of this section may bring an action for recovery of compensatory damages against the person who signed the pleading; in this paragraph, "compensatory damages" means the actual reasonable costs and attorney fees that were incurred, in the action in which the pleading was submitted, by the person who was injured by the violation of (a)(2) of this section, but that were not awarded to that person.

(d) If a person brings an action under (c) of this section, the court shall award actual reasonable attorney fees to the prevailing party, regardless of whether the prevailing party is the plaintiff or defendant.

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