

SCOMM

101A:22

I felt that the senate version of HB 158 was not a good bill. One of the major reasons was the inclusion of the "Mintz provision" which I feel will be used as a tactical weapon. As I read the provision, the lawyer could not be sued until the conclusion of the litigation, although the client could be. Allowing the client to be sued for essentially malicious prosecution during the underlying action is a change from present law requiring a party to prevail in the litigation as a precondition to a malicious prosecution. In order to defend, the client will want to say, "I only filed this claim because my lawyer said I could." That will require the lawyer to withdraw and become a witness. Thus, if you want the opposing lawyer off the case, you simply file this claim during the pending action. (This is not to discount the additional fears of Jim Wright about this provision which appear to be well thought out.)

Additionally, the present law on malicious prosecution requires proof that there was no merit to the claim and that it was brought for malicious purposes. The "Mintz provision" allows one to sue if the claim were brought either without probable cause or for the wrong motive. Thus, you could have probable cause but be liable for bringing if the suit is brought "Primarily for the purpose other than that of securing the proper adjudication of a claim or defense involved in the civil action" whatever that means. In a wrongful death case caused by a drunk driver the survivors may be motivated by hatred, revenge or any other emotion you can think of. If there is probable cause, looking beyond that to motive strikes me as unconstitutional.

I don't know of any lawyer, plaintiff or defendant, who disagrees with Jim Wright that the provision is ill advised. (Including Jeff Feldman who represented Bob Mintz in the ASHA matter.)

Mike Lessmeier, whose opinions on these matters I highly regard, does believe that section (b) of the "Mintz provision" is a good one and that a place should be found for it. That section provides if a party intentionally makes a false statement of a material fact the court will enter judgment against the party on the issue to which the false statement applies. I was unsuccessful in arguing the merits of Mike's position on this issue to the Governor's commission.

use it

I hope this has been helpful.

cc: Dick Cattnach

MEMORANDUM

TO: Jim Sourant

FROM: Roger F. Holmes

RE: Civil Liability for false claims and improper practice

DATE: January 20, 1997

I have several comments on Jim Wright's letter. The letter references section 19 which is in Senate CS for CS for House Bill 158, the bill vetoed by the governor. This was not part of HB158. It was inserted at the 11th hour in the Senate. It is popularly known as the "Mintz provision" after Bob Mintz. You may remember he worked at Burr Pease & Kurtz then married Barney Gottstein's daughter, Sandy, and became counsel for Carr Gottstein Properties. He was on the ASHA Board and was personally named by Olof Hellen as a defendant in a nasty employment case. He became incensed and drafted this provision to right all the wrongs perpetrated upon him by Olof. He imposed on someone in the senate to have the provision inserted.

Jim Wright works in Tim Lynch's office. He is correct that the Federal Court went to a mandatory Rule 11 provision to attempt to stop abuses. The Federal Rule 11 provision was added to HB158 in committee at the request of Representative Mackie and is known as the "Mackie provision." (Section 26 of the committee bill.)

During the Governor's commission hearings Susanne DiPietro of the Judicial Counsel addressed this issue in the procedures subcommittee. She stated that the Federal Courts had done a survey on this provision and concluded that the tail was wagging the dog. The provision was generating lots of bitter litigation. (The very thing Jim Wright fears with the "Mintz proposal.") She told us the Federal Courts had eliminated the provision and gone back to the old non mandatory rule. FRCP 11(c) now makes the application of sanctions permissive as does ARCP 11. By adopting the "Mackie provision" we would be doing something the Federal Courts have now conclusively shown does not work.

As a result of Susanne's comments our subcommittee recommended against adopting the now abandoned Federal Rule 11 as proposed in the "Mackie provision". Instead, we recommended, and the commission adopted, a provision amending ARCP 95 to increase the courts ability to fine lawyers if necessary for any purpose to \$10,000. In my post Christmas memo to Brian (p 6, para j) I suggested the approach of the governor's commission was superior to the "Mackie provision" because of the information we received from the Judicial Counsel.

Robert A. Mintz

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February 10, 1997

Jim Sourant
Alaska State Legislature
State Capitol, Room 216
Juneau, AK 99801-1182

RE: HB 31

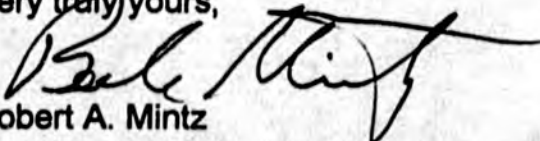
Dear Jim:

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 contains an excellent historical discussion of Civil Rule 11 and the litigation surrounding interpretation of the 1983 version of the rule. According to the author, a lot of the litigation was caused by various circuits interpreting the rule differently. The 1993 amendment was designed to address this by leaving less room for inconsistent interpretations.

It is not fair to say that the portion of HB 31 that is based on Rule 11 will result in a flurry of litigation for several reasons. As a state law, it will be interpreted only by the Alaska Supreme Court, not various federal district courts. Also, keep in mind that Alaska Civil Rule 11 is based upon the 1983 version of Federal Rule 11 and has not been changed to comport with the 1993 amendments to the federal rule. (See enclosed footnote 201 in 21 Pepperdine Law Review 1067 at 1111 "Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions".) Thus, even though the Alaska rule is based on the litigious 1983 version of the federal rule, it has not resulted in a lot of litigation in Alaska. (See the enclosed annotations to Alaska Rule 11.) In summary, the argument that HB 31 will result in a lot of litigation because it is based on Civil Rule 11 is a red herring.

If you have any questions please feel free to call.

Very truly yours,


Robert A. Mintz

cc: Representative Brian Porter, w/o enclosures

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 Procedure³ 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

* 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 amendments¹¹ 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 Court¹⁴ 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

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.

LITIGATION, AMERICAN BAR ASSOCIATION, SANCTIONS: RULE 11 AND OTHER POWERS app. at 136 [hereinafter SANCTIONS] (Edna S. Epstein et al. eds., 1986).

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 151, 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

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

with good faith).

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 requirements⁴⁵ 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 B 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

*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 unin-

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).

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. TRQ, 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 courts⁵⁵ 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

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.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 motions⁷⁰ 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

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).

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-Vedict 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 26⁷⁷ 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 anomaly 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. *INVEST 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. '90) (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 motion¹³⁰ 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

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 sanctioned¹⁴⁷ unless the sanction falls under

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* *Waltz 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.

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 notes.

155. *See, e.g.,* *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (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*, Samborn, *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

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

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 *Comett v. Roth*, 233 Kan. 936, 945, 666 P.2d 1182, 1190 (1983)).

169. KAN. STAT. ANN. § 60-2007 (1983).

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

* David M. Staker. Special thanks to Professor Casad, Thomas Cartmell and Scott Strohm 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. 4005 (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. Anstaeht, 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; Anstaeht, *supra* note 2 (noting settlements conditioned upon appellate court's vacatur of lower judgment).

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Rule 9

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The testimony of the vice-president and secretary of a Colorado automobile dealer, which had repossessed trucks in Alaska, sold them, and then sued the buyer for a deficiency judgment, that the dealer had an interest in trucks because it had obtained a reassignment is sufficient to justify the trial court's denial of a buyer's motion for directed verdict on the grounds that the dealer was not the real party in interest. *Weaver v. O'Meara Motor Company*, Op. No. 515, 452 P2d 87 (Alaska 1969).

AS 13.20.330, providing for the survivorship of those claims which the decedent held before death, cannot be used by the administrator to qualify as the real party in interest in a suit against a funeral home for wrongful interference with the right of a next of kin to preserve the body of a deceased. *Burns v. Anchorage Funeral Chapel*, Op. No. 773, 495 P2d 70 (Alaska 1972).

The trial court has the discretion to determine whether in the particular factual context of the litigation a waiver of a real party in interest issue has occurred. *Burns v. Anchorage Funeral Chapel*, Op. No. 773, 495 P2d 70 (Alaska 1972).

Failure to aver properly superior court's jurisdiction was procedural and harmless in nature and complaint would be deemed amended accordingly. *A.R.C. Industries v. State*, Op. No. 1283, 551 P2d 951 (Alaska 1976).

Where plaintiff's claim would not have been barred if state had been required to file answer within time set by court rule, state was prohibited by equitable estoppel from asserting plaintiff's incapacity to sue when answer was filed at end of extended period allowed by stipulation. *State v. Reeder King Co., Inc.*, Op. No. 1344, 559 P2d 56 (Alaska 1976).

Where defendant sought damages for lack of full performance in its counterclaim, but did not seek to avoid its obligation altogether, it could not point to its counterclaim or to its pretrial memorandum as adequately raising the issue of substantial performance. *Alaska Protection Service v. Frontier Colorable*, Op. No. 2800, 680 P2d 1119 (Alaska 1984).

Although defendant properly pleaded issue of plaintiff's capacity to sue in its answer, defendant waived issue for appeal by failing to bring the issue to trial court's attention by motion. *Von Stauffenberg v. Committee for Honest and Ethical School Board*, Op. No. 4269, 903 P2d 1055 (Alaska 1995).

Rule 10. Form of Pleadings.

(a) **Caption — Names of Parties.** Every pleading shall contain a caption setting forth the title of the court, the number of the judicial district in which the action is filed, the title of the action, the file number and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with appropriate indication of other parties.

(b) **Paragraphs — Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim 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. *Steck & 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 or to cause unnecessary expense in the cost of litigation or other paper is not signed unless it is signed promptly called to the attention of the

(Adopted by SCO 5 October 9, 1959; SCO 743 effective December 1, 1959; amended January 15, 1994 effective July 15, 1994)

Note: AS 10.06.628, as enacted by SLA 1988, amended Civil Rule 10 by requiring that certain documents be attached to a complaint for an involuntary corporation under AS 10.06

Annotations

Cases

Sanctions for failure to sign a document of the trial court. *Sanctions and Red Carriers Union*, Op. No. 1965).

Where appellants did not draw the failure of counsel to sign a motion to strike under this rule, a counsel's failure to sign was any time the trial court had no opportunity to comply with this rule time on appeal. *Sanctions v. Red Carriers Union*, Op. No. 290, 4

The purpose of this rule requires plain set out in its present wording good faith of counsel by holding all the allegations contained in the motion Laborer's and Red Carriers P2d 199 (Alaska 1965).

Imposition of attorney fees as defense attorney in criminal case and legally deficient pleading where attorney was not given notice of a hearing on the issue of sanctions. *Third Judicial Dist.* (Alaska App. 1986).

Attorney had no right to file sanctions should be imposed against unnecessary and legally deficient pleading. *Waldner v. Superior Court*, T 589, 715 P2d 264 (Alaska App. 1986).

Attorney was not entitled to sanctions for filing frivolous, unnecessary pleadings in a criminal case, in conjunction with any affidavits filed by him to the issues. *Waldner v. Superior Court*, Op. No. 589, 715

Attorney was not entitled to file sanctions should be imposed against unnecessary and legally deficient pleading. *Waldner v. Superior Court*, T 589, 715 P2d 264 (Alaska App. 1986).

Where the complaint men context of an abuse of process

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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 is 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

motion the superior court to impose sanctions under the rule, the issue of whether sanction should have been imposed pursuant to the rule was not properly raised below and would not be heard on appeal. *Kollodge v. State*, Op. No. 3355, 757 P2d 1028 (Alaska 1988).

On review of a lower court's decision to impose sanctions under this rule, all factors relevant to the issue of whether the attorney's inquiry into facts and law was reasonable are reviewed under an abuse of discretion standard. *Keen v. Ruddy*, Op. No. 3538, 784 P2d 653 (Alaska 1989).

This rule creates an objective standard of "reasonableness under the circumstances" and is intended to be more stringent than a mere "good faith" formula. *Keen v. Ruddy*, Op. No. 3538, 784 P2d 653 (Alaska 1989).

Where plaintiff's legal theories were frivolous and the suit was brought in bad faith, plaintiff's attorney could not have signed the pleadings with a reasonable belief that the pleadings were supported by existing law or that there was a good faith argument for extending the law; accordingly, imposition of sanction against attorney was appropriate. *Keen v. Ruddy*, Op. No. 3538, 784 P2d 653 (Alaska 1989).

Argument that \$100 sanction against attorney under this rule was too low was rejected; although \$100 was a small sum compared to the attorney's fees imposed against the attorney's client, it nevertheless carried with it a stigma and a message of disapproval. *Keen v. Ruddy*, Op. No. 3538, 784 P2d 653 (Alaska 1989).

A trial court's imposition or nonimposition of sanctions remains subject to review only for abuse of discretion. *Alaska Federal S & L v. Bernhardt*, Op. No. 3562, 794 P2d 579 (Alaska 1990).

This rule no longer strictly requires willful conduct or subjective bad faith to impose sanctions; the determining factor is whether there was a reasonable basis for the attorney's signature. *Alaska Federal S & L v. Bernhardt*, Op. No. 3562, 794 P2d 579 (Alaska 1990).

This rule concerns the veracity and propriety of purpose of affirmative representations by counsel; it does not reach omissions. *Alaska Federal S & L v. Bernhardt*, Op. No. 3562, 794 P2d 579 (Alaska 1990).

Under this rule, a court cannot impose sanctions on a party simply for losing; instead, a court imposes sanctions on an attorney or party when it finds that the pleading signed by him: (1) is not well grounded in fact, or (2) is not warranted by existing law or a reasonable argument for its extension, modification or reversal, or (3) was interposed for an improper purpose. *State Employees Ass'n v. Pub. Emp. Ass'n*, Op. No. 3711, 813 P2d 669 (Alaska 1991).

Sanctions under this rule against new bargaining representative, that filed suit against the previous bargaining representative seeking injunctive and monetary relief from attempts by the old representative to collect back dues, were an abuse of discretion; the new representative's legal arguments and theories of relief were not so devoid of merit as to justify the imposition of sanctions. *State Employees Ass'n v. Pub. Emp. Ass'n*, Op. No. 3711, 813 P2d 669 (Alaska 1991).

Sanctions against plaintiff's attorney for filing a disqualification motion against opposing counsel were improper where the affidavit by plaintiff's attorney demonstrated that the motion was well grounded in fact and the trial court allowed only one day in which to decide whether to file the motion. *Matter of Benson*, Op. No. 3749, 826 P2d 200 (Alaska 1991).

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Claims by employee, who was suspended and then terminated from his employment for marijuana use, that he was entitled to reinstatement and back pay as remedy for his suspension and that the employer's discriminatory treatment of him constituted a violation of the covenant of good faith and fair dealing were not frivolous. *Luedtke v. Nabors Alaska Drilling, Inc.*, Op. No. 3844, 834 P2d 1220 (Alaska 1992).

Where trial court's sanction order was improperly entered without factual findings and without hearing, normal procedure would have been to remand the award of sanctions to the trial court for entry of findings, but appellate court instead reversed the award because it found no evidence in the record that could possibly support it. *Luedtke v. Nabors Alaska Drilling, Inc.*, Op. No. 3844, 834 P2d 1220 (Alaska 1992).

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, unless otherwise directed when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The state or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 40 days after the service upon the attorney general of the pleading in which the claim is asserted. A non-governmental party shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim within 40 days after service upon an officer or agency of the state appointed, authorized or designated as agent to receive service for such party pursuant to statute. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3)

improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other times as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion by a party within 20 days after the service of

the pleading upon the party or initiative at any time, the court from any pleading any insufficiency, immaterial, impertinent matter.

(g) Consolidation of Defenses. A party who makes a motion under this rule may also make any other motions heretofore then available to the party. If a party moves under this rule, but omits therefrom an objection then available to the party, the objection may be raised by motion thereafter make a motion based thereon so omitted, except as provided in subdivision (b) (2) hereof on any of the grounds.

(h) Waiver or Preservation of Rights.

(1) A defense of lack of person, improper venue, insufficiency of service of process, insufficiency of process, or omitted from a motion in the form prescribed in subdivision (g), or made by motion under this rule, shall constitute a waiver of the defense unless the motion is amended by Rule 15 (a) to be made.

(2) A defense of failure to state a claim to which relief can be granted, a failure to join a party indispensable or necessary, or an objection of failure to state a claim may be made in any pleading, or by motion under Rule 7(a), or by motion on the pleadings, or at the trial.

(3) Whenever it appears that a party or otherwise that the court has jurisdiction of the subject matter the court shall determine the matter.

(Adopted by SCO 5 October 1994, effective November 1, 1994; amended by SCO 25B effective November 1, 1994; amended by SCO 1153 effective July 15, 1994)

Amended by

Cases

- I. In General
- II. Presentation of Defenses
 - A. Waiver
 - B. Non-waiver
- III. Failure to State a Claim
 - A. Considerations by Court
 - B. Decisions
- IV. Indispensable Party
- V. Motions for Summary Judgment
- VI. Service

I. In General

Federal authorities supporting the affirmative defense of lack of due diligence in the preparation of pleadings, affidavit counter-affidavits prior to the trial of the merits in *Pennell v. Bassett*, Op. No. 331, 4

Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions

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I. INTRODUCTION

Some judges and legal commentators have complained that "lous" litigation clogs federal and state court dockets.¹ Fearing that the resolution might come to a standstill, these prognosticators that courts adopt stronger measures to curb frivolous litigation.² recommendations have found receptive audiences. Legislative and judicial bodies at the federal and state levels have spun a web of statutory and procedural rules allowing courts to impose substantial sanctions against those who sponsor frivolous litigation.³ Most of these provisions have become effective within the last decade.⁴ The growing use of these provisions parallels the growing and justifiable dissatisfaction that the public exhibits toward courts and the legal

See, e.g., R.J. Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 2 ST. L.J. 3, 6-7 (1987); Scott S. Partridge et al., *A Complaint Based on Ruling Out Frivolous Litigation*, 31 LOY. L. REV. 221, 222 (1985); John W. On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions, 18 FSTR L. REV. 433, 433 (1986); David A. Shaneyfelt, Comment, *Courts Are No for Fun and Frivolity: A Warning to Vexatious Litigants and Over-Zealous eys*, 20 WILLAMETTE L. REV. 441, 443 (1984). While American courts are over- ed, it is unclear whether "frivolous" litigation has contributed disproportionately crowded court dockets. See *infra* pp. 1125-52.

See Partridge, *supra* note 1, at 254-63 (proposing broader causes of action for us litigation, including elimination of the "proof of malice" requirement in mal- prosecution actions); Wade, *supra* note 1, at 494 (arguing that courts should quire proof of subjective bad faith as prerequisite to severe sanctions against who file frivolous lawsuits); Shaneyfelt, *supra* note 1, at 455 (arguing that should require parties who file frivolous lawsuits to bear the attorneys' fees of pponents).

See *infra* pp. 1072-1125.

See, e.g., ALA. CODE §§ 12-19-270 to 270 (Supp. 1993) (Alabama Litigation Ac- bility Act) (effective 1987); MISS. CODE ANN. §§ 11-55-1 to -15 (Supp. 1993) tion Accountability Act of 1988) (effective 1988); S.C. CODE ANN. §§ 15-36-10 to aw. Co-op. Supp. 1993) (South Carolina Frivolous Civil Proceedings Sanctions effective 1988). Even as late as 1980, Dean Wade reported that 18 states had d statutes addressing frivolous litigation. Wade, *supra* note 1, at 457-68. Cur- 35 states have enacted some kind of statute addressing frivolous litigation, and maining states (as well as the District of Columbia) have at least promulgated kind of procedural rule addressing frivolous litigation. See *infra* pp. 1072-1125. If the few sanctions provisions in effect before the 1980s, most have since been ted to provide for a broader range of sanctions. See, e.g., FED. R. CIV. P. 11 ded 1983); FLA. STAT. ch. 57.105 (Supp. 1993) (amended 1986); ARK. R. CIV. P. ended 1986); MINN. R. CIV. P. 11 (amended 1985); MO. R. CIV. P. 55.03 (amend- 45).

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profession.⁵ But the rising tide of sanctions provisions raises a trou- bling question: "Just what is frivolous litigation?"

Few doubt, at least in the abstract, that the courts must do some- thing to eliminate litigation that serves no function other than to con- sume court time and stall the progress of justice. Some lawsuits are nuisance claims that litigants file not to redress legitimate grievances, but to coerce opposing parties into making desirable economic compro- mises.⁶ Other lawsuits—"nut cases," in the absence of a better term—assert exotic factual claims that lack a rational foundation. For example, in recent years, the federal courts have entertained lawsuits alleging that Bill Clinton and Ross Perot conspired to kill 10 million African-American women in concentration camps,⁷ that the devil and his assistants inflicted emotional distress upon the plaintiff,⁸ and that Coretta Scott King should be arrested and detained as a threat to the Catholic Church.⁹ Lawsuits like these, as well as comparable defenses,

5. See Wade, *supra* note 1, at 436; cf. William J. Brennan, Jr., *Are Citizens Justi- fied in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 982 (1989) ("Law is regarded as an obstacle to, rather than an instrument of, the creation of a just and generous society."). Public frustration with the justice sys- tem, and in particular the amount of time it takes to resolve a civil lawsuit as a consequence of crowded court dockets, has contributed to the growth of alternative methods of dispute resolution. See Charles W. Joiner, *Our System of Justice and the Trial Advocate*, 24 U.S.F. L. REV. 1, 18 (1989).

6. See, e.g., Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113 (1988) (observing that some devel- opers use counterclaims to punish public interest litigants for challenging development projects); Gerber, *supra* note 1, at 8 (observing that some defendants in contract ac- tions file counterclaims to gain "litigation leverage"); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 60 MINN. L. REV. 1, 17 (1984) (observing that some parties use lawsuits to increase their opponents' legal costs). The growing number of nuisance suits reflects an apparent decline in legal professionalism. More and more frequently, lawyers have abjured their roles as officers of the court, believing that the concept of "zealous representation" permits them to stretch procedural rules and ob- struct the progress of justice. See Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH. L. REV. 31, 39 (1993) [hereinafter Keeling, *A Prescription for Healing the Crisis in Professionalism*] (discussing the zealous representation of lawyers in the name of client interest); Tommy Prud'homme, *The Need for Respon- sibility Within the Adversary System*, 26 GONZ. L. REV. 443, 446-49 (1991) (pointing out how the adversarial system leads to lawyers' zealous behavior).

7. *Tyler v. Carter*, 151 F.R.D. 537, 538 (S.D.N.Y. 1993).

8. *United States ex rel. Mayo v. Satan & His Staff*, 54 F.R.D. 282, 284 (W.D. Pa. 1971).

9. *Windsor v. Pan Am. Airways*, 744 F.2d 1187, 1188 (5th Cir. 1984).

doubtlessly "frivolous," and their sponsors should be subject to the kind of sanction.¹⁰

The focus of the sanctions debate has been on whether sanctions provisions should go beyond proscribing nuisance claims and nut cases. Surprisingly, different jurisdictions have defined the term "frivolous" in different ways. A few jurisdictions have crafted sanctions provisions—or a scheme of related sanctions provisions—that define "frivolous" narrowly, limiting sanctions to conduct that reflects subjective bad faith.¹¹ These jurisdictions desire to ensure that litigants have fair access to the courts. Accordingly, because the sanctions schemes in these jurisdictions are limited in their reach, the schemes do not inhibit individuals from approaching the courts with colorable, albeit novel, arguments. The limited reach of the sanctions schemes, however, excludes courts from redressing conduct that, while perhaps undesirable or unreasonable, does not rise to the level of bad faith.¹²

Conversely, other jurisdictions have crafted sanctions provisions or schemes that define "frivolous" broadly.¹³ These jurisdictions allow courts to impose sanctions against individuals whose conduct breaches an objective standard of reasonableness. Under sanctions schemes based upon an objective standard, courts might sanction litigants for failing to conduct a reasonable prefiling review of the facts¹⁴ or for filing a pleading that a reasonable person would have known was frivolous.¹⁵ Because the objective standard of reasonableness is much

Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 61-62.

See, e.g., CAL. CIV. PROC. CODE § 128.5 (West Supp. 1994) ("Frivolous" is . . . totally and completely without merit or . . . for the sole purpose of harassing an opposing party."); FLA. STAT. ch. 57.105 (Supp. 1993) (providing a defense if attorney has acted in good faith).

See Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 *DRAKE L. REV.* 483, 503 (1987) ("A subjective standard tends to interfere with the goals of . . . [a sanctions provision] by making it difficult to find a breach of duties it imposes.").

See, e.g., FED. R. CIV. P. 11 (stating that "the pleading, motion, or other paper . . . [must not be] interposed for any improper purpose"); GA. CODE ANN. § 9-15-10 (Michie 1993) (stating that an attorney or party can be sanctioned if the action lacks substantial justification"); N.D. CENT. CODE § 28-26-01 (1991) (awarding sanction "if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor"); WASH. CODE § 4.84.185 (Supp. 1994) (allowing the judge to "consider all evidence presented . . . to determine whether the position of the nonprevailing party was frivolous").

See, e.g., FED. R. CIV. P. 11 ("The signature of an attorney or party constitutes certification 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 a reasonable inquiry it is well grounded in fact . . . and that it is not interposed for an improper purpose . . .") (emphasis added).

See, e.g., N.D. CENT. CODE § 28-26-01 (1991) ("Such costs must be awarded

broader than the subjective bad faith standard, sanctions schemes predicated on an objective standard give courts a more effective weapon against litigation abuse. Defining the term "frivolous" with respect to an objective standard, however, sacrifices clarity.¹⁶ No clear line divides the reasonable lawsuit from the unreasonable—and sanctionable—lawsuit.¹⁷ Sanctions schemes based upon an objective standard, therefore, tend to chill individuals from exercising their rights of fair access to the courts.¹⁸ The threat of sanctions under these schemes does more than discourage litigants from pursuing "frivolous" arguments; it also discourages litigants from pursuing some legitimate and colorable arguments.¹⁹

Drafting a sanctions provision that preserves both the goals of redressing litigation abuse and encouraging fair access to the courts has proven to be a daunting task.²⁰ The existing sanctions schemes in the federal and state courts, regardless of whether they define "frivolous"

regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their [sic] favor . . .").

16. See H. Paul Honsinger, *Attorney Sanctions: A Primer for Louisiana Lawyers*, 39 *LA. B.J.* 347, 348 (1992) (stating that the reasonableness test "sets a flexible standard"); cf. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 33, at 193 (5th ed. 1984) ("The application of this standard of reasonable conduct is as wide as all human behavior. There is scarcely any act which, under some conceivable circumstances, may not [be unreasonable].").

17. In almost all cases that reach trial, the defendant can be expected to proclaim that the claims against it are unreasonable. See Arthur B. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 *VAL. U. L. REV.* 331, 332 (1988).

18. See John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available?*, 36 *ALA. L. REV.* 927, 928 (1985) ("[A]ny attempt to devise a system for responding to spurious actions is, by its very nature, in conflict with the value placed on free access to courts in American society."). In addition to the due process guarantees in the United States Constitution, most states have constitutional "open courts" provisions that ensure fair access to the courts. *Id.* at 928 n.8.

19. See Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 *N.C. L. REV.* 613, 642 (1983) ("Several courts have indicated that the rigorous subjective standard is necessary to ensure that plaintiffs with meritorious claims or colorable but novel claims are not deterred from bringing suit."); See also Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *GEO. L.J.* 1313, 1338-43 (1986) [hereinafter Nelken, *Some 'Chilling' Problems*].

20. Cf. Mallor, *supra* note 19, at 643 ("The balance between maintaining free access to the courts and deterring groundless claims is difficult, and perhaps impossible, to strike.").

narrowly or broadly, suffer two essential flaws. First, the existing schemes use either a subjective or an objective standard but never both. The various jurisdictions assume, incorrectly, that sanctions schemes cannot incorporate the best aspects of both the subjective and objective standards. Second, the existing sanctions schemes encourage the courts to impose attorney fee awards as the predominant form of sanction. In emphasizing the circumstances of the victim rather than the circumstances of the offense and the offender, fee awards fail to advance the main purposes for sanctions awards in the first place—punishment and deterrence.

Sanctions schemes, in sum, must strive to achieve a more balanced approach to frivolous litigation.²¹ This Article will review the existing sanctions provisions available to the federal and state courts; observing that none of the existing provisions offer a satisfactory solution. The Article will then recommend a sanctions scheme that would achieve a better balance between the goals of encouraging fair court access and redressing litigation abuse. The Article concludes that sanctions schemes should require courts to impose sanctions commensurate with the offense and the individual circumstances of the offender. Ultimately, the Article suggests that sanctions schemes must harmonize the best aspects of the subjective and objective standards. The ideal sanctions scheme should give the courts a wide range of minor sanctions with which to punish conduct that violates an objective standard, but it should preclude the courts from imposing severe sanctions absent a finding of subjective bad faith.

II. SANCTIONS PROVISIONS: AN OVERVIEW

The increasing use of judicial sanctions against lawyers and their clients is perhaps the most significant recent development in federal and state civil procedure.²² Without exception, the trial courts in each federal and state jurisdiction currently possess at least one available sanctions provision that they can enforce against persons who file or

21. See *Soffos v. Eaton*, 162 F.2d 682, 683 (D.C. Cir. 1945) ("Some sort of balance has to be struck between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights."); see also *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir.) (stating that a judge assessing sanctions "should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms"), cert. denied, 498 U.S. 891 (1990).

22. See Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 Sw. L.J. 1011, 1011 (1989) (commenting that sanctions litigation has become the "hot topic" of federal civil procedure); Paul Marcotte, *Rule 11 Changes: Blessing or Curse?*, A.B.A. J., Sept. 1, 1986, at 34 (commenting that sanctions litigation is fast becoming a "cottage industry").

sponsor "frivolous" litigation.²³ The most influential of these provisions is Federal Rule of Civil Procedure 11. Besides being the foremost weapon in the federal sanctions arsenal,²⁴ Federal Rule 11, in its various manifestations, has provided the model for dozens of state sanctions provisions.²⁵ As influential as it is, though, Rule 11 does not represent the final or definitive approach to preventing frivolous litigation. A number of states have crafted sanctions provisions which deviate from the approach set forth in Federal Rule 11. These provisions run the gamut from those that define frivolous litigation broadly in the interest of curbing abuses, to others that define frivolous litigation narrowly in the interest of encouraging free access to the courts.²⁶ This Section will examine Federal Rule 11, its state analogues, and the various state sanctions provisions that have charted a different course than the federal rules.

A. Federal Rule 11

Federal courts possess several weapons that they can use against lawyers or litigants who abuse the judicial process. Under 28 U.S.C. § 1927, for example, federal courts can sanction lawyers who "unreasonably and vexatiously" multiply the proceedings in a lawsuit.²⁷ Under

23. See *infra* pp. 1073-1125.

24. See *infra* pp. 1073-94.

25. For state sanctions provisions based, at least in large part, upon the 1983 amendments to Federal Rule 11, see CAL. CIV. PROC. CODE § 447 (West Supp. 1993); KAN. CIV. PROC. CODE ANN. § 60-211 (Vernon Supp. 1992); LA. CODE CIV. PROC. ANN. art. 803 (West Supp. 1994); OKLA. STAT. ANN. tit. 12, § 2011 (West 1993); R.I. GEN. LAWS § 9-29-21 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 15-6-11(a) & (b) (Supp. 1993); VA. CODE ANN. § 8.01-271.1 (Michie 1992); WIS. STAT. ANN. § 802.05 (West Supp. 1992); ALASKA R. CIV. P. 11; ARIZ. R. CIV. P. 11(a); ARK. R. CIV. P. 11; CAL. R. CIV. P. 11; DEL. CHAN. R. 11; D.C. SUP. CT. R. CIV. P. 11; HAW. R. CIV. P. 11; IDAHO R. CIV. P. 11(a)(1); IOWA R. CIV. P. 80; KY. R. CIV. P. 11; MICH. R. CIV. P. 2.114; MINN. R. CIV. P. 11; MO. R. CIV. P. 55.03; MONT. R. CIV. P. 11; NEV. R. CIV. P. 11; N.C. R. CIV. P. 11; N.D. R. CIV. P. 11; OR. R. CIV. P. 17; TENN. R. CIV. P. 11; UTAH R. CIV. P. 11; VT. R. CIV. P. 11; WASH. SUP. CT. R. 11; W. VA. R. CIV. P. 11; WYO. R. CIV. P. 11. For state sanctions provisions based upon original Federal Rule 11, see ALA. R. CIV. P. 11; IND. TRIAL R. 11(A); MAINE R. CIV. P. 11; MD. R. CIV. P. 1-311(a)-(c); MASS. R. CIV. P. 11(a); MISS. R. CIV. P. 11; N.H. R. CIV. P. 15; N.J. R. CIV. P. 1:4-8; N.M. R. CIV. P. 1-011; OHIO R. CIV. P. 11; R.I. R. CIV. P. 11; S.C. R. CIV. P. 11.

26. See *infra* pp. 1094-1125. Some of these sanctions provisions supplement sanctions provisions that are based upon Federal Rule 11.

27. 28 U.S.C. § 1927 (Supp. 1992). As enacted in 1813, § 1927 permitted the court to assess costs against the offending lawyer. Johnson & Cassidy, *supra* note 18, at 956. In 1980, § 1927 was amended to require that the offending lawyer pay "the ex-

inherent judicial power, federal courts can sanction litigants who "in bad faith, vexatiously, wantonly, or for oppressive reasons."²⁸ The most significant weapon in the federal sanctioning arsenal, though, is Rule 11 of the Federal Rules of Civil Procedure. Under amendments effective in 1983, Rule 11 authorizes sanctions, principally in the form of monetary awards, against persons who sign legal documents that are not grounded in fact and . . . warranted by existing law or a good argument for the extension, modification, or reversal of existing law.²⁹ The 1983 version of Rule 11 changed the nature of federal litigation, compelling lawyers to conduct more serious investigations of facts and law supporting their claims.³⁰ Although the rule was amended again in 1993 to soften some of its more repressive effects, the focus of Rule 11 as a weapon against frivolous litigation has not changed.³¹ Rule 11 continues to cast a large shadow over litigation in federal courts.

1. The Original Rule 11

The original version of Federal Rule 11 was not nearly as far reaching as its amended versions. Enacted with the bulk of the Federal Rules of Civil Procedure in 1938, Rule 11 required lawyers to sign all pleadings filed in federal court.³² According to the rule, the lawyer's

costs, expenses, and attorneys' fees reasonably incurred" as a consequence of "unreasonable or vexatious conduct." 28 U.S.C. § 1927 (Supp. 1992). Although not a sanctions provision as Federal Rule of Civil Procedure 11, federal courts are invoking § 1927 more frequently. Gregory P. Joseph, *Rule 11 is Only the Beginning*, 74 A.B.A. J., May 1, 1988, at 62. For a general discussion of § 1927, see Eve Josselyn, Note, *The Song of the Sirens—Sanctioning Lawyers Under 28 U.S.C. § 1927*, 31 B.C. L. Rev. 477 (1990).

Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2133 (1991) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 120 (1974)). The Supreme Court in *Chambers* reasoned that specific sanctions provisions, such as Rule 11, do not circumscribe the "inherent power" to punish bad faith conduct. 2134. Thus, the "inherent power" recognized in *Chambers* allows federal courts to punish certain egregious conduct that falls outside the precise boundaries of the Rule 11 sanctions provisions. *Id.*

The inherent power doctrine is, for the most part, a creature of the federal courts. *Mallor, supra* note 19, at 631. Only a few state courts have recognized an inherent power to punish bad faith conduct—although the number is growing. See, e.g., *Gikert v. Krumm*, 474 N.E.2d 503 (Ind. 1985); *Arnold v. Edelman*, 592 S.W.2d 106 (Mo. 1985); *Atkinson v. Pittsgrove Township*, 471 A.2d 1215 (N.J. Ch. Div. 1983); *Nat'l Bank & Trust Co. v. Owens*, 565 P.2d 4 (Okla. 1977); *Andrews v. Bible*, 722 S.W.2d 284, 291 (Tenn. 1991).

FED. R. CIV. P. 11 (1983).

See *infra* pp. 1077-80.

See *infra* Section II.A.3, pp. 1090-94.

FED. R. CIV. P. 11 (1938). The rule provided that an unrepresented litigant

signature certified that the lawyer had read the pleading, that to the best of his belief there was good ground to support it, and that the pleading was not filed to stall court proceedings.³³ The main purpose of the rule was not to deter pleadings that lacked factual or legal merit, but rather to deter pleadings that manifested a subjective intent to abuse the judicial process.³⁴ Therefore, the range of available sanctions was narrow. The rule prescribed that if "a pleading is not signed or is signed with intent to defeat the purpose of this rule," the court could strike the pleading.³⁵ For a wilful violation, the rule provided that the court could subject the offending lawyer to "appropriate disciplinary action."³⁶

The original Rule 11 did not leave much of an impression in the federal case law. Only about two dozen published opinions addressed the original rule, and few of those opinions awarded sanctions.³⁷ A prominent factor in the disuse of Rule 11 was the language requiring a subjective intent to abuse the judicial process.³⁸ Few parties invoking the rule could prove that the offending lawyer filed the objectionable pleading with the knowledge that it lacked "good grounds."³⁹

should sign his or her own name to the pleading. *Id.*

33. *Id.* The rule did not indicate whether the signature of an unrepresented litigant carried a certification that a pleading had "good grounds" to support it. *Id.*

34. 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, 59 (1976) (noting that Rule 11 standards are subjective; "that is, that violation is dependent upon what the attorney knew and believed at the relevant time"); see also *id.* at 14 ("[T]he only reasonably certain observation we can make about the 'good ground' requirement . . . is that it was meant to secure lawyer honesty").

35. FED. R. CIV. P. 11 (1938). A pleading signed "with intent to defeat the purpose" of Rule 11 was a pleading that either (1) was advanced to stall court proceedings, or (2) was advanced despite the attorney's knowledge that the pleading lacked good grounds to support it. Risinger, *supra* note 34, at 15.

36. FED. R. CIV. P. 11 (1938). Professor Risinger observed that the term "appropriate disciplinary action" might include "[p]unitive fine or imprisonment through the contempt power, formal reprimand by the court, or even disbarment." Risinger, *supra* note 34, at 43. A federal district court in Pennsylvania suggested that the phrase also authorized an award of expenses to the parties who defended the improper pleading. *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975, 983 (E.D. Pa. 1973).

37. See Risinger, *supra* note 34, at 34-37; 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, 257 (1991).

38. See *supra* text accompanying note 34.

39. See, e.g., LaFrance, *supra* note 17, at 332; William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182-83 (1985).

The strict subjective standard in the original rule, however, does fully explain the small number of sanctions decisions issued under rule.⁴⁰ Another factor contributing to the disuse of original Rule 11 is the spirit of the times.⁴¹ During the first three decades of Rule 11, litigation abuse was not a serious problem in the federal courts.⁴² Because opposing members of the bar were usually cooperative,⁴³ judges rarely imposed sanctions, preferring instead to deal with the few rotten apples through established procedural methods.⁴⁴ Federal judges thus avoided "frivolous" litigation, whenever it arose, through orders granting summary judgment or a directed verdict.⁴⁵ The congenial relationship between the bench and bar lasted until the late 1970s, when the federal courts experienced a dramatic increase in civil litigation.⁴⁶ The increased number of civil lawsuits during that period

⁴⁰ While no one doubts that it would be easier to find conduct sanctionable under an objective standard than a subjective standard, a subjective standard does not have a sanctions provision "inherently unworkable." Risinger, *supra* note 34, at 60. Though the original Federal Rule 11 might have fallen into disuse, other sanctions provisions with strict standards—such as 28 U.S.C. § 1927 and § 128.6 of the California Civil Procedure Code—have not. Indeed, in recent years, sanctions awards under one of these strict provisions have become commonplace. See Joseph, *supra* note 42, at 62 (discussing the use of § 1927); Fred Woods, *Sanctions—Stepchild or Heir to Trial and Appellate Court Delay Reduction?*, 17 PEPP. L. REV. 666, 690 (1990) (discussing the use of California Civil Procedure Code § 128.6).

⁴¹ See David J. Webster, Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 CASE W. RES. L. REV. 279, 294 (1987) ("Notwithstanding empirical evidence, the reluctance of the courts [before the 1983 amendments] to sanctions may be less attributable to an inability to prove bad faith and more attributable to the spirit of the Federal Rules of Civil Procedure and the adversary system.").

⁴² See Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH. L.J. 956, 960 (1992) (describing the professional nature of trial practice before the 1983 amendments).

⁴³ See *id.* For much of this period, the organized bar was small and clubbish. In large cities, the ratio between lawyers and residents remained small until the 1960s. See *id.* at 961 (the ratio for the United States as a whole has gone from one lawyer for every 695 persons in 1951 to one lawyer for every 340 persons in 1988). half of the lawyers either were solo practitioners or practiced with one or two others. See Prud'homme, *supra* note 6, at 454.

⁴⁴ See Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 683 (1983).

⁴⁵ See *id.* at 718 ("Consequently, when practical, judges usually will opt for non-litigious resolution of a problem.").

⁴⁶ See John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567; Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 332 (1976); see also Bayless Manning, *Hypertaxis: Our National Disease*, 71 NW. L. REV. 767, 768 (1977) (discussing the increase in criminal litigation). But see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know Think We Know About our Allegedly Contentious and Litigious Society*, 31

compelled federal judges, for the first time, to view sanctions provisions as a means of weeding the chaff from their dockets.⁴⁷ The dramatic change in their attitude toward sanctions precipitated the adoption of the 1983 amendments to Rule 11 and, ultimately, the explosion in sanctions litigation.⁴⁸

2. The 1983 Amendments to Rule 11

The 1983 amendments to Rule 11, which became effective August 1, 1983, were specifically designed to "reduce the reluctance of courts to impose sanctions."⁴⁹ Under amended Rule 11, all pleadings, motions, and other papers filed in federal court must contain the signature of the filing lawyer or, if the litigant lacks legal representation, the signature of the litigant.⁵⁰ The signature of a lawyer or litigant, according

UCLA L. REV. 4, 5 (1983) (arguing that litigation levels during the 1970s and early 1980s reflected a slight rise, but were "not historically unprecedented"). The number of civil lawsuits filed in federal district court increased from 98,560 in 1973 to 241,842 in 1983. A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227 n.24 (1985). As the number of lawsuits increased, so did the size and competitiveness of the organized bar. See Cook, *supra* note 42, at 962-63.

The expanding civil dockets, and the competitiveness that they inspired, were reflected in the motions for sanctions filed under Rule 11. Litigants made the same number of sanctions motions during the first five years of the 1970s as they made during the first 32 years that Rule 11 existed. Risinger, *supra* note 34, at 5 n.12.

⁴⁷ See Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 192 (1988) ("Shortly before the 1983 amendments were adopted, federal courts had begun to impose more frequently awards of attorneys' fees and other sanctions for abusive litigation practices."). At the urging of prominent judges such as William W. Schwarzer and Abraham D. Sofaer, federal judges gradually began placing greater reliance upon sanctions as a means of policing the courts. See Schwarzer, *supra* note 39, at 201; Sofaer, *supra* note 44, at 729-30. Within five years after Rule 11 was amended in 1983, federal judges had come full circle in their attitude towards sanctions. See Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 659 (1991) (noting that the 1983 amendments to Rule 11 inspired federal judges to impose severe sanctions as a docket control device).

⁴⁸ See Levin & Colliers, *supra* note 46, at 219-20 (discussing the 1983 amendments to Federal Rules of Civil Procedure as an effort to cope with escalating litigation); cf. James L. Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 MISS. C. L. REV. 111, 133 (1988) ("It is not so much the new language that has wrought the explosion of Rule 11 litigation in the federal courts What is new is the sub silentio 'and we really meant it' behind Federal Rule 11.").

⁴⁹ FED. R. CIV. P. 11 advisory committee's notes (1983).

⁵⁰ FED. R. CIV. P. 11 (1983). The amended rule extended to all papers filed in

the amended rule, certified (1) that the signing individual had read the document, (2) that after a reasonable inquiry the signing individual believed the document was well grounded in fact and warranted either by existing law or a good faith argument for extension, modification, or reversal of existing law, and (3) that the signing individual had not filed the document for an improper purpose, such as to harass the opposing party or to stall court proceedings.⁵¹ If the signing individual violated the rule, amended Rule 11 required that the court impose an appropriate sanction against that individual.⁵² The rule did not dictate the form that the sanction should take, but it stated that an appropriate sanction could include an award of legal fees to the offended parties.⁵³

Perhaps the most significant addition to the 1983 version of Rule 11 was the clause providing that the signature of the signing individual certified that the individual conducted a "reasonable inquiry" which related, "to the best of his knowledge, information, and belief," that the document was well grounded in fact and law.⁵⁴ The language requiring "reasonable inquiry" imposed an objective standard: If the signing individual failed to conduct a reasonable inquiry into the law and facts, then the signing individual was subject to Rule 11 sanctions.⁵⁵ Conversely, the language requiring that the signing individual find the document well grounded in fact and law, to the best of her "knowledge, information or belief," seemed to impose a subjective standard.⁵⁶ In principle, therefore, while amended Rule 11 authorized sanctions against signing individuals who failed to conduct reasonable pre-filing inquiries, the rule did not authorize sanctions against signing individuals

mal court, not just pleadings. *Id.*

1. *Id.*

2. *Id.* Unlike original Rule 11, the 1983 version of Rule 11 stated that an award of sanctions was mandatory if the signing individual violated the requirements in the rule. *Id.* See *Thomas v. Capital Sec. Servs., Inc.*, 830 F.2d 866, 876 (6th Cir. 1988) (en banc) ("There are no longer any 'free passes' for attorneys and litigants who violate Rule 11. Once a violation of Rule 11 is established, the rule mandates the application of sanctions."); see also *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir. 1986); *Amoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

3. *FED. R. CIV. P.* 11 (1983). While amended Rule 11 required an award of sanctions in the event that a signing individual violated the rule, see *supra* note 52, the rule left the trial judge the discretion to determine the form that the sanctions award should take. *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (Cir. 1988) ("The language of Rule 11 evidences the critical role of judicial discretion, stating that when the district court determines that a filing is in violation of the rule, the court 'shall' impose sanctions that 'may'—not 'shall'—include an order to the other party's expenses.").

4. *FED. R. CIV. P.* 11 (1983).

5. STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* at 14 (1989).

6. *Id.* at 15.

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who filed documents that the individuals believed were well grounded in fact and law, even if the documents were actually not "reasonable" in an objective sense.⁵⁷ In practice, however, federal courts ignored the subjective "knowledge, information or belief" language in the certification clause. Under the 1983 version of Rule 11, the courts concluded that filed documents themselves must be "reasonable"—that is, well grounded in fact, and warranted either by existing law or a good faith argument for the extension, modification, or reversal of existing law.⁵⁸

The 1983 amendments succeeded in their goal of encouraging the federal courts to impose sanctions more frequently.⁵⁹ Because Rule 11, as interpreted, allowed the federal courts to review the objective reasonableness of filed documents rather than the subjective knowledge or beliefs of the individuals who signed the documents, the courts found it much easier to impose sanctions.⁶⁰ As the courts became familiar with

67. *Id.* Professor Burbank described the certification clause in amended Rule 11 as a "conduct" approach to sanctions, requiring sanctions for unreasonable conduct—i.e., an inadequate pre-filing review of the facts and law. He distinguished the "conduct" approach from a "product" approach, which requires sanctions for an unreasonable final product—i.e., the filing itself. Professor Burbank praised the "conduct" approach, observing that it gives signing individuals a more precise idea of the things they must do to avoid sanctions. *Id.* at 21. Moreover, he observed that unlike the "product" approach, the "conduct" approach is less likely to encourage judges to use hindsight to second guess the arguments contained in filed documents. *Id.* at 19 ("The message of the product approach for the lawyer who is sanctioned . . . is either 'be smarter' or, at any rate, 'think as I think.'").

68. See *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987) (en banc), *cert. dismissed*, 485 U.S. 901 (1988); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986); *Davis v. Veslan Enters.*, 765 F.2d 404, 407 (5th Cir. 1985); *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985); see also Schwarzer, *supra* note 39, at 184-85 (reasoning that amended Rule 11 requires that filed documents be well grounded in fact and warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law). The federal courts follow a "product" approach to Rule 11 sanctions. See *supra* note 57. Conceptually, the difference between a "conduct" approach to sanctions and the "product" approach to sanctions is slight. Even in a court that follows a "conduct" approach, the mere existence of a groundless pleading might compel the court to presume that the individual who signed the pleading failed to conduct a reasonable inquiry. Nonetheless, the adoption of a "product" approach is significant in the message that it sends litigants. It signals that federal courts are ardent in their desire to reduce perceived "frivolous" litigation, even to the extent of sacrificing the doctrine of fair access. See BURBANK, *supra* note 55, at 20.

69. See *supra* text accompanying note 49.

70. See LaFrance, *supra* note 17, at 341-42. The other prong in the certification clause, requiring that signing individuals ensure that their pleadings, motions, or other

new rule, they became more willing to use the rule as a docket control device.⁶⁰ Their enthusiasm fed upon itself. Seeing that federal courts were more willing to impose sanction awards, litigants became more willing to request them, spurring the courts to impose still more awards.⁶¹ Within five years, federal district and appellate courts published 688 Rule 11 decisions.⁶² Empirical studies revealed that the published decisions reflected just "the tip of the iceberg."⁶³ In sum, the

ers are "not interposed for any improper purpose," was not often used as a basis for sanctions under the 1983 version of Rule 11. Almost exclusively, federal courts tended to base sanctions upon perceived violations of the "reasonable inquiry" requirement of the certification clause. See Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 *STANFORD L. J.* 383, 406 (1990) [hereinafter Nelken, *Looking for a Middle Ground*].

1. See Johnson et al., *supra* note 47, at 669.

2. See Daniel Slocum Hinerfeld, *The Sanctions Explosion*, CAL. LAW., Nov. 1987, at 1. Although a large proportion of the Rule 11 sanctions decisions issued before 1980 involved sanctions orders that the judge made sua sponte, the proportion of sua sponte sanctions decisions has since declined. Most of the recent Rule 11 sanctions decisions are based upon a motion from the offended litigant. Compare Nelken, *Some Illing Problems*, *supra* note 19, at 1327-28 (finding that 30.6% of Rule 11 decisions issued before 1980 involved sua sponte consideration) with Gerald F. Hess, *11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 *U. L. REV.* 313, 318 (1992) (finding that 4% of Rule 11 decisions issued between August 1, 1983, and December 31, 1990 in the Eastern District of Washington involved sua sponte consideration).

3. Valro, *supra* note 47, at 199 (reviewing the decisions published between August 1983, and December 15, 1987).

4. BURBANK, *supra* note 55, at 59. According to the available empirical data, Rule 11 sees widespread use. A survey conducted by the American Judicature Society in federal judicial districts found that, during a twelve month period, 7.0% of the respondents had been involved in a lawsuit in which Rule 11 sanctions were imposed, 24.3% had been involved in a lawsuit in which either litigants had filed Rule 11 motions or judges had issued show cause orders based upon Rule 11. Lawrence C. Shall et al., *The Use and Impact of Rule 11*, 86 *NW. U. L. REV.* 943, 952 (1992). Another survey, conducted in the Northern District of California, 41% of the respondents reported that since 1983 their firms had sought Rule 11 sanctions at least once, and 43% reported that their firms had been the targets of Rule 11 sanctions tests at least once. Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers Judges in the Northern District of California*, JUDICATURE, Oct.-Nov. 1990, at 49 [hereinafter Nelken, *The Impact of Federal Rule 11*].

After the 1983 amendments, some commentators predicted that Rule 11 sanctions activity would blossom for a few years and then decline as lawyers became more familiar with the rule. See, e.g., Judith L. Maute, *Sporting Theory of Justice: Taming Errand Zeal with a Logical Sanctions Doctrine*, 20 *CONN. L. REV.* 7, 27 (1987); cy H. Wilder, Note, *The 1983 Amendments to Rule 11: Answering the Critics' Cern With Judicial Self-Restraint*, 61 *NOTRE DAME L. REV.* 798, 817-18 (1986). This fiction would have seemed reasonable: some increased activity is inevitable after a procedural rule is implemented, but eventually, the activity should diminish after it fills the gaps in the language of the new rule. Nelken, *Looking for a Middle Ground*, *supra* note 60, at 388-89. Empirical research revealed, however, that the

1983 amendments to Rule 11 fueled a sanctions explosion,⁶⁴ engendering a wide range of problems related to the fundamental nature of litigation in the federal courts.

Lack of a Precise Standard. Not surprisingly, the insertion of an objective standard in the 1983 amendments made the amended Rule 11 far less predictable than the original rule. Although federal courts promised that Rule 11 sanctions would be confined to unreasonable claims or defenses,⁶⁵ in practice judges could not agree which claims were reasonable and which were not.⁶⁶ Research conducted under the auspices of the Federal Judicial Center, for instance, found that on the same set of facts, half of the responding judges would have awarded sanctions, while the other half would have declined sanctions.⁶⁷ This research was confirmed in actual litigation. Frequently, appellate judges differed about whether pleadings merited sanctions.⁶⁸ Sanctioned litigants often appealed from sanctions awards and succeeded in securing reversals not just on the sanctions but also on the merits of the litigation.⁶⁹ Repeated incidents in which judges could not agree

forecasted decline in Rule 11 activity did not occur, in part because the rule gave lawyers an incentive to recover their fees. See Hess, *supra* note 62, at 319 ("The number of Rule 11 requests did follow the predicted pattern from 1984 through 1988: it rose, plateaued, and tapered off. However, the formal Rule 11 activity initiated in 1989 and 1990 increased dramatically.")

65. Hinerfeld, *supra* note 62, at 33.

66. See Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1080 (7th Cir. 1987) (en banc), cert. dismissed, 485 U.S. 901 (1988); Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986).

67. See George Cochran, *Rule 11: The Road to Amendment*, 61 *MISS. L.J.* 5, 8-9 (1991); see also Charles M. Shaffer, Jr., *Rule 11: Bright Light, Dim Future*, 7 *REV. LITIG.* 1, 11 (1987) ("No matter what words are used as the objective yardstick, the application of [Rule 11] to different facts by different judges inevitably will yield inconsistent results."). While purporting to follow the same objective standard, the courts of appeals took different approaches to enforcing Rule 11. Compare Linda R. Hirshman, *Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 *CHL.-KENT L. REV.* 191, 199 (1987) (noting that the Seventh Circuit enforces Rule 11 aggressively) with Frederic C. Tausend & Lisa L. Johnsen, *Current Status of Rule 11 in the Ninth Circuit and Washington State*, 14 *U. PUGET SOUND L. REV.* 419, 425 (1991) (noting that the Ninth Circuit enforces Rule 11 passively).

68. SAUL M. KASSIN, *AN EMPIRICAL STUDY OF RULE 11 SANCTIONS* 17 (1985).

69. See, e.g., Federal Sav. and Loan Ins. Corp. v. Molinaro, 923 F.2d 736 (9th Cir. 1991); Mareno v. Rowe, 910 F.2d 1043 (2d Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); International Shipping Co. v. Hydra Offshore, Inc., 875 F.2d 388 (2d Cir.), cert. denied, 110 S. Ct. 563 (1989).

70. See, e.g., *In re Edmonds*, 924 F.2d 176 (10th Cir. 1991); Cooper v. City of Greenwood, 904 F.2d 302 (5th Cir. 1990); Masson v. New Yorker Magazine, Inc., 805

hether certain claims were reasonable fostered the perception, not together unwarranted, that the difference between a legitimate pleading and a sanctionable pleading depended upon the whim and price of the beholding judge.⁷¹ Inevitably, the lack of a precise standard in Rule 11 encouraged abuse and, at the same time, discouraged litigants from filing marginal claims.

Chilling Effect. Although the 1983 amendments to Rule 11 did not state the form that sanctions should take, the last sentence in the amended rule stated that an appropriate sanction could include an award of legal fees to the offended litigant.⁷² Latching upon this sentence, federal district courts used Rule 11, almost exclusively, as a device to reimburse litigants for legal expenses incurred in challenging "frivolous" motions or pleadings.⁷³ Some of the fee awards that the

id 1535 (9th Cir. 1989), *rev'd on other grounds*, 111 S. Ct. 2419 (1991); *Operating g's Pension Trust v. A-C Co.*, 859 F.2d 1336 (9th Cir. 1988).

71. See Cochran, *supra* note 67, at 11. Because the objective standard in amended Rule 11 is a flexible standard, some commentators have suggested that federal judges, consciously or subconsciously, use Rule 11 sanctions to reinforce their decisions on merits. See Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 635 (1987) ("There seems to be an ineluctable pressure on judges to reinforce the propriety of their initial legal determinations by extending them a step further, thus concluding that their legal analysis is so correct and perhaps even self-evident that anybody but a fool, an incompetent lawyer, or one misusing the courts should have reached the same conclusion."); see also Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. REV. 1033, 1058 (1993); Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 316 (1990).

72. See *supra* text accompanying note 53.

73. Johnson et al., *supra* note 47, at 649; see Marshall et al., *supra* note 64, at 457 (concluding that 95% of all sanctions awards under Rule 11 were monetary sanctions, such as fee awards); Nelken, *Some "Chilling" Problems*, *supra* note 10, at 43 (concluding that some form of fee award is assessed in 96% of all cases involving a Rule 11 sanction).

Interestingly, the Supreme Court attempted to discourage district courts from depending upon fee awards, concluding that the function of Rule 11 was not to compensate offended litigants, but rather to deter baseless filings. *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 553 (1991); *Cooter & Glick v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). In addition, the federal circuit courts cautioned the district courts to enforce the "least severe sanction adequate" to serve the deterrence function of Rule 11, which might include "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education . . . or other measures appropriate to the circumstances." *Thomas v. Capital City Servs.*, 836 F.2d 865, 878 (5th Cir. 1988) (en banc); see also *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991); *Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C. Cir. 1990); *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). The district courts, however, did not get the hint. They continued to impose fee awards as a matter of course, usually without considering whether the awards were the least se-

courts granted under Rule 11 were substantial.⁷⁴ Moreover, in an overwhelming percentage of the cases in which the courts assessed a fee award, plaintiffs—and especially, civil rights and other public interest plaintiffs—were the targets of the sanction.⁷⁵ The threat of large fee awards under the 1983 amendments, coupled with the unpredictable objective standard for the imposition of sanctions,⁷⁶ had the effect of chilling potential plaintiffs, or their lawyers, from pursuing novel or unusual claims.⁷⁷ Often, litigants and practitioners could not bear the risk of incurring fee awards where their positions, though tenable, departed from existing law.⁷⁸

Increased Tension Between Adversaries. As the federal courts began to impose Rule 11 sanctions more frequently, the expanding po-

vere sanction adequate to serve the deterrence function underlying Rule 11. See Johnson et al., *supra* note 47, at 658 (discussing the preference that district court judges demonstrated for fee awards).

74. See, e.g., *Doyle v. United States*, 817 F.2d 1235, 1236 (5th Cir.) (affirming \$38,872 sanction), *cert. denied*, 484 U.S. 854 (1987); *Unifoll, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 559 (9th Cir. 1986) (affirming \$294,141.10 sanction), *cert. denied*, 484 U.S. 822 (1987); *In re Ginther*, 791 F.2d 1151, 1154 (5th Cir. 1986) (affirming \$52,000 sanction); *Calloway v. Marvel Entertainment Group*, 111 F.R.D. 637, 651 (S.D.N.Y. 1986) (imposing \$200,000 sanction); *Day v. Amoco Chems. Corp.*, 595 F. Supp. 1120, 1126 (S.D. Tex. 1984) (imposing \$10,000 sanction against *pro se* litigant), *dismissed without opinion*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985). But see *Marshall et al.*, *supra* note 64, at 957 (noting that while the cases involving huge fee awards have generated wide publicity, 44.6% of Rule 11 cases assessing monetary sanctions involved an amount smaller than \$1500, and 91.3% involved \$25,000 or less).

75. See Valro, *supra* note 47, at 200-01. The American Judicature Society study reported that the plaintiff was the target in 70.3% of the cases in which Rule 11 sanctions were imposed. Marshall et al., *supra* note 64, at 953. In particular, the study found that lawyers who spent most of their time representing plaintiffs in civil rights suits were "far more likely to be affected by Rule 11 than other lawyers." *Id.* at 971; see also Margaret L. Sanner & Carl Tobias, *Recent Work of the Civil Rules Committee*, 52 MONT. L. REV. 307, 313 (1991) (noting that civil rights plaintiffs were 2.6 times more likely to be sanctioned than other litigants) (citing FEDERAL JUDICIAL CENTER, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Feb. 27, 1991)).

76. See *supra* text accompanying notes 66-71.

77. See Nelken, *Looking for a Middle Ground*, *supra* note 60, at 394; see also Marshall et al., *supra* note 64, at 961, 971 (19.3% of respondents reported that within the survey year they had declined to present a claim or defense they believed to be meritorious because they were concerned about Rule 11; 31% of lawyers representing civil rights plaintiffs reported that they had declined to present a claim they believed to be meritorious).

78. See Johnson et al., *supra* note 47, at 650.

ential for sanctions increased the tension between opposing lawyers, often creating a judicial atmosphere that was more hostile than adversarial.⁷⁹ The increased tension in part was an unavoidable consequence of the perception that federal judges would keep lawyers on a tighter leash.⁸⁰ Some of the tension, though, was also attributable to the expanding use of Rule 11 as a weapon in litigation.⁸¹ Observing that the objective standard in the 1983 amendments was unpredictable and exerted a chilling effect, some lawyers would file motions for Rule 11 sanctions as a tactic to induce their opponents to withdraw undesirable arguments.⁸² Even if unsuccessful in cowing their opponents, lawyers who pursued this tactic believed that the mere presence of the sanctions motions would influence federal judges to reach a favorable decision.⁸³ Understandably, the victims of unfounded sanctions motions felt compelled to retaliate with sanctions motions of their own, further exacerbating the problem.⁸⁴ As a result of the increased ten-

79. See Lazaroff, *supra* note 71, at 1056; Stein, *supra* note 71, at 330; see also Nelken, *The Impact of Federal Rule 11*, *supra* note 64, at 150 (40% of respondents believed that Rule 11 had contributed to deteriorating relations between lawyers).

80. See Michael H. Dettmer, *Observations on Professionalism*, 68 MICH. ST. B.J. 412, 843 (1989) ("Increased judicial pressure imposed on our profession [from sanctions and the growing malpractice problem] causes us to lash out against each other."); Sofaer, *supra* note 44, at 717 ("Often, punishing lawyers will change the atmosphere in which a judge works from one of cooperation to one that is combative and less effective in bringing controversies to just, speedy, and inexpensive resolutions.").

81. See Sidney A. Fitzwater, *Toward a Renaissance of Professionalism in Trial Advocacy*, 20 TEX. TECH. L. REV. 787, 800 (1989) (discussing the increase in lawyers who use Rule 11 motions as a litigation tactic); Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 47-48 (same).

82. See William I. Weston, *Court-Ordered Sanctions of Attorneys: A Concept that Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897, 899 (1990) ("Even more troublesome is the use of attorney sanctions as a weapon Lawyers threaten one another to force or prevent specific conduct.").

83. See Stein, *supra* note 71, at 315. Stein states that:

[A] request for sanctions may in some cases succeed in affecting the judge's decision on the merits. The judge may be convinced by the lawyer's attempt to focus attention not on whether the opponent's position is wrong, but on how wrong it is. The judge may also use the request for sanctions as an opportunity to 'split the difference' by ruling for the party requesting sanctions on the merits but denying sanctions."

84.

84. See Fitzwater, *supra* note 81, at 801 ("Unfounded requests for sanctions that accuse the opposing lawyer of filing a claim or defense that is not based upon an adequate investigation of the facts or analysis of the law can trigger an instinctive reaction in the adversary to launch a retaliatory strike."). Unfounded sanctions motions are themselves subject to Rule 11 sanctions. *Id.* at 800. As with lawyers who file nuisance suits to gain an economic advantage for their clients, however, lawyers who file unfounded sanctions motions to gain leverage in litigation do not find Rule

sion, competing lawyers became less willing to cooperate with each other, impeding the progress of settlement negotiations and other attempts to reach a compromise.⁸⁵

Satellite Litigation. With more and more litigants filing motions for Rule 11 sanctions, the 1983 amendments engendered substantial satellite litigation.⁸⁶ Each sanctions motion required, at a minimum, that a federal judge review the factual and legal basis for the challenged document and then make a ruling on the motion. Naturally, given the large number of sanctions motions, this process consumed valuable court time.⁸⁷ The federal courts tried to reduce the burdens of satellite litigation—for example, by abridging due process safeguards⁸⁸ and refusing to make written factual findings⁸⁹—but their efforts could not stem the tide of sanctions activity. As the Ninth Circuit observed, "Asking judges to grade accuracy of advocacy in connection with every piece of paper filed in federal court multiplies the decisions which the court must make as well as the cost for litigants."⁹⁰ Thus, rather than

11 a serious obstacle. See Cochran, *supra* note 67, at 19.

85. See Lazaroff, *supra* note 71, at 1056.

86. *Id.* at 1060-61; Nelken, *Looking for a Middle Ground*, *supra* note 60, at 388; Schaffer, *supra* note 67, at 21.

87. See Nelken, *Looking for a Middle Ground*, *supra* note 60, at 387-88. Some lawyers took advantage of the time that courts had to invest in addressing sanctions motions. See Schwarzer, *supra* note 39, at 182-84 (lawyers "may welcome the resulting proliferation of proceedings"). Whenever it was desirable to prolong proceedings, such as to avoid as long as possible paying a potentially adverse judgment, these lawyers would file Rule 11 motions as a stalling tactic. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 47.

88. See *infra* text accompanying notes 92-99.

89. See Johnson et al., *supra* note 47, at 600. Encouraging this practice, some federal appellate courts declined to impose a rigid rule requiring that district judges enter specific factual findings to support sanctions awards under the 1983 amendments. See *Thomas v. Capital Sec. Servs., Inc.*, 830 F.2d 866, 883 (5th Cir. 1988) (en banc) (rejecting "a rule that would impose upon district courts the onerous and often time-consuming burden of making specific findings and conclusions in all Rule 11 cases"); see also *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1438 (7th Cir. 1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987) (en banc), *cert. dismissed*, 485 U.S. 901 (1988). But see *In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990) (requiring specific factual findings), *cert. denied*, 499 U.S. 969 (1991); *White v. General Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir. 1990) (same), *cert. denied*, 498 U.S. 1069 (1991).

90. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) (Schroeder, J.). On more than one occasion, judges in the Ninth Circuit complained about the satellite litigation that resulted from Rule 11 motions. See *Townsend v. Holman Consulting Corp.*, 881 F.2d 788, 792 (9th Cir. 1989) ("Since Rule

streamlining court dockets through eliminating "frivolous" pleadings—a function that, at least ostensibly, the 1983 amendments were intended to serve—the amendments to Rule 11 expanded court dockets.⁹¹

Abridged Due Process Rights. The proliferation in satellite litigation led federal courts to abridge the due process safeguards afforded to individuals who were subject to a potential sanctions award.⁹² Several federal appellate courts, for example, concluded that a district judge need not send lawyers who filed groundless complaints specific notice that the judge was considering an award of Rule 11 sanctions.⁹³ These courts reasoned that the mere existence of Rule 11 was adequate notice that the judge could impose sanctions.⁹⁴ In addition, most appel-

11 was amended six years ago, it has increasingly become the wellspring of the very satellite litigation we have consistently decried." (Reinhardt, J.); see also *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc.*, 873 F.2d 1327, 1330 (9th Cir. 1989) (Schroeder, J., concurring) ("[E]ven in the hands of our ablest judges Rule 11 can lead to costly and aimless satellite litigation having nothing to do with the dispute between the parties. Here indeed the sanctions tail is wagging the dog").

91. Lazaroff, *supra* note 71, at 1061.

92. See Cochran, *supra* note 67, at 17 ("Concerns with 'satellite litigation' and the perceived need to 'streamline cases' result in truncated proceedings."); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1784 (1992) (the absence of specific due process safeguards in the 1983 amendments "meant that numerous judges provided very few, and inconsistent, procedures, particularly for satisfying due process"). Publicly, the federal courts admitted that judges could not impose Rule 11 sanctions without giving sanctioned individuals fair due process notice and an opportunity to respond. See, e.g., *Eisenberg v. University of N.M.*, 936 F.2d 1131, 1134 (10th Cir. 1991); *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 346 (5th Cir. 1990); *Hudson v. Moore Business Forms, Inc.*, 808 F.2d 684, 686 (9th Cir. 1990). By interpreting the elements of due process narrowly, however, the courts attempted to escape the demands that a full range of due process safeguards would have entailed. See Byron C. Keeling, *Neither an Elephant Gun Nor a Cardboard Sword: Due Process Requirements in Sanctions Litigation*, 12 REV. LITIG. 343, 344 (1993) [hereinafter Keeling, *Due Process Requirements*]; Charlene Cullen, Comment, *Rule 11: Due Process Reconsidered*, 22 CUMB. L. REV. 729, 737-38 (1992).

93. See, e.g., *Mike Ousley Prods., Inc. v. WJBF-TV*, 952 F.2d 380, 383 (11th Cir. 1992); *1488, Inc. v. Phisec Inv. Corp.*, 930 F.2d 1281, 1292 & n.5 (5th Cir. 1991); *Eisenberg*, 936 F.2d at 1135; *Spiller*, 919 F.2d at 346; *Davis v. Carl*, 906 F.2d 533, 535 (11th Cir. 1990); *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987). Some of these decisions drew a distinction between complaints that lacked a factual basis and complaints that lacked a legal basis: for the former, these decisions reasoned that the courts need not provide notice as a prerequisite to sanctions, but for the latter, the decisions required specific notice. See *Spiller*, 919 F.2d at 346-47; *Donaldson*, 819 F.2d at 1560.

94. See *1488, Inc.*, 930 F.2d at 1292 n.5 ("Rule 11, standing alone, will constitute sufficient notice of an attorney's responsibilities."); *Donaldson*, 819 F.2d at 1560 ("Rule 11 alone should constitute sufficient notice of the attorney's responsibilities."). But see *Jones v. Pittsburgh Nat'l Corp.*, 809 F.2d 1350, 1357 (3d Cir. 1990) (Rule 11 itself is not adequate due process notice for the imposition of sanctions); *Tom Growney Equip., Inc. v. Shelley Irrigation Dev.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987)

late courts concluded that, regardless of the circumstances, a district judge need not give the subjects of potential sanctions awards an oral hearing before imposing the sanctions.⁹⁵ To allow individuals an adequate chance to respond to a sanctions motion, according to these appellate courts, all that a district judge had to do was allow the individuals to file written briefs defending their conduct.⁹⁶ The limits that

(same). The conclusion that a procedural rule like Rule 11 in itself could provide notice for the imposition of a sanction under that rule distorted the requirements of the due process clause:

Sanctions provisions, like other statutes that penalize misconduct, provide general notice that penalties can be assessed for infractions of the rules. Due process, however, requires more than general notice that penalties can be assessed. The purpose of the notice requirement is to apprise interested parties that the imposition of penalties is imminent. A sanctions provision, in itself, cannot provide this form of direct notice.

Keeling, *Due Process Requirements*, *supra* note 92, at 360-61; see Morton Stavis, *Rule 11: Which is Worse—The Problem or the Cure?*, 5 GEO. J. LEGAL ETHICS 597, 604 (1992) ("One of the most surprising features of Rule 11, as it has been implemented, is the overt denial of due process in proceedings which may lead to sanctions.")

95. See, e.g., *Dodd Ins. Servs., Inc. v. Royal Ins. Co.*, 935 F.2d 1152, 1160 (10th Cir. 1991); *Spiller*, 919 F.2d at 347; *In re Kunstler*, 914 F.2d 505, 521 (4th Cir. 1990), cert. denied, 499 U.S. 969 (1991); *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990); *White v. General Motors Corp.*, 908 F.2d 675, 686 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991); *Hudson v. Moore Business Forms, Inc.*, 808 F.2d 684, 686 (9th Cir. 1990). Rule 11 itself contributed to this conclusion. The advisory committee notes that accompanied the 1983 amendments to Rule 11 recited that courts "must to the extent possible limit the scope of sanction proceedings to the record." FED. R. CIV. P. 11 advisory committee note to 1983 amendment.

The appellate courts reasoned that due process never required an oral hearing. See *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc.* 815 F.2d 391, 405 (6th Cir.) ("[N]o hearing is required where an attorney is sanctioned for filing frivolous motions ungrounded in law or fact."), cert. denied, 484 U.S. 927 (1987). Certainly, in most cases the circumstances did not require a hearing: either the facts were clear and concise or the threatened sanction was small. In other cases, however, the circumstances did require some kind of hearing, even if not an evidentiary hearing. See Keeling, *Due Process Requirements*, *supra* note 92, at 369 (arguing that a hearing should be required "before a court imposes a sanction so severe that it precludes presentation of the merits"); The Committee on Federal Courts, *Procedural Rights of Attorneys Facing Sanctions*, 40 REC. 313, 323-24 (1985) (arguing that a hearing should be required "when the imposition of the sanction is dependent upon facts genuinely in dispute"); cf. Stephen A. Stallings, Note, *Rule 11: What Process is Due?*, 62 ST. JOHN'S L. REV. 586, 599 (1988) ("[W]hile there should be a presumption against an evidentiary hearing, a party should at least be allowed to submit briefs and affidavits, and present oral arguments against the imposition of sanctions.")

96. See *Dodd Ins. Servs.*, 935 F.2d at 1160; *White*, 908 F.2d at 686. Some appellate courts went so far as to suggest that judges need not give individuals a chance to

the federal appellate courts recognized upon pre-sanction notice and oral hearings found little support in the established due process jurisprudence,⁹⁷ ensuring that persons sanctioned under amended Rule 11 received "less process than would be necessary to seize a refrigerator."⁹⁸ Without the sobering reflection that broad due process safeguards encouraged, federal judges found few reasons to temper their sanctions awards.⁹⁹

Deferential Standard of Review. Just as the federal appellate courts attempted to reduce the demands that sanctions litigation placed upon the district courts, the appellate courts also attempted to reduce the demands placed upon themselves. The Supreme Court in *Cooter & Gell v. Hartmarx Corp.*¹⁰⁰ concluded that the appellate courts should apply the deferential abuse of discretion standard in reviewing "all aspects" of a Rule 11 sanctions decision.¹⁰¹ The abuse of discretion stan-

defend their conduct before sanctions are imposed. See *G.J.B. & Assocs.*, 913 F.2d at 832 (hearing on a motion to vacate is adequate opportunity to respond); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1178 (D.C. Cir. 1985) (appeal is adequate opportunity to respond).

97. See Keeling, *Due Process Requirements*, *supra* note 92, at 357. The established due process jurisprudence recognizes that due process is a flexible concept that "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); see also *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."). In concluding that due process never requires specific notice for lawyers who file groundless complaints and that due process never requires an oral hearing as a prerequisite to sanctions, the federal appellate courts ignored the flexible nature of due process, favoring rigid rules.

98. Cochran, *supra* note 67, at 16; see also COMMENT OF THE CHICAGO BAR ASSOCIATION TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 13 (Nov. 2, 1990) ("It is astonishing to realize that a \$500,000 sanctions award is subject to fewer procedural protections than . . . a \$50,000 diversity case.").

99. See Keeling, *Due Process Requirements*, *supra* note 92, at 374.

100. 496 U.S. 384 (1990).

101. *Id.* at 405. Before *Cooter & Gell*, the courts of appeals disagreed over the proper standard of review for Rule 11 decisions. Some circuits applied the abuse of discretion standard to all factual and legal issues arising under Rule 11. See, e.g., *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 757-58 (1st Cir. 1988); *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988); *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir.), *cert. denied*, 488 U.S. 848 (1988); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (*en banc*). Other circuits applied a tripartite standard of review: (1) reviewing factual findings under a clearly erroneous standard, (2) reviewing legal findings related to whether an individual violated Rule 11 under a *de novo* standard; and (3) reviewing the choice of sanction under an abuse of discretion standard. See, e.g., *International Bd. of Teamsters v. Association of Flight Attendants*, 864 F.2d 173, 176 (D.C. Cir. 1988); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986).

dard permitted the appellate courts to take a "hands off" approach to sanctions decisions in the lower courts.¹⁰² Thus, even though the appellate courts required that district courts impose the least severe sanction adequate to serve the functions of Rule 11,¹⁰³ the appellate courts nonetheless rubberstamped most lower court decisions related to the form and size of sanctions.¹⁰⁴ In the absence of more vigorous appellate review, the appellate courts could not police possible abuses of Rule 11, encouraging larger sanctions awards and, in turn, further contributing to the chilling effect that the rule exerted on good faith litigation.¹⁰⁵

Although the Court in *Cooter & Gell* rejected a tripartite standard of review, it nonetheless concluded that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405. Thus, while the standard in *Cooter & Gell* remained a deferential standard, in practice it differed little from the tripartite standard that the Court rejected. Johnson et al., *supra* note 47, at 661-62.

102. *Cooter & Gell*, 496 U.S. at 402 ("[T]he district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11."); see also Johnson et al., *supra* note 47, at 662. Illustrating the deferential nature of the abuse of discretion standard, the Federal Circuit has reasoned that it can find an abuse of discretion in only four instances: (1) the lower court decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision is based upon an erroneous conclusion of law; (3) the factual findings contained in the lower court decision are clearly erroneous; or (4) the record contains no evidence upon which the lower court rationally could have based its decision. *Hendler v. United States*, 952 F.2d 1364, 1372 (Fed. Cir. 1991).

103. See *supra* note 73.

104. See Johnson et al., *supra* note 47, at 663. Sometimes an appellate court, in a case in which the district court ignored the least severe sanction doctrine, would vacate the sanction and remand the case for reconsideration in light of the doctrine. See, e.g., *Jennings v. Joshua Indep. Sch. Dist.*, 877 F.2d 313, 321-22 (5th Cir. 1989); *Cabell v. Petty*, 810 F.2d 463, 466-67 (4th Cir. 1987). More often than not, though, the appellate courts have affirmed sanctions awards regardless of whether the district court considered the least severe sanction doctrine. See Johnson et al., *supra* note 47, at 663 ("[T]he appellate courts have simply acquiesced in the sanction selected by the district court, even if the sanction is a substantial monetary award that clearly is not the least severe sanction adequate to deter future misconduct.").

105. See Johnson et al., *supra* note 47, at 662; see also Lazaroff, *supra* note 71, at 1068 ("By adopting a deferential standard of review for all aspects of Rule 11 jurisprudence, the Supreme Court may encourage chilling of creative advocacy."); Georgene M. Valro, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 489 (1991) ("Neither the goal of reducing the indeterminacy of Rule 11 nor the goal of fairness to those sanctioned is served by the highly deferential type of abuse review envisioned by the Court.") [hereinafter Valro, *Where We Are*].

3. The 1993 Amendments to Rule 11

After an extended review and revision process,¹⁰⁶ the existing version of Federal Rule 11 became effective December 1, 1993.¹⁰⁷ Designed to "remedy [the] problems that [had] arisen in the interpretation and application of the 1983 revision of the rule,"¹⁰⁸ the 1993 amendments to Rule 11 have effected a sweeping change in the spirit of the principal federal sanctions provision.¹⁰⁹ The 1993 amendments, for instance, ensure that district courts give sanctions decisions more studied consideration than the courts gave such decisions under the 1983 revision. One of the provisions requires courts to enter specific factual findings.¹¹⁰ Specifically, the new rule states that "[w]hen imposing sanctions, the court shall describe the conduct determined to constitute a violation . . . and explain the basis for the sanction imposed."¹¹¹ Likewise, another provision in the new rule gives the potential subjects

106. Tobias, *supra* note 92, at 1777-78. The Advisory Committee on the Civil Rules of the United States Judicial Conference issued a Call for Written Comments on Rule 11 in August 1990 and conducted a public hearing in February 1991. *Id.* at 1778. The committee agreed that the rule should be amended, and in May 1991, it proposed a series of amendments. *Id.* The Committee on Rules of Practice and Procedure of the United States Judicial Conference, known as the "Standing Committee," studied the proposed amendments and then, after making various changes, approved the amendments in June 1992. *Id.*

107. FED. R. CIV. P. 11. The United States Supreme Court approved the 1993 amendments to Rule 11 over the dissents of Justices Scalia and Thomas. See 61 S.L.W. 4365 (April 27, 1993).

108. Johnson et al., *supra* note 47, at 680 (quoting FED. R. CIV. P. 11 comment proposed Amendments 1991)).

109. Several articles discuss the potential effects of the 1993 amendments to Rule 11. See, e.g., Johnson et al., *supra* note 47, at 663-66; Lazaroff, *supra* note 71, at 10-10; Tobias, *supra* note 92, at 1779-82; Valro, *Where We Are*, *supra* note 105, at 5-500; Kerlan Bunch, Note, *Taming the Fury: Do the 1991 Proposed Amendments Rule 11 Go Far Enough?*, 5 GEO. J. LEGAL ETHICS 957, 960-70 (1992); Scott Hrbass, Comment, *The Proposed Amendment to Federal Rule of Civil Procedure: Balancing the Goal of Deterrence with Considerations of Due Process and Fairness*, 41 U. KAN. L. REV. 190, 220-24 (1992); James R. Simpson, Note, *Why Change Rule 11? Ramifications of the 1992 Amendment Proposal*, 29 CAL. W.L. REV. 495, 1-12 (1993).

110. FED. R. CIV. P. 11(c)(3). This provision requiring specific factual findings was a new addition to the amendments. Originally, the proposed amendments required factual findings only at the request of counsel. FED. R. CIV. P. 11 (Proposed Amendments 1991). See also Johnson et al., *supra* note 47, at 673-76; Bunch, *supra* note 109, at 968.

111. FED. R. CIV. P. 11(c)(3). While the rule requires district courts to enter specific factual findings in cases in which sanctions are imposed, the rule does not appear to require written findings. Presumably, the rule would allow courts to enter oral findings into the record of sanction hearings that the courts might conduct. See *id.*

of sanctions awards greater due process safeguards.¹¹² Subsection (c) states that a person must receive "notice and a reasonable opportunity to respond" before a district court can impose sanctions against the person.¹¹³ Although the rule provides courts with little guidance concerning the response element of due process,¹¹⁴ the rule specifies the form of notice that a sanctioned individual must receive. Before a district court imposes a sua sponte award of monetary sanctions, the court must issue an order that describes the offensive conduct and requires the offender to show cause for her actions.¹¹⁵ Before a litigant files a motion for Rule 11 sanctions, the litigant must serve the motion upon the offender, describing the conduct alleged to violate the rule.¹¹⁶

Another significant change in the 1993 version of Rule 11, and perhaps the change that has attracted the most attention, is the addition of a "safe harbor" provision.¹¹⁷ Under the 1993 amendments, a litigant cannot file or present a sanctions motion to the district court until twenty-one days after serving the motion on the alleged offender.¹¹⁸ Within the twenty-one day "safe harbor," the offender can withdraw or correct the challenged document and thus avoid sanctions.¹¹⁹ The function of the "safe harbor" provision is to lessen the chilling effect of Rule 11 by insulating litigants from sanctions for correctable mis-

112. See Simpson, *supra* note 109, at 503-04.

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

114. All that the 1993 amendments state is that opportunities to respond must be "reasonable." See FED. R. CIV. P. 11(c). Presumably, this language will not change the presumption under the 1983 amendments that due process requires only that sanctioned litigants be able to file written briefs defending their conduct. See *supra* notes 92-99 and accompanying text. Cf. Bunch, *supra* note 109, at 968 ("No oral hearing is mandated, but it appears that the party on notice will at least be permitted an opportunity to submit a written brief.").

115. FED. R. CIV. P. 11(c)(1)(B), 11(c)(2)(B). It is unclear whether a district court must issue a show cause order before imposing an award of nonmonetary sanctions. See Bunch, *supra* note 109, at 967 (concluding that a show cause order would not be required).

116. FED. R. CIV. P. 11(c)(1)(A). The motion must "be made separately from other motions or requests . . ." *Id.*

117. See Tobias, *supra* note 92, at 1784-85, 1785 n.63 (stating that safe harbor is an "important protective mechanism"); Bunch, *supra* note 109, at 967 (safe harbor serves the goals of "detering abusive behavior and promoting judicial efficiency").

118. FED. R. CIV. P. 11(c)(1)(A). The "safe harbor" provision does not protect individuals from sanctions that the district court issues sua sponte. Accordingly, it is unclear whether sua sponte sanctions are appropriate against a litigant who has filed, but then withdrawn, a groundless legal document. See Bunch, *supra* note 109, at 967.

119. See FED. R. CIV. P. 11(c)(1)(A).

akes.¹²⁰ As the drafters of the new rule explained, "Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions."¹²¹

To counter the administrative burdens that the new due process and "safe harbor" provisions might entail, the 1993 amendments add three provisions that attempt to decrease Rule 11 sanctions activity. First, the new rule gives district courts the discretion to decline sanctions even in circumstances that establish a technical Rule 11 violation.¹²² Second, the rule requires that district courts limit sanctions awards to a form "sufficient to deter repetition" of the sanctioned behavior.¹²³ Third, while the rule allows district courts to award sanctions against litigants responsible for Rule 11 violations,¹²⁴ it limits awards of monetary sanctions against litigants who have legal representation.¹²⁵ These provisions, taken together, aim to reduce the number

120. See Bunch, *supra* note 109, at 966.

121. FED. R. CIV. P. 11 advisory committee's note (Proposed Amendments 1993).

122. Johnson et al., *supra* note 47, at 667; see also FED. R. CIV. P. 11(c). Under the 1983 revision, Rule 11 sanctions were mandatory if the circumstances established a violation. See *supra* note 52.

123. FED. R. CIV. P. 11(c)(2). Under the 1983 revision, federal appellate courts urged district judges to enforce the "least severe sanction adequate" to deter repetition of the sanctionable behavior, but the district judges frequently ignored this admonition. See *supra* note 73. In incorporating the "least severe sanction adequate" doctrine into the text of Rule 11, the drafters of the 1993 amendments hoped to reemphasize the doctrine and curtail reliance upon fee awards as sanctions. Johnson et al., *supra* note 47, at 666. To that end, subsection (c)(2) of the new Rule 11 authorizes district judges to enforce "directives of a nonmonetary nature." FED. R. CIV. P. 11(c)(2).

124. FED. R. CIV. P. 11(c) ("[T]he court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.").

125. FED. R. CIV. P. 11(c)(2)(A). The rule forbids monetary sanctions—such as fee awards—against represented parties for a violation of subsection (b)(2), which requires that the challenged document be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b)(2). Apparently, the rule would not forbid monetary sanctions against represented parties in instances in which they filed a factually groundless contention in violation of subsections (b)(3) or (b)(4) or filed a contention for an improper purpose in violation of subsection (b)(1). Neither would the rule affect unrepresented parties. As a class, unrepresented parties are responsible for the documents that they present to the court and, accordingly, are therefore subject to the full range of Rule 11 sanctions. See FED. R. CIV. P. 11(b) (stating that by presenting a legal document to the court, unrepresented parties certify that the document meets the substantive requirements of Rule 11). Of course, the rule does not prevent courts from imposing fee awards or other monetary sanctions against lawyers as opposed to parties.

of fee awards assessed as Rule 11 sanctions and, accordingly, to reduce the incentive for lawyers to use Rule 11 as a litigation tactic.¹²⁶

Nonetheless, even though it is too soon to reach definitive conclusions about whether the 1993 amendments will succeed in eliminating the problem that arose under the 1983 amendments, it seems safe to predict that Rule 11 will continue to cast a brooding presence over litigation decisions in federal court. The 1993 amendments do not significantly alter the prevailing objective "reasonableness" standard for Rule 11 sanctions.¹²⁷ While the amendments attempt to reduce reliance upon fee awards,¹²⁸ the amendments do not forbid the application of fee awards as sanctions against persons—other than represented litigants—who file pleadings that fail the prevailing objective standard.¹²⁹ As long as Rule 11 allows district courts to assess fee awards for violations of an objective "reasonableness" standard, the rule will exert a chilling effect upon litigation—safe harbor or not.¹³⁰ Unquestionably,

126. Lazaroff, *supra* note 71, at 1117. See *supra* notes 70-85 and accompanying text.

127. See Tobias, *supra* note 92, at 1781-82. Indeed, the 1993 amendments have bolstered slightly the objective standard for imposing Rule 11 sanctions. Although the new rule retains the language requiring that the signing individual certify the propriety of the filed document to the best of her subjective "knowledge, information, and belief," FED. R. CIV. P. 11(b), the rule states that the signing individual must certify, if appropriate, that the document is warranted by a "nonfrivolous" rather than "good faith" argument for the "extension, modification or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b)(2). The substitution of the word "nonfrivolous" for the word "good faith" implies that the drafters of Rule 11 intended to eliminate subjective language from the rule, thus reemphasizing the product approach to sanctions. See *supra* notes 54-58 and accompanying text.

128. See *supra* notes 122-26 and accompanying text.

129. See Tobias, *supra* note 92, at 1788; see also Johnson et al., *supra* note 47, at 666 (stating that the 1993 amendments "are unlikely to wean the district courts from their excessive and damaging reliance on awards of attorneys' fees.").

130. See Lazaroff, *supra* note 71, at 1118-19.

The Advisory Committee's unwillingness to reconsider a subjective bad faith standard for Rule 11 . . . may also be criticized. When combined with the retention of attorney's fees as a viable sanction under Rule 11, this could encourage continued fee shifting despite the Supreme Court's and the Advisory Committee's rejection of that approach.

Id.

Moreover, as long as Rule 11 exerts a chilling effect on litigation, it encourages litigants to use Rule 11 motions as a tactic to dissuade their opponents from pursuing undesirable arguments. See Tobias, *supra* note 92, at 1788. Indeed, in some sense, the 1993 amendments promote even greater use of Rule 11 as a litigation tactic because they allow district judges to award parties who file successful Rule 11 motions the fees incurred in presenting and arguing the motions. FED. R. CIV. P. 11(c)(2). See

the 1993 amendments to Rule 11 improve a sanctions provision that since 1983 had been repressive and unwieldy. Even after the 1993 amendments, however, Rule 11 still does not represent a balanced approach to frivolous litigation.¹³¹

B. State Sanctions Provisions

Like the federal courts, state courts and legislatures have struggled to devise a balanced response to frivolous litigation. Some states have been content to follow the lead of the federal courts, amending their procedural rules to keep pace with the evolution of Federal Rule 11.¹³² But while almost all of the states have enacted statutes or procedural rules that parallel Federal Rule 11,¹³³ the range of state sanctions schemes nonetheless varies widely, in large part because most states have crafted sanctions provisions that either supplement or supplant provisions based on Rule 11.¹³⁴ The state law schemes for addressing frivolous litigation, although disparate and often quite dissimilar, fall

Tobias, *supra* note 92, at 1788 (noting that the 1993 amendments make "filings cost free").

131. See Johnson et al., *supra* note 47, at 676-77 (concluding that the 1993 amendments "offer some measure of relief" but "[f]urther changes are required if Rule 11 is to become a useful tool in the fair and effective administration of justice").

132. Currently, nine states and the District of Columbia have a procedural rule that mimics the 1983 version of Federal Rule 11 as their sole sanctions provision against frivolous litigation. See *infra* note 169. Surprisingly, however, few states have drafted procedural rules that altogether replicate the Federal Rules of Civil Procedure. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986). Especially in the area of sanctions, states have been willing to experiment with procedural rules that deviate from the federal model.

133. See *supra* note 25. Most states are expected to amend their statutes or procedural rules to reflect the 1993 amendments to Federal Rule 11. See, e.g., REPORT OF THE TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 72-75 (1993) (proposing various amendments modeled upon the 1993 amendments to Rule 11); Sanner & Tobias, *supra* note 76, at 325-29 (discussing the likelihood that Montana will adopt the 1993 amendments).

134. See *supra* note 25-26 and accompanying text. Almost all of these supplemental sanctions provisions are statutes. Some commentators have challenged the constitutional basis for these statutes, arguing that state legislatures do not have the power to promulgate statutes that affect the operation of state courts. See, e.g., Gary D. Nissenbaum & Nancy Lem, *Stop, Look, and Listen: Selected Defenses to the New Jersey Frivolous Lawsuit Statute*, 20 SETON HALL L. REV. 184, 192 (1989) (noting that "[t]he New Jersey Constitution empowers the New Jersey Supreme Court, not the legislature, to promulgate rules governing the practice and procedure in all state courts"); Robertson, *supra* note 48, at 113 (noting that "the response to the problem of frivolous filings, though a matter of general and legitimate public concern, is ultimately the responsibility of the judiciary of [Mississippi], not its legislature") (citations omitted).

into three rough models: a "high threshold" model that favors the interest of preserving free access to the courts;¹³⁵ a "low threshold" model that favors the interest of reducing perceived litigation abuse;¹³⁶ and a "hybrid" model that borrows elements from both the high threshold and low threshold models.¹³⁷ Although all three models—like Rule 11—encourage sanctions in the form of a fee award the sanctions schemes in the "high threshold" model are dependent upon a subjective standard, while the sanctions schemes in the "low threshold" and "hybrid" models are dependent upon an objective standard. Failing to harmonize the best aspects of both the subjective and objective standards, state sanctions schemes suffer predictable consequences related to their dependence upon one or the other standard alone. This Section will review the various state sanctions models in turn.

1. The High Threshold Model

The high threshold model is the most lenient of the three sanctions models. Typically, the states that follow a high threshold sanctions model require some kind of subjective bad faith—or the absence of good faith—as a condition to an award of sanctions, usually a fee award. Eight states have adopted sanctions schemes that fall within the high threshold model. California, for instance, uses as its principal sanctions provision a statute that requires the trial court to find that the sanctioned individual acted in subjective bad faith.¹³⁸ Florida uses a

135. See *infra* Section II.B.1, pp. 1005-1102.

136. See *infra* Section II.B.2, pp. 1102-11.

137. See *infra* Section II.B.3, pp. 1111-25.

138. CAL. CIV. PROC. CODE § 128.5 (West Supp. 1993). Section 128.5 provides that a California trial court "may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." *Id.* Although the California appellate courts are split, most have concluded that § 128.5 requires a finding of subjective bad faith as a condition to the imposition of sanctions. See *Llomas v. Diaz*, 267 Cal. Rptr. 427, 430 (Ct. App. 1990) ("Our study of the legislative history of § 128.5, from its inception in 1981, through two amendments, in 1984 and 1985, convinces us there must be an assessment of subjective bad faith in addition to finding a particular action or tactic was frivolous."); see also *Javor v. Dellinger*, 3 Cal. Rptr. 2d 662, 664 (Ct. App. 1992); *Summers v. City of Cathedral City*, 275 Cal. Rptr. 694, 698-99 (Ct. App. 1990); cf. *West Coast Dev. v. Reed*, 3 Cal. Rptr. 2d 790, 795 (Ct. App. 1992) (agreeing that precedent requires a finding of subjective bad faith, but noting that "[o]f course the prosecution of a frivolous action may in itself be evidence from which a finding of subjective bad faith may be made"). But see *On v. Cow Hollow Properties*, 272 Cal. Rptr. 535,

statute that allows evidence of good faith to serve as a defense against sanctions.¹⁰⁹ Maine, New Mexico, and Pennsylvania use sanctions provisions that are based upon the pre-1983 version of Federal Rule 11.¹¹⁰ Massachusetts and South Carolina also use sanctions provisions

539 (Ct. App. 1990) (stating that § 128.5 requires either a finding of bad faith or frivolousness, but not both). For a discussion of the subjective nature of § 128.5, see Maryann Jones, "Stop, Think & Investigate": Should California Adopt Federal Rule 11?, 22 Sw. U. L. Rev. 337, 367-63 (1993).

From 1988 to 1993, California experimented in San Bernardino and Riverside counties with a sanctions provision based upon the 1983 amendments to Federal Rule 11. See CAL. CIV. PROC. CODE § 447 (West Supp. 1993). Section 447 provided that it would remain in effect until January 1, 1993. During its short existence, § 447 found little use, "largely due to the bar's lack of familiarity with the section." Jones, *supra*, at 305. A new § 447 has since been extended to be effective until January 1, 1998. CAL. CIV. PROC. CODE § 447 (West Supp. 1994).

139. FLA. STAT. ANN. § 57.105 (West Supp. 1993). Section 57.105 provides, in pertinent part:

The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client.

Id. See Johnson & Cassidy, *supra* note 18, at 959 (noting that the sanctions statute in Florida "appear[s] to require a more grievous transgression before a court will impose sanctions"). It is unclear whether section 57.105 would allow a losing party to claim good faith as a defense to a fee award.

140. See MAINE R. CIV. P. 11; N.M. R. CIV. P. 11; PA. R. CIV. P. 1023. The Pennsylvania version of Rule 11 is a relatively new rule that, by its express terms, suspends former § 8355 of the Pennsylvania Judicial Code—a sanctions provision which was almost identical to the 1983 version of Federal Rule 11. GOODRICH-AMIRAM PROCEDURAL RULES SERVICE 403-04 (2d ed. 1991). Neither the Maine nor the Pennsylvania courts have attempted to calculate the measure of evidence needed to support sanctions under their versions of Rule 11. But the New Mexico courts have interpreted their version of Rule 11, and like the federal courts with pre-1983 Federal Rule 11, have concluded that their rule requires evidence of a subjective intent to abuse the judicial process. See *Lowe v. Bloom*, 813 P.2d 480, 481 (N.M. 1991) ("Imposition of Rule 11 sanctions requires subjective evidence that a willful violation has occurred."); *Rivera v. Brazos Lodge Corp.*, 808 P.2d 955, 960 (N.M. 1991) ("Unlike the [1983] federal counterpart, the good ground provision in New Mexico's Rule 11 is to be measured by subjective standards at the time of the signing of the pleading.").

All three states supplement their Rule 11 provisions with narrow sanctioning powers that govern specific situations. Maine, for example, recognizes the inherent power of its trial courts "to sanction parties and attorneys for abuse of the litigation process." *Chiappetta v. LeBlond*, 544 A.2d 759, 760 (Me. 1988). New Mexico has two statutes that allow trial courts to sanction parties who bring "frivolous" securities claims or agricultural nuisance claims. N.M. STAT. ANN. § 47-9-7 (Michie 1991) (agricultural nuisance actions); N.M. STAT. ANN. § 58-12B-40(H) (Michie 1991) (actions under the New Mexico Securities Act of 1986). Pennsylvania has a statute that codi-

based upon the pre-1983 version of Rule 11,¹¹¹ but these two states supplement their Rule 11 provisions with frivolous litigation statutes that apply subjective standards for the imposition of sanctions.¹¹² Connecticut, the sole state without a general sanctions provision against frivolous litigation, uses an assortment of narrow sanctioning powers, most of which also enforce a subjective bad faith standard.¹¹³

fies the common law abuse of process action. 42 PA. CONS. STAT. § 8351 (1982). None of these narrow supplemental sanctioning powers, however, have seen much use.

141. See MASS. R. CIV. P. 11; S.C. R. CIV. P. 11.

142. See MASS. GEN. L. ch. 231, § 6F (1986); S.C. CODE ANN. §§ 15-36-10 to -50 (Law. Co-op. Supp. 1992). The Massachusetts statute allows trial courts to award attorney fees as sanctions against litigants who advance claims or defenses which are "wholly insubstantial, frivolous and not advanced in good faith." MASS. GEN. L. ch. 231, § 6F (1986). Under the plain language of this statute, a sanctions award requires evidence both that the challenged claims or defenses are frivolous and that the sanctioned litigant advanced the claims or defenses in bad faith. Mel L. Greenberg, *Sanctions: In Search of Standards*, 74 MASS. L. REV. 155, 165-66 (1989). Recently, however, Massachusetts courts have shown a willingness to fudge on the bad faith prong of the statute. See *infra* notes 102-05 and accompanying text.

The South Carolina statute states that a person who takes part in the "procurement, initiation, continuation, or defense" of a civil lawsuit is subject to a fee award if (1) that person acts with a purpose other than securing proper adjudication of the claim upon which the proceedings are based and (2) the proceedings terminate in favor of the individual seeking the sanction. S.C. CODE ANN. § 15-36-10 (Law. Co-op. Supp. 1992). According to the statute, a person acts with a proper purpose if he "reasonably believes" in the existence of the facts upon which his claim is based and if he either "reasonably believes" that his claim is legally valid or he relies in good faith upon the legal advice of counsel. *Id.* § 15-36-20. The elements for a "proper purpose" under the South Carolina statute seem to hinge upon a subjective belief in the factual and legal validity of the challenged claim or defense. Thus far, though, the South Carolina courts have not attempted to interpret the statute, which became effective in April 1988. When the South Carolina courts finally address this issue, they might conclude that the word "reasonably" in section 15-36-20 injects an objective standard into the determination of whether a person acted with a proper purpose.

143. See Daniel Cassidy & Marina Lee, *Connecticut State Practice: Judicial Authority to Impose Sanctions Against Attorneys*, 65 CONN. B.J. 472, 472-76 (1991). Cassidy and Lee observe:

There are three statutes in Connecticut which permit the imposition of sanctions on attorneys. The first, § 52-99, which imposes a ten dollar fine for submission of an untrue pleading, is seldom used. The second, § 52-190a, is limited to sanctioning an attorney for his or her failure to make a reasonable inquiry before filing a negligence claim against a health care provider. The court, upon motion or its own initiative, can impose "appropriate" monetary sanctions. The third, § 51-84, which permits courts to promulgate rules to

Of the three sanctions models, the high threshold model goes the farthest in attempting to preserve free access to the courts.¹⁴⁴ Sanctions schemes in the high threshold model direct their penalties against the most egregious litigation abuse, hoping that in confining the availability of sanctions, litigants will not abandon legitimate claims for fear of incurring sanctions.¹⁴⁵ Unfortunately, the high threshold model tips the balance too far in favor of the principle of free access. States adopt sanctions provisions, regardless of their views about the principle of free access, to punish and deter litigation abuse.¹⁴⁶ Even in tolerant states like California, the legislature designs sanctions schemes to discourage litigants from abusing the judicial process.¹⁴⁷ High threshold sanctions schemes, however, tend to be ineffective in punishing and deterring litigation abuse.¹⁴⁸ Specifically, high threshold sanctions schemes offer state court judges few options for dealing with the abusive conduct that for one reason or another falls through the cracks of the subjective standard.

The problem with high threshold sanctions schemes is *not*, in itself, the fact that the schemes use a subjective standard. While a subjective standard is, admittedly, more difficult to prove than an objective standard,¹⁴⁹ a subjective standard is not impossible to prove.¹⁵⁰ As one commentator has observed, "There is nothing . . . unworkable

sanction counsel, is limited to monetary fines of no more than \$100.00.

Id. at 472-73 (citations omitted). Still another Connecticut statute allows a court, in its discretion, to impose an award of fees against a litigant who pursues a frivolous claim or defense in a products liability action. CONN. GEN. STAT. § 52-240a (1991). Further, the Connecticut rules of practice allow a court, in its discretion, to impose an award of fees up to \$250 against a litigant who files allegations or denials which the court finds untrue and made without reasonable cause. Cassidy & Lee, *supra*, at 473 (citing CONNECTICUT PRACTICE BOOK § 111). If none of the above provisions are applicable, Connecticut Superior Courts retain the inherent power to impose sanctions against a litigant who files a bad faith pleading. Fattibene v. Kealey, 558 A.2d 677, 685 (Conn. App. Ct. 1989). In *Fattibene*, the court vacated a sanctions order from a trial court which, recognizing that Connecticut had no general sanctions provision against frivolous litigation, used Federal Rule 11 as the basis for imposing sanctions. *Id.* at 683.

144. For a discussion of the principle of free access, see *infra* Section III.A, pp. 1126-34.

145. See, e.g., Greenberg, *supra* note 142, at 157 (noting that because Federal Rule 11 has produced a chilling effect upon litigation, among other problems, "[t]here currently appears no fervor [in Massachusetts] to follow the federal model").

146. See *infra* Section III.B, pp. 1134-52.

147. See *On v. Cow Hollow Properties*, 272 Cal. Rptr. 535, 540 (Ct. App. 1990) (maintaining that a purpose of § 128.5 is to control "burdensome and unnecessary legal tactics").

148. See, e.g., Jones, *supra* note 138, at 362-63.

149. See Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 503 (1986-87).

150. Risinger, *supra* note 34, at 60.

about subjective standards. If there were, the requirement of scienter would render convictions in criminal cases impossible.¹⁵¹ Just as in criminal cases, a judge in a sanctions proceeding can look behind protestations of innocence. Some litigants might be able to hide wrongful conduct behind a shield of "good faith," but in most instances in which a litigant violates a subjective standard, the record will bear enough evidence of bad faith to support an award of sanctions even under a high threshold sanctions scheme.¹⁵²

And while a subjective standard covers fewer situations than an objective standard, a subjective standard is not a toothless dinosaur. Although the pre-1983 version of Federal Rule 11, which embraced a subjective standard, did not see much active use,¹⁵³ the prevailing attitude toward sanctions at the time was much different from the attitude that judges express toward sanctions today.¹⁵⁴ With the evolution of litigation into a combative—rather than adversarial—device for resolving disputes,¹⁵⁵ judges are far more willing to use sanctions as a means of compelling desirable litigation behavior.¹⁵⁶ California judges, for exam-

151. *Id.*

152. See *id.* ("Intellectually honest examination of evidence proffered in particular cases can result in the effective enforcement of even subjective standards of ethics."). Recently, for example, several courts have heard claims that real estate developers brought against public interest spokespersons to dissuade them from opposing development projects. These claims often take the form of meritless actions for malicious prosecution, abuse of process, intentional interference with contractual or business relations, or libel. See John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 402-03 & n.34 (1993); Brecher, *supra* note 6, at 105; see also *infra* text accompanying notes 323-36. Frequently, the developers in these SLAPPs leave enough evidence of bad faith—e.g., falsified affidavits, a lack of cooperation with requests for depositions, a track record of meritless claims against public interest spokespersons—to support an award of sanctions under a subjective standard. See generally David Sive, *Environmental Litigation Countersuits and Delay*, C427 ALI-ABA 1319 (1989) (available in Westlaw, ALI-ABA Database).

153. See *supra* text accompanying note 37.

154. See *supra* text accompanying notes 41-48.

155. See *supra* note 6. Cf. Edwin J. Wesely, *Pretrial Development in Major Corporate Litigation*, LITIG., Spring 1975, at 12 ("Litigating the big case is the ultimate in civilized warfare. It is warfare—strategy and tactics are at least as important as the law and the facts. It is civilized—there is a resolution short of bloodshed and short of medieval trial by combat.").

156. See Robertson, *supra* note 48, at 133. But see Sofaer, *supra* note 44, at 718 (noting that judges, if they have the discretion to do so, will not impose sanctions for minor infractions because the sanctions would not be worth the time and trouble).

ple, have imposed and upheld several large sanctions within the last five years,¹⁵⁷ and despite the subjective standard in the California statute, their reliance upon the sanctions statute is increasing.¹⁵⁸

The inherent flaw in the high threshold sanctions schemes is, instead, that the schemes confine *all* sanctions to conduct that reflects subjective bad faith. Under the high threshold schemes adopted in eight states, judges are unable to impose sanctions—even nominal sanctions—absent some proof that the challenged conduct violates a subjective standard. Judges in high threshold states, therefore, have no means with which to reach persons who, acting in subjective good faith, pursue pleadings or motions that offend the judicial process—e.g., claims that raise allegations which ignore binding adverse precedent, “nut” claims that make wild factual assertions, and motions that reassert arguments a court has earlier rejected.¹⁵⁹ Likewise, judges in the high threshold states have no means with which to reach persons who, although pursuing meritorious pleadings or motions in actual bad faith, have been careful to ensure that the record does not reflect their subjective bad faith.¹⁶⁰ High threshold sanctions schemes, in sum, are less effective than other forms of sanctions schemes in policing the judicial process.

157. See, e.g., *Bach v. McNelis*, 255 Cal. Rptr. 232, 248-49 (Ct. App. 1989) (affirming fee award of more than \$11,000); *Dwyer v. Crocker Nat'l Bank*, 240 Cal. Rptr. 207, 306-09 (Ct. App. 1987) (affirming fee award of \$75,258). Cf. *Woods*, *supra* note 40, at 673 (“Notwithstanding the growing pains California has experienced with the increasing use of sanctions, the courts in recent years have imposed and upheld sizable sanctions.”).

158. *Woods*, *supra* note 40, at 673-74. Likewise, the subjective standard in the California statute has not inhibited lawyers from filing large numbers of sanctions motions. Professor Roberts estimated that the Central District of the Los Angeles Superior Court faces around 4900 sanctions motions annually. Florrie Young Roberts, *Pre-trial Sanctions: An Empirical Study*, 23 PAC. L.J. 1, 16 (1991). From that estimate, Roberts concluded that “attorneys apparently perceive that their adversaries have engaged in conduct which not only violates pre-trial rules but does so in a fashion that is sanctionable because it is ‘without substantial justification’ or is in ‘bad faith,’ ‘frivolous,’ or ‘for the purpose of delay.’” *Id.*

Other high threshold states, such as Maine and South Carolina, have not experienced much sanctions litigation. Few sanctions decisions appear in the published cases of these states. The absence of sanctions litigation in these states, though, does not suggest that the subjective standard in the respective sanctions statutes has inhibited sanctions motions. Instead, it seems that the more probable reason for the absence of sanctions litigation is that these states are more rural and, therefore, do not experience as much litigation abuse. See Donald D. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 AM. B. FOUND. RES. J. 81, 107 (1985).

159. See Shaneyfelt, *supra* note 1, at 451-52.

160. See Cady, *supra* note 149, at 503.

Understandably, state court judges experience a great deal of frustration when high threshold sanctions provisions leave them unable to redress perceived litigation abuse.¹⁶¹ Judges in Massachusetts, in fact, tinkered with the subjective standard in their sanctions provisions in an attempt to reach a broader range of undesirable litigation conduct. Thus, while the Massachusetts sanctions statute requires findings that the challenged claims or defenses are “wholly insubstantial, frivolous and not advanced in good faith,”¹⁶² some Massachusetts state court judges have suggested that the statute does not impose a “wholly subjective” standard.¹⁶³ These judges reason that absence of good faith, as required in the Massachusetts statute, can be inferred from objective criteria, such as the reasonableness and significance of the factual and legal grounds advanced in opposing a sanctions award.¹⁶⁴ Judges in other high threshold states, although perhaps not as inclined to tinker with their sanctions statutes, express similar dissatisfaction with the subjective standards in their statutes.¹⁶⁵

Because high threshold sanctions schemes do not go far enough in allowing judges to redress litigation abuse, the high threshold model does not represent a balanced approach to frivolous litigation. Unquestionably, the high threshold sanctions model advances the laudable goal of protecting free access to the courts. As laudable as that goal might be, though, it does not excuse lawsuits that serve no legitimate function other than to consume valuable court time.¹⁶⁶ Commentators might ar-

161. See *Jones*, *supra* note 138, at 362.

162. MASS. GEN. L. ch. 231, § 6F (1986) (emphasis added). See *supra* note 142.

163. *Massachusetts Adventura Travel, Inc. v. Mason*, 537 N.E.2d 609, 612 (Mass. App. Ct. 1989).

164. *Id.* at 613-14 (affirming fee award of \$13,608). See also *Hahn v. Planning Bd.*, 529 N.E.2d 1334, 1338 (Mass. 1988) (affirming fee award of \$3795 and noting that “[s]ufficient evidence existed in the record before both the Superior Court judge and the single justice of the Appeals Court from which to infer an absence of good faith”). But see *Greenberg*, *supra* note 142, at 166 (noting that Massachusetts judges often determine whether a claimant is subject to a fee award under the sanctions statute “exclusively by examining the subjective beliefs of the claimant rather than inferring bad faith from the facts”).

165. See *Jones*, *supra* note 138, at 362 (discussing California judges). Professor Jones conducted an informal poll of more than 50 California judges about their experience with the California sanctions provision. Of the 27 judges responding, 15 reported that the sanctions provision was ineffective, and many called it a “waste of time.” *Id.* at 362 & n.211.

166. See *infra* Section III.A, pp. 1126-34.

gue that the number of frivolous lawsuits is small,¹⁶⁷ but even if that is true, judges still perceive that frivolous claims and defenses are congesting their dockets. And as long as judges hold that perception, judges will be dissatisfied with sanctions measures that allow certain frivolous claims or defenses to go unpunished. Sanctions schemes must attempt both to preserve free access to the courts and to give judges reasonable measures with which to reach litigation misconduct that might not rise to the level of subjective bad faith.

2. The Low Threshold Model

Compared with the other sanctions models, the low threshold model gives state court judges the greatest power to combat perceived litigation abuse. States that follow a low threshold model use an objective standard to determine when sanctions are appropriate. Thus, under a sanctions scheme in a low threshold state, a person can be subject to sanctions if she acts unreasonably—regardless whether she acts in subjective bad faith.¹⁶⁸ The states with low threshold sanctions schemes are divisible into three categories: (1) states that adopted the 1983 version of Federal Rule 11 as their sole sanctions provision;¹⁶⁹ (2) states that adopted the 1983 version of Federal Rule 11 as their principal, but not sole, sanctions provision;¹⁷⁰ and (3) states that created, as their

167. See *infra* Section III, pp. 1125-52.

168. See *supra* notes 13-15 and accompanying text.

169. Nine states, as well as the District of Columbia, have enacted as their sole sanctions provision a procedural rule modeled upon the 1983 version of Federal Rule 11. See OKLA. STAT. tit. 12, § 2011 (1993); VA. CODE ANN. § 8.01-271.1 (Michie 1992); ARK. R. CIV. P. 11; DEL. SUP. CT. R. CIV. P. 11; D.C. R. CIV. P. 11; MONT. R. CIV. P. 11; N.C. R. CIV. P. 11(a); TENN. R. CIV. P. 11; VT. R. CIV. P. 11; W. VA. R. CIV. P. 11.

170. Twelve states have adopted the 1983 version of Rule 11 as their principal, but not sole, sanctions provision:

Idaho—The Idaho version of Rule 11 is identical to the 1983 federal rule, except that it requires a resident Idaho lawyer to sign all pleadings or other legal documents which a represented litigant files in Idaho state court. IDAHO R. CIV. P. 11(a)(1). A provision in the Idaho Code allows trial courts to award reasonable fees to a litigant who suffers "frivolous conduct," which the provision defines as (1) conduct that "serves merely to harass or maliciously injure" or (2) conduct that "is not supported in fact or warranted under existing law" or "a good faith argument for an extension, modification or reversal of existing law." IDAHO CODE § 12-123 (1990). The statute specifies, however, that it does not limit the application of other statutes or procedural rules, meaning that the Idaho version of Rule 11 tends to be the more prominent sanctions provision in Idaho. *Id.* § 12-123(4).

Iowa—The Iowa version of Rule 11 is identical to the 1983 federal rule, except that it allows a court to require a plaintiff who has filed three or more frivolous actions in a five-year period to post a bond before proceeding in another lawsuit. IOWA R. CIV. P. 80. See Cady, *supra* note 149, at 490 ("The

federal rule is strikingly similar to Iowa Rule of Civil Procedure 80(a) . . ."); Carol C. Knoepfler, Note, *Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through an Analysis of Federal and State Civil Procedure Rules*, 72 IOWA L. REV. 701, 704-06 (1987) ("Like many other states that have amended their civil procedure rules, the Iowa amendment closely tracks Federal Rule of Civil Procedure 11 . . .") (citations omitted). A provision in the Iowa Code reinforces this procedural rule by providing that a court can require a plaintiff who has filed three or more frivolous actions in a five-year period to post a bond before proceeding in another lawsuit. IOWA CODE § 617.16 (Supp. 1993).

Kansas—The Kansas version of Rule 11 is almost identical to the 1983 federal rule. KAN. CIV. PROC. CODE ANN. § 60-211 (Vernon Supp. 1992). In addition, a Kansas statute requires that a trial court assess a fee award against litigants who have asserted a claim or defense "without a reasonable basis in fact and not in good faith." *Id.* § 60-2007 (emphasis added). The annotations to the respective sanctions provisions reveal that the Rule 11 provision has produced a much greater effect upon Kansas litigation than the fee statute.

Minnesota—The Minnesota version of Rule 11 is, with a few minor changes, almost identical to the 1983 federal rule. MINN. R. CIV. P. 11. In addition, a Minnesota statute authorizes a trial court, in its discretion, to award reasonable attorney fees and costs against a lawyer or litigant who has acted fraudulently or in bad faith, has asserted a claim that is frivolous and costly to the opposing party, or has asserted a position that is intended solely to delay or to harass. MINN. STAT. § 549.21 (1988).

Missouri—With the exception of one inconsequential deleted sentence, the Missouri version of Rule 11 is identical to the 1983 federal rule. MO. R. CIV. P. 55.03. See William E. Corum, Note, *Sanctions Under Missouri Rule 55.03: Problems and Promises*, 61 UMKC L. REV. 381, 381 (1992); Ronald K. Medlin, Comment, *Rule 55.03: Good Intentions No Longer Good Enough in Missouri Courts?*, 52 MO. L. REV. 417, 420-21 (1987). A Missouri statute requires trial courts to award expenses against a litigant who asserts a cause "frivolously and in bad faith." MO. REV. STAT. § 514.205 (Supp. 1993) (emphasis added). The sanctions statute, though, has not had as much effect upon litigation in Missouri state court as Rule 55.03. See Steven M. Gray, *Sanctions Against Attorneys for Frivolous Litigation*, 42 J. MO. B. 391, 391 (1986).

Nevada—The Nevada version of Rule 11 is almost identical to the 1983 federal rule. NEV. R. CIV. P. 11. A Nevada statute allows trial courts to award fees against a litigant who asserts a claim or defense "without reasonable grounds or to harass the prevailing party." NEV. REV. STAT. § 18.010 (1986).

North Dakota—With the exception of one inconsequential deleted sentence, the North Dakota version of Rule 11 is identical to the 1983 federal rule. N.D. R. CIV. P. 11. The North Dakota Code contains two additional sanctions provision. One provision requires that trial courts award fees against a lawyer or litigant who asserts a claim for which there is "such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor." N.D. CENT. CODE § 28-26-01 (1991). The other provision allows a trial court to award fees against a lit-

principal sanctions provision, a sanctions statute—other than a Rule 11 duplicate—that uses an objective standard.¹⁷¹ While perhaps differing

ligant who makes allegations or denials in a pleading "without reasonable cause and not in good faith." *Id.* § 28-26-31.

Oregon—The Oregon version of Rule 11 is identical to the 1983 federal rule, except that it requires a member of the Oregon Bar to sign all pleadings and other legal documents filed in Oregon state court. OR. R. CIV. P. 17. An Oregon statute provides that a court, in its discretion, can award attorney fees against a litigant who "wilfully disobeyed a court order or acted in bad faith, wantonly or solely for oppressive reasons." OR. REV. STAT. § 20.105 (1988).

Rhode Island—Unlike the other states in this category, Rhode Island maintains a procedural rule that follows the pre-1983 version of Federal Rule 11. R.I. R. CIV. P. 11. A state statute, however, adopts the 1983 version of Rule 11 and thus is the principal sanctions provision in Rhode Island. R.I. GEN. LAWS § 9-29-21 (Supp. 1992).

South Dakota—The South Dakota version of Rule 11 is almost identical to the 1983 federal version. S.D. CODIFIED LAWS ANN. § 15-6-11(a) & (b) (Supp. 1993). A South Dakota statute provides, in addition, that "[i]f a civil action or special proceeding is dismissed and if the court determines that it was frivolous or brought for malicious purposes, the court may order the plaintiff to pay part or all expenses incurred by the person defending the matter, including reasonable attorneys' fees." *Id.* § 15-17-51.

Washington—The Washington version of Rule 11 is, with a few minor changes, almost identical to the 1983 federal version. WASH. SUP. CT. R. 11. The Washington Code provides that a court can, in its discretion, assess a fee award against a litigant who files a claim or defense that is "frivolous and advanced without reasonable cause." WASH. REV. CODE § 4.84.185 (Supp. 1993). The state Rule 11 provision, however, has had a much greater effect upon litigation in Washington state court. See Tausend & Johnsen, *supra* note 67, at 443.

Wyoming—The Wyoming version of Rule 11 is identical to the 1983 federal version, except that it requires a member of the Wyoming bar to sign all pleadings and papers filed in Wyoming state court. WYO. R. CIV. P. 11. A Wyoming statute likewise is almost identical to the 1983 version of Federal rule 11, but the statute, unlike the Wyoming rule, authorizes Wyoming courts to grant sanctions "up to double the amount of the reasonable expenses incurred by the other party . . . including reasonable attorney's fees." WYO. STAT. § 1-14-128 (1992).

Because the Rule 11 provision in these states uses an objective standard, and thus easier to prove, it sees more use than the other sanctions provisions. Indeed, in all these states, the supplemental sanctions provisions do little more than reinforce the Rule 11 provisions. If the supplemental sanctions provision is a fee shifting statute, in effect all it accomplishes is to ensure that frivolous claims falling within its terms are subject to a fee award, rather than some other form of sanction. *Cf. supra* note 71 and accompanying text (observing that the 1983 version of Federal Rule 11 did not require that district courts impose fee awards).

71. Only one low threshold state, Georgia, has deviated from the Rule 11 pattern and fashioned, as its principal sanctions provision, a provision that uses an objective standard. Georgia, in fact, has no Rule 11 equivalent. Its principal sanctions provision is a statute which provides (1) that a Georgia court must award attorney fees and expenses of litigation against a litigant who asserts a claim or defense "with respect

from each other in language and scope, the sanctions schemes in each of these categories share the characteristic of chilling litigants from bringing colorable claims.

Just as the defect in the high threshold model is that it confines *all* sanctions to conduct that reflects subjective bad faith,¹⁷² the defect in the low threshold model is that it confines *all* sanctions to conduct that breaches an objective standard of reasonableness. None of the *low* threshold states limits the most severe sanctions, such as large fee awards, to conduct that reflects subjective bad faith. Accordingly, the threat of severe sanctions in low threshold states will influence the filing decisions of potential litigants who, albeit in good faith, desire to pursue claims or defenses that are difficult to prove.¹⁷³ These potential litigants realize that if their claims or defenses are for one reason or another unsuccessful, opposing counsel might file a motion for sanctions alleging that the unsuccessful claims or defenses violated the prevailing objective standard.¹⁷⁴ Further, these litigants recognize that

to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim [or] defense" and (2) that a Georgia court can, in its discretion, award attorney fees and expenses against a litigant who asserts a claim or defense either that lacks substantial justification, that was interposed for delay or harassment, or that unnecessarily expanded the proceedings. GA. CODE ANN. § 9-15-14 (Michie 1993). Other Georgia sanctions powers supplement the principal sanctions provision. A Georgia statute allows a jury in civil litigation to award expenses against a defendant who has "been stubbornly litigious or has caused the plaintiff unnecessary trouble and expense." *Id.* § 13-6-11. Moreover, a Georgia Supreme Court decision, *Yost v. Torok*, gives litigants a tort cause of action for special damages against opposing litigants who pursued a claim or defense that either lacked substantial justification or lacked a justiciable issue of law or fact. *Yost v. Torok*, 344 S.E.2d 414, 417 (Ga. 1986). The Georgia legislature has since codified the *Yost* cause of action, creating a statutory action for "abusive litigation." GA. CODE ANN. 171. § 51-7-81 to 85 (Michie 1993). See generally Robert A. Elsner & John A. Bender, Jr., *The Torok Tort: Recovery for Abusive Litigation*, 23 GA. ST. B.J. 84 (1986); Charles T. Huddleston & J. Randolph Evans, *Litigators on Trial: Professionalism Implications of Yost v. Torok*, 23 GA. ST. B.J. 88 (1986); L. Ray Patterson, *Yost v. Torok: Taking Legal Ethics Seriously*, 4 GA. ST. U.L. REV. 23 (1988); Anne Proffitt Dupre, Comment, *Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem*, 21 GA. L. REV. 429 (1986).

172. See *supra* text accompanying notes 159-60.

173. *Cf. supra* text accompanying notes 72-78 (discussing the chilling effect of the 1983 amendments to Federal Rule 11).

174. See Hinerfeld, *supra* note 62, at 82. A motion for sanctions is becoming an automatic response to a losing legal argument. *Id.* "There's an attitude that losing is sanctionable," says San Francisco lawyer Alvin H. Goldstein Jr., former chair of the State Bar's Litigation Section. "The rationale is that if you lose you shouldn't have

an objective standard is unpredictable: an argument which is reasonable to one judge, even if unpersuasive, might be both unpersuasive and unreasonable to another judge.¹⁷⁵ Faced with the prospect of bearing not just an undesirable judgment but also a fee award—the predominant form of sanction¹⁷⁶—potential litigants in low threshold states often will abandon claims or defenses which, while tenable, stand a less than even chance of succeeding.¹⁷⁷

A prime example of a state in which large sanctions produce a chilling effect upon litigation is Georgia—the one low threshold state that does not use a Rule 11 duplicate.¹⁷⁸ Georgia has perhaps the most repressive sanctions scheme among the fifty states. The principal sanctions statute in Georgia declares that a trial court must impose an award of fees and expenses against a litigant who brings a claim or

seen there to begin with." *Id.* at 33.

175. *Cf. supra* text accompanying notes 66-71 (observing that the objective standard in the 1983 amendments to Federal Rule 11 led to inconsistent results). Using an objective standard to test the reasonableness of a legal conclusion presumes that the judge will be competent "to ascertain what the conclusion should have been." Webster, *supra* note 41, at 301. This presumption does not hold true in all cases. Just as the biases of a lawyer will color her perception of whether her client has a legitimate claim or defense, the biases of a judge will color her perception of whether a lawsuit is reasonable.

Judge Mark Cady of the Iowa courts argues that an objective standard is no less predictable for lawyers and litigants than it is for defendants in negligence actions. He suggests, "Our society judges others by an objective standard and lawyers are entitled to no less." Cady, *supra* note 149, at 603. His argument is too simplistic. When the circumstances require a more predictable rule of law, our society will in fact judge others by a subjective standard, rather than by an objective standard. State courts use an objective standard in negligence actions because the principal function of tort law is to compensate the victim. But while sanctions provisions might incidentally serve to compensate the victim of a frivolous lawsuit, the principal function of sanctions provisions is to punish or deter the wrongdoer. See *infra* Section III.B, n. 1134-52. Laws that carry the stigma of severe punishment, such as criminal laws, typically employ a subjective standard—the circumstances demand a greater degree of discretion in ensuring that the object of the punishment is in fact a wrongdoer. See LIVER WENDELL HOLMES, *THE COMMON LAW* 107-10 (1881).

176. Besides the various Rule 11 duplicates that authorize fee awards as one permissible form of sanction, many low threshold states also have supplemental sanctions statutes that allow or require state courts to impose fee awards against litigants who file claims or defenses that breach an objective standard. See *supra* notes 170-

77. See Hess, *supra* note 62, at 345. The chilling effect of low threshold state sanctions schemes is much more likely to be felt upon claims than defenses. Empirical research in Washington state court has revealed, for example, that the Washington state sanctions scheme has "a disproportionate impact on plaintiffs," and thus, has a greater chilling effect on plaintiffs. *Id.* at 346.

78. See *supra* note 171.

defense that lacks "a justiciable issue of law or fact."¹⁷⁹ In addition, the statute provides that a trial court can, in its discretion, impose an award of fees against a litigant who brings a claim or defense that lacks "substantial justification."¹⁸⁰ And as if that were not enough, the Georgia legislature, codifying the decision of the Supreme Court in *Yost v. Torok*,¹⁸¹ has created a tort cause of action that a person can assert against a litigant who brings a claim or defense with malice and without substantial justification.¹⁸² These measures raise the threat of large sanctions for the violation of an unpredictable objective standard.

The Georgia sanctions measures, taken together, have effected a dramatic increase in sanctions litigation in the Georgia state courts. Although the empirical data is sketchy,¹⁸³ the available evidence suggests that sanctions motions and *Yost* actions are common responses to claims and defenses filed in Georgia state courts.¹⁸⁴ The case law, in

179. GA. CODE ANN. § 9-15-14(a) (Michie 1990). See *supra* note 171.

180. GA. CODE ANN. § 9-15-14(b) (Michie 1990). The statute defines the term "lacked substantial justification" to mean "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* By comparison, the term "complete absence of any justiciable issue of law or fact" in subsection (a) means, presumably, completely frivolous or completely groundless. See *Moore v. Harris*, 410 S.E.2d 804, 806 (Ga. Ct. App. 1991).

181. 344 S.E.2d 414 (Ga. 1986).

182. GA. CODE ANN. § 51-7-81 (Michie 1993). The "abusive litigation" or *Yost* cause of action in Georgia goes farther than the malicious prosecution causes of action in most states. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 57-58. According to the supreme court in *Yost*:

Any party who shall assert a claim, defense, or other position with respect to which there exists such a complete absence of any justiciable issue of law or fact that it reasonably could not be believed that a court would accept the asserted claim, defense, or other position; or any party who shall bring or defend an action, or any part thereof, that lacks substantial justification, or is interposed for delay or harassment; or any party who unnecessarily expands the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures, shall be liable in tort to an opposing party who suffers damage thereby.

Yost, 344 S.E.2d at 417. While the decision in *Yost* allowed the claimant to recover "special damages other than attorneys fees and expenses of litigation," *Id.* The abusive litigation statute allows the claimant to recover all allowable damages, "including costs and expenses of litigation" and reasonable attorneys' fees." GA. CODE ANN. § 51-7-83 (Michie 1993).

183. The one empirical survey examining Georgia sanctions litigation addresses the opinions of 17 trial judges in Atlanta. Michael Gruber, *Battling the Many-Headed Hydra: Abusive Litigation in Georgia*, 25 GA. ST. B.J. 65, 69 (1988).

184. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra*

fact, indicates that sanctions litigation in Georgia has become almost a cottage industry. Dozens of published Georgia decisions have addressed one or another of the Georgia sanctions measures,¹⁸⁵ and undoubtedly, dozens more unpublished decisions or sanctions orders have been issued.¹⁸⁶ Two factors have contributed to this flood of sanctions litigation: (1) the objective standards in the Georgia sanctions measures encourage litigants to assert sanctions motions and claims as a means of recovering fees¹⁸⁷ and (2) the comprehensive nature of the

note 6, at 59; see also Dupre, *supra* note 171, at 464 n.167 ("I'll Yost you' is becoming the battle-cry of the Georgia litigator."). One commentator found in a survey of 17 trial court judges in Atlanta that "about one-third of the judges felt that parties rarely failed to assert Yost claims when they could properly do so." Gruber, *supra* note 183, at 70.

Interestingly, although Gruber recognized that a significant portion of the judges he surveyed believed that parties asserted Yost claims frequently, he concluded that "the flood of abusive litigation counterclaims which was anticipated two years ago has not materialized." *Id.* at 65. His conclusion, however, seems inconsistent with the published case law. See *infra* text accompanying note 185. Moreover, the statistics that Gruber gleaned from his survey are less than conclusive. According to Gruber, 13 of the judges reported that less than 25% of the cases on their dockets included requests for sanctions under § 9-15-14 or Yost, one judge reported that between 25% to 50% of his cases included sanctions requests, and three judges gave no answer. Gruber, *supra* note 183, at 69. Even if 10% or 15% of the 100,000 or so civil cases handled annually in the Georgia courts included sanctions requests, the result could in fact be a flood of sanctions litigation. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 59 n.168.

185. For a small sample of the published case law discussing the Georgia sanctions measures, see *Porter v. Felker*, 405 S.E.2d 31, 32 (Ga. 1991) (noting that denial of summary judgment does not preclude sanctions under § 9-15-14); *Haggard v. Board of Regents*, 300 S.E.2d 566, 568 (Ga. 1987) (affirming fee award of \$15,403.64 under § 9-15-14); *S. Hammond Story Agency, Inc. v. Baer*, 414 S.E.2d 287, 288 (Ga. Ct. App. 1991) (affirming fee award under § 9-15-14); *Moore v. Harris*, 410 S.E.2d 804, 806 (Ga. Ct. App. 1991) (affirming fee award under § 9-15-14); *Patterson v. Butler*, 409 S.E.2d 531, 537 (Ga. Ct. App. 1991) (affirming fee award under § 9-15-14); *Covrig v. Miller*, 406 S.E.2d 239, 241 (Ga. Ct. App. 1991) (finding that denial of Yost damages did not preclude award of fees under § 9-15-14); *Souder v. Webb*, 401 S.E.2d 630, 631 (Ga. Ct. App. 1991) (affirming \$150 fee award against pro se litigant under § 9-15-14); *Haywood v. Aerospec, Inc.*, 388 S.E.2d 367, 369 (Ga. Ct. App. 1989) (affirming fee award under § 9-15-14); *Maddox v. Brown*, 387 S.E.2d 584, 586 (Ga. Ct. App. 1989) (finding sufficient evidence for a recovery under Yost claim), *cert. denied*, 408 S.E.2d 719 (Ga. 1991).

186. Certainly, using statistics on reported and unreported opinions to draw generalizations about sanctions activity is problematic. BURMAN, *supra* note 55, at 56. "Apart from the obvious problems of under-inclusiveness and double-counting, those statistics are subject to question on the basis of possible biases in publication practices and possible differential rates of appeal." *Id.* Nonetheless, while these statistics might not give an accurate picture of the exact amount of sanctions orders or proceedings, they can be useful in calculating the trends in sanctions activity. Vairo, *Where We Live*, *supra* note 105, at 478. The amount of sanctions decisions emanating from Georgia courts reflects a clear trend of increasing sanctions activity.

187. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra*

sanctions measures implies that Georgia courts must be diligent in eradicating frivolous litigation.¹⁸⁸ The flood of sanctions litigation increases the odds that a Georgia litigant will incur sanctions for an unsuccessful legal argument and, thus, magnifies the fear that litigants might feel when asserting novel or creative propositions.¹⁸⁹ Rather than submit themselves to possible sanctions, some Georgia litigants will, inevitably, choose to abandon otherwise legitimate claims or defenses.¹⁹⁰

Obviously, Georgia is a good example of the chilling effect that low threshold sanctions schemes can exert upon litigation. The flood of sanctions litigation in Georgia ensures that litigants in the state remain conscious of the threat that their claims or defenses might bear sanctions. Nonetheless, low threshold sanctions schemes exert a chilling effect upon litigation even in states in which courts impose sanctions infrequently. As a general practice, trial courts in the states that have adopted the 1983 version of Federal Rule 11, either as their principal or sole sanctions provision,¹⁹¹ do not impose sanctions as often as the federal courts.¹⁹² Although state courts are becoming less reluctant to impose Rule 11 sanctions,¹⁹³ state courts still do not experience the

note 6, at 59-60.

188. *Yost v. Torok*, 344 S.E.2d 414, 415 (Ga. 1986) ("There is a continuing concern over the abuse of the judicial process, and a justifiable interest in its prevention There is the need to contain the corrupting effect of groundless claims, and of those which, while having some merit, are brought with the principal intent or effect of harassment, coercion, or embarrassment.")

189. Heightening the repressive effect of the Georgia sanctions scheme is the fact that there are significant differences between the scope of § 9-15-14 and the scope of the Yost cause of action. Unlike § 9-15-14 for instance, the statute that codifies the decision in Yost specifically directs its remedies against parties, not lawyers. GA. Code Ann. § 51-7-81 (Michie 1993); See *Yost*, 344 S.E.2d at 417 ("Any party who shall assert a [frivolous] claim . . . shall be liable in tort to an opposing party who suffers damage thereby."). See Dupre, *supra* note 171, at 465. Thus, because Yost strikes so close to home, litigants—who otherwise might have been willing to assert a claim on the word of their lawyer that the claim is meritorious—might have second thoughts about advancing cause of actions that would elicit a Yost claim. *Id.*

190. See *Patterson*, *supra* note 171, at 49; Dupre, *supra* note 171, at 443.

191. See *supra* notes 169-70.

192. See Hess, *supra* note 62, at 325-26 (observing that Washington courts impose few Rule 11 sanctions); Sanner & Tobias, *supra* note 75, at 325 (observing that Montana courts impose few Rule 11 sanctions); Pierre G. Walker III, Note, *Chris and Todd, Inc. v. Arkansas Department of Finance and Administration: Rule 11 in the Federal Courts—Unanswered Questions in Arkansas*, 43 ARK. L. REV. 847, 872 (1990) (observing that Arkansas courts impose few Rule 11 sanctions).

193. See Lucian T. Pera, *Rule 11 Comes to Tennessee: The Emerging State Law of*

same degree of satellite litigation that has plagued the federal courts under the federal rule.¹⁹¹ Nonetheless, while the odds of incurring Rule 11 sanctions are greater in federal court than in state court, the mere potential that low threshold sanctions schemes create for large sanctions awards is sufficient to inhibit creative advocacy.

Empirical research in the Washington state courts has revealed, for instance, that the threat of large sanctions awards under the Washington version of Rule 11 is just as apt to chill colorable litigation as the threat of sanctions under Federal Rule 11.¹⁹² The research compared sanctions litigation in the United States District Court for the Eastern District of Washington under Federal Rule 11 with sanctions in Spokane County Superior Court under Washington Superior Court Rule 11. Specifically, the author of the study, Professor Gerald F. Hess of Gonzaga University School of Law, reviewed the files of cases involving sanctions in both the federal and state trial courts, and then, he surveyed the lawyers who practiced in those courts about their experiences with Rule 11 sanctions.¹⁹³ The resulting data indicated that, as a consequence of Rule 11, 20% of the respondents who practiced in state court exhibited a decreased willingness to make arguments to extend or change the law—compared with 11% of the respondents who practiced in federal court.¹⁹⁴ Fourteen percent of the respondents who practiced in state court had declined to assert meritorious claims or defenses because of their concern about Rule 11 sanctions—compared with 23% of the respondents who practiced in federal court.¹⁹⁵ In both federal and state court, low threshold sanctions schemes produced a similar chilling effect.

Sanctions, TENN. B.J., Jan./Feb. 1992, at 24 ("Until recently, for lawsuits filed in Tennessee courts the simple answer has been that, although state courts have had their own, substantively identical, Rule 11 since 1987, most state judges have been much more reluctant than federal judges to consider imposing sanctions. Well, times are changing."); Sanner & Tobias, *supra* note 76, at 326 ("The Montana Supreme Court has issued relatively few Rule 11 opinions, and there apparently has been comparatively little Rule 11 activity in the state district courts. Nonetheless, the supreme court has published more decisions recently, while Rule 11 activity seems to be increasing in the trial courts.");

194. See Hess, *supra* note 62, at 345 ("satellite litigation is not a serious problem in state court").

195. *Id.* (finding that while the state courts in Washington assessed far fewer Rule 11 sanctions than the federal courts, the chilling effect of Rule 11 "in state court was similar to its effect in federal court"). Cf. Tausend & Johnsen, *supra* note 67, at 443 ("While far fewer cases involving sanctions under amended Washington State CR 11 have reached the appellate level, the state appellate courts seem to give solid encouragement to the use of the amended rule to curb abuses in attorney conduct.");

196. Hess, *supra* note 62, at 316-17 (discussing the methodology of the study).

197. *Id.* at 337.

198. *Id.*

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Because low threshold sanctions schemes chill legitimate claims and defenses, the low threshold model is just as inadequate as the high threshold model in providing a balanced approach to frivolous litigation. When sanctions schemes are so severe that the mere fact of their existence exerts a chilling effect upon litigation, the schemes can, potentially, retard the development of the law. The law is not, and should not be, static. It must evolve over time to reflect changing economic and sociological circumstances. But if litigants are inhibited from pursuing attempts to change the law, the law will not evolve and, accordingly, will not be able to address the different circumstances of an advancing society. To ensure that the law will evolve, the courts must remain open to litigants who desire to change existing law.¹⁹⁹ Certainly, the courts should possess sufficient measures with which to control litigation that abuses the judicial process, but the courts should not be permitted to impose repressive sanctions against litigants whose offense is, simply, to press a position that departs from the current popular conception of the law.²⁰⁰ Sanctions schemes must strive for a reasonable balance between redressing litigation abuse and preserving free access to the courts.

3. The Hybrid Model

Of the three sanctions models, the hybrid model goes the farthest in attempting to accommodate the competing goals of curbing litigation abuse and preserving free access. States that follow this model preserve an objective standard for the imposition of sanctions, but nonetheless, they incorporate into their sanctions schemes one or more procedural devices intended to mitigate the repressive effects of the objective standard. The states that have enacted hybrid sanctions schemes divide into four categories: (1) states that have adopted a hybridized version of the 1983 Federal Rule 11 as their sole sanctions provision;²⁰¹ (2) states

199. See *infra* Section III.A, pp. 1120-34.

200. See *infra* Section IV, pp. 1152-59.

201. Three states have enacted as their sole sanctions provision a hybridized procedural rule modeled upon the 1983 version of Federal Rule 11:

Alaska—The Alaska version of Rule 11 is almost identical to the 1983 federal rule, except that since 1990 the Alaska rule does not contain a sentence that authorizes courts to award sanctions. See ALASKA R. CIV. P. 11. Interpreting this rule, the Alaska courts have concluded that sanctions are discretionary, not mandatory, for a violation of the rule. *In re Benson*, 816 P.2d 200, 201 n.1 (Alaska 1991). Significantly, in Alaska, unlike in other states, prevailing

that have adopted a hybridized version of the 1983 Federal Rule 11 as their principal, but not sole, sanctions provision;¹⁰² (3) states that have

parties in litigation receive a portion of their attorney fees as a matter of course. ALASKA R. CIV. P. 82; see also ALASKA STAT. § 09.60.010 (1993) (requiring supreme court to "determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case"). See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AMER. U.L. REV. 1567, 1622-26 (1993); Gregory J. Hughes, Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 139-45 (1974); Kevin Michael Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429, 448-53 (1993).

Illinois—The Illinois sanctions provision is substantially similar to the 1983 version of Federal Rule 11, but it contains two significant differences. First, unlike the mandatory federal rule, the Illinois rule states that a court "may" in its discretion, but need not, award an appropriate sanction for a violation of the rule. See ILL. S. Ct. R. 137. Second, the Illinois rule states that the trial judge must "set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." *Id.* See generally Donald B. Hilliker & David F. Wentzel, *Coping in the '90s: The Demand on Illinois Litigators Under Supreme Court Rule 137*, 80 ILL. B.J. 168, 168 (1992); Jeffrey A. Parness, *Observations on Recent Efforts to Deter Frivolous Papers in the Illinois Circuit Courts*, 21 LOY. U. CHI. L.J. 859, 860-61 (1991); George W. Timberlake & Nancy Plonk, *Attorney Sanctions in Illinois Under Illinois Supreme Court Rule 137*, 20 LOY. U. CHI. L.J. 1027, 1027-28 (1989).

Kentucky—The Kentucky version of Rule 11 is almost identical to the 1983 federal rule, except that it requires that courts "postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment." See KY. R. CIV. P. 11. Further, unlike the federal appellate courts, at least one Kentucky appellate court has reviewed a Rule 11 sanctions decision under a tripartite standard of review. *Clark Equip. Co. v. Bowman*, 762 S.W.2d 417, 421 (Ky. Ct. App. 1988). Cf. *supra* note 101.

¹⁰² Seven states have adopted a hybridized version of 1983 Federal Rule 11 as their principal, but not sole, sanctions provision:

Arizona—The Arizona version of Rule 11 is virtually indistinguishable from the 1983 federal rule. See ARIZ. R. CIV. P. 11. See generally Chad Steven Campbell, Note, *Risky Business: The Nuts and Bolts of Amended Rule 11(a)*, 19 ARIZ. ST. L.J. 145, 145-46 (1987). Significantly, though, the comments adjoining the Arizona rule, and the Arizona cases interpreting the rule, adopt a conduct rather than product approach to Rule 11 sanctions. ARIZ. R. CIV. P. 11 state bar committee note ("The signing of a pleading, motion or other paper . . . now constitutes a certification of a bona fide belief formed after reasonable inquiry that it is well grounded in fact and warranted by law or a good faith argument for extension, modification or reversal of existing law . . ."); see also *Boone v. Superior Court*, 700 P.2d 1335, 1341 (Ariz. 1985) (en banc) ("The new rule requires no more than a good faith belief, formed on the basis of [a] reasonable investigation, that a colorable claim exists."). Compare *Wright v. Hills*, 780 P.2d 416, 422 (Ariz. Ct. App. 1989) (suggesting that Rule 11 standard does not incorporate any notion of subjec-

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tive good faith) with *James, Cook & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection*, 868 P.2d 320 (Ariz. Ct. App.) (abrogating *Wright*), rev. denied (March 1, 1994). Supplementing the Rule 11 provision, an Arizona statute requires that a court award attorney fees to a claimant when clear and convincing evidence demonstrates that the opposing litigant filed a claim or defense that "constitutes harassment, is groundless and [was] not made in good faith." ARIZ. REV. STAT. ANN. § 12-341.01 (1992).

Colorado—The Colorado version of Rule 11 is almost identical to the 1983 federal rule, except that the Colorado rule adds a safe harbor provision which allows litigants to withdraw or dismiss frivolous pleadings and papers with impunity from sanctions. See COLO. R. CIV. P. 11. In addition, a Colorado statute requires that courts impose attorney fees against any lawyer or litigant who brought an action which lacked substantial justification, was interposed for delay or harassment, or unnecessarily expanded proceedings. COLO. REV. STAT. § 13-17-102(4) (1987). As used in the statute, the term "lacked substantial justification" means "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* Like the procedural rule, the statute extends a safe harbor that allows litigants to withdraw or dismiss frivolous actions with impunity. *Id.* § 13-17-102(5).

Hawaii—The Hawaii version of Rule 11 is almost identical to the 1983 federal rule. See HAW. R. CIV. P. 11. Until recently, the Hawaii courts reviewed Rule 11 sanctions decisions under a tripartite standard rather than the abuse of discretion standard that most state appellate courts use to review sanctions decisions. Compare *Coll v. McCarthy*, 804 P.2d 881, 886-87 (Haw. 1991); see also *DeSilva v. Burton*, 832 P.2d 284, 288 (Haw. Ct. App. 1992), overruled by *Matter of Hawaiian Flour Mills, Inc.*, 868 P.2d 410 (Haw. 1994). In addition, a Hawaii statute allows a Hawaii court, "as it deems just," to assess a fee award against a litigant who brings a frivolous claim or defense. HAW. REV. STAT. § 607-14.5 (Supp. 1992). In a decision interpreting the statute, the Hawaii Supreme Court has defined the term "frivolous" narrowly, concluding that fee awards are appropriate under the statute if the challenged claim or defense is "manifestly and palpably without merit, so as to indicate bad faith." *Coll*, 804 P.2d at 887 (quoting *Kawaihae v. Hawaiian Ins. Co.*, 619 P.2d 1086, 1091 (Haw. Ct. App. 1980)). Obviously, the Hawaii version of Rule 11 has a much more significant impact than the sanctions statute. Given the apparent change of perspective in the Hawaii Supreme Court, from the time of *Coll* to *Hawaiian Flour Mills*, though, Hawaii may be the one state to be regressing from a hybrid model to a low threshold model. See *infra* note 212.

Louisiana—The Louisiana version of Rule 11 is similar to the 1983 federal rule, but the Louisiana rule contains two significant differences. First, the Louisiana rule states that a court must conduct a hearing before it can impose sanctions. LA. CODE CIV. PROC. ANN. art. 863(E) (West Supp. 1993). Second, the Louisiana rule includes a safe harbor provision which states that a court cannot impose a sanction for an original petition that is filed within 60 days of a prescriptive date and then dismissed within 90 days later. *Id.* art. 863(F). See generally *Honsinger*, *supra* note 16, at 348. Louisiana statutes

also contain a sanctions provision that allows courts to award fees against a litigant who brings a "frivolous" discrimination claim. LA. REV. STAT. ANN. § 49:145 (West 1987).

Michigan—The Michigan version of Rule 11 operates much like the 1983 federal rule, except that the Michigan rule specifies that it does not allow punitive damages as sanctions. See MICH. R. CIV. P. 2.114. Further, the Michigan appellate courts review Rule 2.114 sanctions decisions under a tripartite standard. See *Contel Sys. Corp. v. Gores*, 456 N.W.2d 398 (Mich. Ct. App. 1990). Besides the Rule 11 provision, a Michigan statute also provides that, upon the motion of a prevailing party in a civil lawsuit, a Michigan court must award attorney fees and costs against a litigant who initiated a claim or defense that meets one of the following conditions: (1) it was initiated with the purpose of harassing, embarrassing or injuring the prevailing party; (2) it lacks a reasonable factual basis; or (3) it is devoid of arguable legal merit. MICH. COMP. LAWS ANN. § 600.2591 (West Supp. 1993). But although Rule 2.114 is a hybridized rule, it is still broader than the Michigan statute, which applies solely to prevailing parties; accordingly, Rule 2.114 is the principal sanctions provision in Michigan. See JAMES A. MARTIN, ROBERT DEAN & ROBERT B. WEBSTER, MICHIGAN COURT RULES PRACTICE 62 (3d ed. Supp. 1992); L. Paul Hudgins, Comment, *Vexatious and Frivolous Lawsuits: Attorney Sanctions in Michigan*, 8 COOLEY L. REV. 657, 670-71 (1991); Marianne E. Lebeuf, Note, *Frivolous and Abusive Litigation Practices: A Survey of Michigan Procedural and Substantive Remedies*, 64 U. DET. L. REV. 247, 260 (1986).

Utah—The Utah version of Rule 11 is almost identical to the 1983 federal rule. See UTAH R. CIV. P. 11. The Utah appellate courts, however, review Rule 11 sanctions decisions under a tripartite standard rather than the abuse of discretion standard that most state appellate courts use to review sanctions decisions. See *Barnard v. Sutliff*, 846 P.2d 1220, 1235 (Utah 1992). A Utah statute requires a Utah court to award fees to a prevailing litigant "if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." UTAH CODE ANN. § 78-27-56 (1992) (emphasis added). The statute gives a court discretion to reduce or even decline a fee award if either (1) the offending litigant files an affidavit of impecuniosity or (2) the court enters into the record the reasons for not awarding fees. *Id.* See Kevin Richards, Comment, *Recent Developments in Utah Law: The Awarding of Attorney's Fees in Frivolous Law Suits*, 1989 UTAH L. REV. 342, 345-46.

Wisconsin—The Wisconsin version of Rule 11 is similar to the 1983 federal rule, except that the Wisconsin rule gives trial courts the discretion to refuse a sanction award even if the circumstances establish a technical violation of the rule. See WIS. STAT. ANN. § 802.05 (West Supp. 1992). Besides § 802.05, the Wisconsin statutes also include a provision that requires a court to impose costs and fees against a litigant who either (1) brings or continues a claim or defense "in bad faith, solely for purposes of harassing or maliciously injuring another" or (2) brings a claim or defense that she know or should have known "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *Id.* § 814.025. See Jay W. Endress, Comment, *Is Wisconsin's Frivolous Claim Statute Frivolous? A Critical Analysis of Wis. Stat. § 814.025*, 68 MARQ. L. REV. 270, 298-99 (1985) (arguing that § 814.025 is ineffective because both prongs of the statute have an element of subject-

created, as their principal sanctions provision, a hybridized sanctions statute other than a Rule 11 duplicate;²⁰³ and (4) states that supple-

tivity). Section 814.025 states, however, that § 802.05 controls over § 814.025 in instances in which both sanctions provisions are applicable. WIS. STAT. ANN. § 814.025 (West Supp. 1992).

As was the case in the low threshold states that supplemented a sanctions provision based upon the 1983 version of Federal Rule 11 with a sanctions statute, the supplemental statutes in these hybrid states do little more than reinforce the dominant Rule 11 provisions. See *supra* note 170.

203. Three states, although perhaps borrowing a few elements from Rule 11, have deviated from the Rule 11 model and drafted their own unique hybridized sanctions schemes:

Nebraska—The Nebraska sanctions statute requires Nebraska courts to assess reasonable fees and costs against any lawyer or litigant who asserts a claim or defense "which a court determines is frivolous or made in bad faith." NEB. REV. STAT. § 25-824(2) (1989). If a court grants a sanction award, the statute requires that the court list the reasons for the award. *Id.* § 25-824.01. Moreover, the statute provides a safe harbor: sanctions are unavailable against a lawyer or litigant who dismisses a claim within a reasonable time after the person knew or should have known that he would not prevail. *Id.* § 25-824(5).

New York—The principal New York sanctions provision states that a New York court can, in its discretion, award fees or other financial sanctions against a lawyer or litigant who engages in "frivolous conduct." N.Y. RULES § 130-1.1. The provision defines "frivolous conduct" as conduct—i.e., a pleading, motion or other paper—that either (1) is "completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or (2) is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." *Id.* The provision requires that before imposing sanctions, a court must make written factual findings stating its reasons for doing so, and the provision limits the total amount of a financial award, whether a fee award or some other form of financial sanction, to \$10,000. *Id.* § 130-1.2. A New York statute supplements the principal sanctions provision. The statute provides that a New York court must award reasonable attorney fees—not exceeding \$10,000—against a litigant who asserts a frivolous claim or defense "in an action to recover damages for personal injury, injury to property or wrongful death." N.Y. CIV. PRAC. L. & R. § 8303-a(a) (McKinney Supp. 1993). The statute defines "frivolous" in much the same manner as does the principal New York sanctions provision. *Id.* § 8303-a(c). Essentially, the sanctions statute does nothing more than remove the discretion of the court to decline a sanctions award in the range of cases that fall within the scope of the statute. See DAVID D. STIEGEL, NEW YORK PRACTICE 633-34 (2d ed. 1991); see also Barbara A. Schaus, Comment, *Sanctions for Frivolous Litigation Take Hold in New York*, 38 BUFF. L. REV. 280, 304-05 (1990).

Texas—The Texas sanctions provision, like Federal Rule 11, requires that all pleadings or other legal documents filed in Texas state court must be signed.

ment a pre-1983 version of Federal Rule 11 with a hybridized sanctions statute.²⁰⁴ Unfortunately, the hybrid sanctions schemes in these states

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See TEX. R. CIV. P. 13. According to the Texas rule, a signature upon a document filed in Texas court certifies that the signing individual has read the document and that, to the best of his knowledge and belief, the document "is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." *Id.* If a document is signed in violation of this requirement, the court must impose an appropriate sanction. *Id.* The rule declares, however, that a court must presume that legal documents are filed in good faith. *Id.* Moreover, the rule states that "[n]o sanctions . . . may be imposed except for good cause, the particulars of which must be stated in the sanction order." *Id.* See *Watkins v. Pearson*, 795 S.W.2d 257, 260 (Tex. Ct. App. 1990) ("A mere recitation that 'good cause being shown' does not satisfy [Rule 13] [T]he rule inherently makes it incumbent upon the trial court to point out with sufficient particularity the offensive acts so that remedial action may be taken by the party or his counsel."). In effect, the Texas rule lessens the burden that a pleader must bear in proving that she acted appropriately: "under state practice, a pleader satisfies the requirement if any basis exists in law or fact; under federal practice, a pleader must meet a much tougher standard, by demonstrating a 'well-grounded' basis." REPORT OF TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 69-70 (1992). See David J. Beck, *Sanctions Under New Rule 13: A More Effective Tool to Prevent Overzealous Advocacy*, 51 TEX. B.J. 1120, 1121 (1988); Alan B. Rich, *Certified Pleadings: Interpreting Texas Rule 13 in Light of Federal Rule 11*, 11 REV. LITIG. 59, 75-79 (1991).

204. Eight states supplement a sanctions provision based upon the pre-1983 version of Rule 11 with a hybridized sanctions statute that uses an objective standard to define conduct that merits sanctions:

Alabama—The Alabama version of Rule 11 is almost identical to the pre-1983 version of the federal rule, except that the Alabama rule applies to motions and other papers as well as pleadings—an addition that the federal rule did not adopt until the 1983 amendments. See ALA. R. CIV. P. 11. The more significant Alabama sanctions provision is the Alabama Litigation Accountability Act. See ALA. CODE §§ 12-19-270 to -276 (Supp. 1992). The Act requires that an Alabama court assess fees and costs against a lawyer or litigant who brings a claim or defense that the court determines to be "without substantial justification." *Id.* § 12-19-272(a). To mitigate the effect of the objective "without substantial justification" standard, however, the Act includes a safe harbor clause, *id.* § 12-19-272(d), and requires that a court make specific factual findings before imposing a fee award. *Id.* § 12-19-273.

Indiana—The Indiana version of Rule 11 is, with few significant deviations, almost identical to the pre-1983 version of the federal rule. See IND. TRIAL R. 11. Thus, the more significant sanctions provision in Indiana is a statute that allows a court, in its discretion, to award fees against a litigant who either (1) brought a frivolous, unreasonable, or groundless action or defense, (2) continued to litigate an action or defense after the action or defense became frivolous, unreasonable, or groundless or (3) litigated an action in bad faith. IND. CODE § 34-1-32-1 (1986). See Donald Clementson-Mohr & Jeffrey A. Cooke, *F frivolous, Unreasonable or Groundless Litigation: What Shall the Standard Be for Awarding Attorney's Fees?*, 22 IND. L. REV. 299, 304 (1988)

(observing that because the conditions in the Indiana statute are not stated in the disjunctive, the statute does not require subject to bad faith as a condition to a fee award); Andrew W. Hull, *Attorney's Fees for Frivolous, Unreasonable or Groundless Litigation*, 20 IND. L. REV. 151, 166-67 (1987) (same). The Indiana statute does not define the words "frivolous" or "groundless." See Clementson-Mohr & Cooke, *supra* at 304 ("The problem facing Indiana courts now is determining an appropriate legal standard with which to construe the language of [the statute]. 'Frivolous, unreasonable, or groundless' are not self-defining terms.").

Maryland—The Maryland version of Rule 11 is similar to the pre-1983 federal rule. See MD. R. CIV. P. 1-311. Maryland has supplemented its Rule 11 provision with another procedural rule which states that a Maryland court, in its discretion, can award reasonable fees against a lawyer or litigant whose conduct "in maintaining or defending any proceeding was in bad faith or without substantial justification." MD. R. CIV. P. 1-341 (emphasis added). The Maryland Supreme Court has required that sanctioning courts give advance notice before imposing an award of sanctions. *Zdravkovich v. Bell Atlantic-Tricon Leasing Corp.*, 592 A.2d 498, 503 (Md. 1991). The supreme court also has concluded that sanctioning courts must make explicit factual findings supporting the award. *Id.*

Mississippi—The Mississippi version of Rule 11 is similar to the pre-1983 federal rule, except that the Mississippi rule applies to motions as well as pleadings. See MISS. R. CIV. P. 11. Moreover, and perhaps more significantly, the Mississippi rule includes a clause which allows a court, in its discretion, to award fees and expenses against a litigant who advances a motion or pleading that "is frivolous or is filed for the purpose of harassment or delay." *Id.* A Mississippi statute, the Litigation Accountability Act of 1988, offers an additional sanctions provision for the Mississippi courts. MISS. CODE ANN. §§ 11-55-1 to -15 (Supp. 1992). But see Robertson, *supra* note 48, at 116 (arguing that the Mississippi Act is not an independent sanctions provision in itself, but rather serves as an aid for interpreting Mississippi Rule 11). The Act requires that Mississippi courts must assess reasonable fees and costs against a lawyer or litigant who asserts a claim or defense that "is without substantial justification" or that "was interposed for delay or harassment." MISS. CODE ANN. § 11-55-5(1) (Supp. 1992). Like the Alabama Act, the Mississippi Act includes a safe harbor clause, *id.* § 11-55-5(2), and requires that sanctioning courts make factual findings supporting sanctions awards. *Id.* § 11-55-7.

New Hampshire—The New Hampshire version of Rule 11 is similar to the pre-1983 federal rule. See N.H. R. CIV. P. 15. Another New Hampshire rule states that a court "may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion." N.H. R. CIV. P. 69. In addition, a New Hampshire statute provides that in tort or contract actions, the court can, in its discretion, award fees and costs against a litigant who asserts a claim or defense that "is frivolous or intended to harass the prevailing party." N.H. REV. STAT. ANN. § 507:15 (Supp. 1992). The statute adds that besides

awarding fees, the court should report the offensive conduct to the Supreme Court Committee on Professional Conduct. *Id.* See Merrick C. Weinstein, *Frivolous Lawsuits and RSA 507:15—Let the Proponent Beware*, 28 N.H. B.J. 103, 109-10 (1986).

New Jersey—The New Jersey version of Rule 11 is almost identical to the pre-1983 federal rule, except that the New Jersey rule states that both lawyers and pro se litigants can be subject to contempt for a willful violation. See N.J. R. Civ. P. 1:4-8. The New Jersey appellate courts have concluded that the rule forbids monetary sanctions, reasoning that the rule allows trial courts only to pursue a disciplinary action or a contempt proceeding against a lawyer who files a bad faith pleading. See, e.g., *Berthelsen v. Hall*, 476 A.2d 1276, 1277 (N.J. Super. Ct. App. Div. 1984). Accordingly, the more prominent sanctions provision in New Jersey is the frivolous litigation statute, which states that a court, in its discretion, can impose reasonable attorney fees against a litigant who files a frivolous claim or defense. N.J. REV. STAT. § 2A:15-59.1(a) (Supp. 1993). The statute defines a "frivolous" claim or defense to include either (1) a claim or defense that "was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury" or (2) a claim or defense that the sanctioned litigant "knew, or should have known . . . was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *Id.* § 2A:15-59.1(b). See *Iannone v. McIlhale*, 583 A.2d 770, 776 (N.J. Super. Ct. App. Div. 1990) (stating that the statute imposes a standard of objective reasonableness); see also *Nissenbaum & Lem*, *supra* note 134, at 185 (same).

Ohio—The Ohio version of Rule 11 is almost identical to the pre-1983 federal rule. See OHIO R. Civ. P. 11. Like the original federal rule, the Ohio rule is based upon a narrow subjective standard. See *Haubeil & Sons Asphalt and Materials, Inc. v. Brewer & Brewer Sons, Inc.*, 565 N.E.2d 1278, 1279 (Ohio Ct. App. 1989) ("Before a court may subject an attorney to 'appropriate action' under Civ. R. 11, the attorney must have willfully violated the rule . . ."); see also James L. Graham, *Navigating Between the Scylla of Tolerating Litigation Abuse and the Charybdis of Chilling Legitimate Advocacy: An Overview of Federal Rule 11 and Comparable Ohio Provisions*, 18 CAP. U. L. REV. 1, 28 (1989) ("[T]he Ohio Rule is subject to the same limitations as was the original Federal Rule"). An Ohio statute offers a more objective standard for measuring frivolous conduct. OHIO REV. CODE ANN. § 2323.51 (Anderson 1991). The statute authorizes an Ohio court, in its discretion, to award reasonable attorney fees to a litigant who has suffered frivolous conduct. *Id.* § 2323.51(B)(1). The statute defines "frivolous conduct" to include either (1) conduct that "serves merely to harass or maliciously injure" or (2) conduct that is "not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." *Id.* § 2323.51(A)(2). Before a court imposes sanctions under this statute, the court must conduct a hearing in which parties can present relevant evidence. *Id.* § 2323.51(B)(2)(c). See generally Raymond A. Nolan, Comment, *Ohio's Frivolous Conduct Statute: A Need for Stronger Deterrence*, 21 CAP. U. L. REV. 201 (1992).

In almost all of these states, the supplemental sanctions statutes offer the state courts a far more attractive weapon against litigation abuse. The objective standard in the supplemental statutes is much easier to establish than is the subjective standard in the

tend to have almost as much of a chilling effect upon litigation as low threshold sanctions schemes.²⁰⁶

The procedural devices that states have used to "hybridize" their sanctions schemes do not negate the repressive effects of the objective standard for imposing severe sanctions. Sanctions provisions that give judges the discretion to refuse to grant a sanctions award, for instance, do little good in reducing the disadvantages of sanctions litigation. Usually, these sanctions provisions recite that a judge "may"—not "shall"—assess sanctions against the offending litigant.²⁰⁷ Inserting discretionary language into a sanctions provision, however, does not in itself ensure that judges will exercise reasonable discretion in asserting their sanctioning power.²⁰⁸ If a judge is predisposed toward using sanctions as a docket control device, the fact that the relevant sanctions provision states that sanctions "may" be imposed, rather than "shall" be imposed, will not discourage the judge from assessing sanctions awards.²⁰⁹ And if judges are not discouraged from exercising

provisions based upon the pre-1983 version of Federal Rule 11. See *supra* note 149 and accompanying text.

205. See *infra* text accompanying notes 200-23.

206. See, e.g., IND. CODE § 34-1-32-1 (1986) ("In any civil action, the court may award attorney's fees [for frivolous conduct] . . ."); N.H. REV. STAT. ANN. § 507:15 (Supp. 1992) (If "it clearly appears to the court that the action or any defense is frivolous or intended to harass the prevailing party, then the court . . . may award against the party who brought such action or raised such defense the amount of costs and attorneys' fees incurred by the prevailing party."); WISC. STAT. ANN. § 802.05 (Supp. 1992) ("If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may . . . impose an appropriate sanction . . ."); ILL. S. CT. R. 137 ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . may impose upon the person who signed it, a represented party, or both, an appropriate sanction . . ."); MD. R. Civ. P. 1-341 ("If the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay . . . reasonable expenses, including reasonable attorney's fees.").

207. See Tobias, *supra* note 92, at 1786. The converse is also true. Mandatory sanctions provisions in themselves are no more likely to foster excessive sanctions activity than discretionary sanctions provisions. See Robertson, *supra* note 48, at 133 (noting that "[i]n cases where, under pre-1983 Rule 11, the district court would not be inclined to impose sanctions, the court today will merely find that there is no violation in the first place").

208. See Tobias, *supra* note 92, at 133. Certainly, discretionary sanctions provisions are not without advantages and, indeed, are preferable to mandatory sanctions provisions in many ways. For example, discretionary sanctions provisions allow judges to

their sanctioning power excessively, then the threat that sanctions pose to potential litigants remains an inhibitive influence upon litigation.²⁰⁸ Thus, as long as a sanctions scheme permits large sanctions awards for conduct that breaches an objective standard, the sanctions scheme will continue to exert a chilling effect upon litigation, regardless of whether sanctions awards are discretionary or mandatory.

Another procedural safeguard that some states have adopted to hybridize their sanctions schemes is a tripartite—or "three-standard"—standard of appellate review for sanctions decisions. Rejecting the logic of the Supreme Court in *Cooter & Gell* that appellate courts should review all sanctions decisions under an abuse of discretion standard,²⁰⁹ the courts in these states instead exercise three different standards for reviewing aspects of the sanctioning process.²¹⁰ Generally, the appellate courts in these states review factual findings for clear error, review legal decisions about the scope and operation of the relevant sanctions provision de novo, and review the form and amount of sanctions for abuse of discretion.²¹² In adopting the tripartite standard,

overlook minor or technical offenses that should not require sanctions awards. See Johnson et al., *supra* note 47, at 668 ("In some cases, the violation of the rule is insignificant and has little or no effect on the administration of justice. The district court in such cases should have the discretion to conclude that the violation does not warrant any sanction—in effect, that the 'appropriate' sanction is no sanction at all."); see also Simpson, *supra* note 109, at 511.

209. Cf. Robertson, *supra* note 48, at 133 (noting that the reason the 1983 amendments to Federal Rule 11 effected a sanctions explosion was not necessarily related to the fact that sanctions under the amended rule were mandatory, but rather was related to the fact that the amended rule sent a message to federal judges that litigation abuse would not be tolerated).

210. See *supra* text accompanying notes 100-05.

211. See *infra* text accompanying note 212. Interestingly, the supreme court in at least one state, Michigan, has deviated from the *Cooter & Gell* model but has not adopted a tripartite standard of review. In *Contel Sys. Corp. v. Gores*, 455 N.W.2d 98 (Mich. Ct. App. 1990), the Michigan Supreme Court concluded that Michigan appellate courts should use the clearly erroneous standard, rather than the abuse of discretion standard, to review findings of fact under Rule 2.114—the Michigan equivalent of Federal Rule 11. *Id.* at 400. While the supreme court did not expressly adopt a tripartite standard, though, it did not foreclose the possibility that it might use a de novo standard to review legal conclusions regarding the scope and interpretation of rule 2.114. See *id.*

212. See, e.g., *DeSilva v. Burton*, 832 P.2d 284, 288 (Haw. Ct. App. 1992) (disapproved by Matter of Hawaiian Flour Mills, Inc., 868 P.2d 419 (Haw. 1994)); *Clark Equip. Co. v. Bowman*, 762 S.W.2d 417, 421 (Ky. Ct. App. 1988); *Barnard v. Sutliff*, 46 P.2d 1229, 1235 (Utah 1992). The three categories tend to blend together. A factual finding about the "frivolous" actions of a particular litigant, for instance, differs little from a legal conclusion about the scope of a sanctions provision. The Hawaii courts illustrate this problem rather dramatically. In *DeSilva v. Burton*, the Hawaii Court of Appeals concluded that the question whether, for purposes of Hawaii Rule 11, a document is well grounded in fact and warranted under the existing law is a

these states intend to curtail the discretion vested in the trial courts and, in the process, ensure more uniform sanctions decisions "in an area that . . . suffers from ambiguity."²¹³

Nonetheless, the tripartite standard is insufficient in itself to quell the chilling effect of a sanctions scheme based upon an objective standard of conduct. First, while few can quibble with the notion that appellate courts should exercise more rigorous review over sanctions decisions,²¹⁴ the tripartite standard gives appellate courts no more power to review the most important sanctions decisions than does the abuse of discretion standard that the Supreme Court articulated in *Cooter & Gell*.²¹⁵ A principal reason that the sanctions explosion in the federal and state courts has chilled litigation is the fact that appellate courts have been reluctant to vacate excessive fee awards.²¹⁶ The tripartite standard will not change that fact: even under the tripartite standard, appellate courts will continue to defer to trial court decisions regarding the form and amount of sanctions.²¹⁷ Second, the success of the tripartite standard in mitigating the repressive effects of sanctions schemes depends, unavoidably, upon the cooperation of appellate judges.

legal question reviewed de novo. *DeSilva*, 832 P.2d at 288. But in *Coll v. McCarthy*, the Hawaii Supreme Court concluded that the question whether a pleading is "frivolous" under § 607-14.5 of the Hawaii statutes is a mixed question of law and fact reviewed for clear error. *Coll v. McCarthy*, 804 P.2d 881, 886-87 (Haw. 1991).

213. *Barnard*, 846 P.2d at 1235.

214. See Johnson et al., *supra* note 47, at 672 ("More vigorous appellate review is the only mechanism available to police possible abuses of the [sanctions rules].")

215. The difference between the standard of review articulated in *Cooter & Gell* and other standards of review for sanctions decisions "appears to be one of terminology, rather than one of substance." MARTIN ET AL., *supra* note 202, at 62. Even while the Supreme Court in *Cooter & Gell* rejected a tripartite standard that would authorize de novo review for legal conclusions and clear error review for factual findings, the Court observed that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). See Johnson et al., *supra* note 47, at 662 ("In essence, the decision in *Cooter & Gell* may have implicitly adopted the same tripartite standard of review it expressly rejected.")

216. See Johnson et al., *supra* note 47, at 650 & 658-59; cf. Mallor, *supra* note 19, at 615 ("Although the shifting of attorneys' fees for abuses of the judicial system holds out the promise of alleviating the congestion that cripples courts, it also holds out the threat of intimidating litigants with potentially meritorious claims and inhibiting the growth and refinement of the substantive law.")

217. See *DeSilva*, 832 P.2d at 288; *Clark Equip. Co.*, 762 S.W.2d at 421; *Barnard*, 846 P.2d at 1235.

es. Just as discretionary sanctions provisions will not slow the sanctions explosion if trial judges remain predisposed towards using sanctions as a docket control device,²¹⁸ the tripartite standard of review will not slow the sanctions explosion if appellate judges refuse to assume a more vigorous role in reviewing sanctions decisions.²¹⁹ Third, the costs of overturning a sanctions award remain the same under a tripartite standard. As long as the trial court continues to evaluate conduct objectively, the mere fact that a litigant might be able to secure reversal on appeal will not inspire the litigant to run the risk of asserting a novel or unusual claim.

Still other states have required, as a means of hybridizing their sanctions schemes, that their courts conduct an oral hearing before imposing sanctions,²²⁰ issue factual findings in support of sanctions awards,²²¹ or postpone rulings on sanctions motions until final judgment.²²² Each of these procedural safeguards serves a laudable function—encouraging judges to give their sanctions decisions more time and attention.²²³ Undoubtedly, each of these procedural safe-

218. See *supra* text accompanying note 208.

219. See Johnson et al., *supra* note 47, at 672.

220. See, e.g., LA. CODE CIV. PROC. ANN. art. 863 (West 1994) ("A sanction . . . shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction."); OHIO REV. CODE ANN. § 2323.51(B)(2)(c) (Anderson 1991) (stating that a court may award reasonable attorney fees only after it conducts a hearing in which it "allows the parties and counsel of record involved to present any relevant evidence").

221. See, e.g., ALA. CODE § 12-19-273 (Supp. 1992) ("When granting an award of costs and attorneys' fees, the court shall specifically set forth the reasons for such award . . ."); MISS. CODE ANN. § 11-55-7 (1993) ("When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award . . ."); NEB. REV. STAT. § 25-824.01 (1989) ("When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award . . ."); ILL. S. CT. R. 137 ("Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order."); N.Y. RULES § 130-1.2 ("The court may make an award of costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate"); TEX. R. CIV. P. 13 ("No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order").

222. See, e.g., KY. R. CIV. P. 11 ("The Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment").

223. For the most part, these procedural safeguards—requiring oral hearings, requiring factual findings and postponing sanctions decisions—protect the subjects of sanctions motions against awards that a judge might be inclined to make in "the heat of the moment." Requiring a brief hearing in which lawyers can argue the merits of a sanctions award, for example, serves three functions: (1) it permits the subjects of the proposed sanctions to explain their conduct; (2) it allows the judge the time to

guards improves the sanctions scheme to which it is attached. None is sufficient in itself, however, to temper the repressive effects of the objective standard for imposing sanctions. Oral hearings and factual findings cannot diminish the fear that litigants might have for incurring large sanctions awards. If a sanctions scheme authorizes large awards even in circumstances evincing good faith, the mere fact that a court must conduct a hearing before imposing sanctions or must enter its reasons for imposing sanctions into the record will not encourage litigants to bear the risk of pressing positions which, while colorable, are less than certain to succeed.

Empirical data about the chilling effect of hybrid sanctions schemes is, regrettably, nonexistent.²²⁴ The closest available data is a recent poll of Texas lawyers and judges, which found that the Texas sanctions scheme does not represent an acceptable answer to the problem of litigation abuse.²²⁵ Significantly, the Texas sanctions scheme, in

consider the "severity and propriety" of the proposed sanctions; and (3) it ensures that "the facts supporting the sanctions will appear in the record." *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 522-23 (9th Cir. 1983). See also Keeling, *Due Process Requirements*, *supra* note 92, at 365-74. Requiring factual findings as a prerequisite to sanctions ensures that appellate courts can understand the reasons for a sanctions award and thus exercise appropriate appellate review. See Johnson et al., *supra* note 47, at 674-75. Postponing sanctions decisions until the end of litigation ensures that sanctioning judges will have a "complete rather than piece-meal picture" of the circumstances that, arguably, warrant sanctions. Eric K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box*, 13 U. HAW. L. REV. 57, 86 (1991). But see Weston, *supra* note 82, at 906-07 (sanctions decisions should not be postponed until the end of litigation because "[j]udicial hindsight, like any post mortem review, is likely to find questionable conduct").

224. The available anecdotal evidence suggests that the courts in states which follow a hybrid sanctions model are no less willing to impose large sanctions awards than courts in low threshold states. See, e.g., MARTIN ET AL., *supra* note 202, at 58-59 ("The latest opinions out of the [Michigan] state courts reflect an equal readiness [compared with the federal courts] to impose stiff sanctions when the circumstances warrant").

225. REPORT OF THE TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 2 (1993). The Texas Supreme Court Task Force on Sanctions, a committee that the Texas Supreme Court appointed to review the Texas sanctions provisions, conceived the poll to solicit input from judges and lawyers. *Id.* at 1. The Task Force published a questionnaire in the *Texas Lawyer* and, at the same time, set the questionnaire to all Texas trial court judges. *Id.* at 7. Responding were 112 judges and 139 lawyers. The Task Force was concerned that using the *Texas Lawyer* to forward the questionnaire to lawyers might produce a sample that was unrepresentative. *Id.* "[B]ut the large number of judges who responded, and more importantly, who agreed with lawyer respondents on many issues, gave the Task Force some measure of comfort that the questionnaire

comparison with other state sanctions schemes based upon objective standards of conduct, perhaps best protects the principle of fair access to the courts: it allows a litigant to avoid sanctions for a frivolous pleading if the litigant can assert *any* basis in law or fact for the challenged pleading.²²⁶ Nonetheless, the poll results suggested that the Texas sanctions scheme, even with its language designed to reduce judicial reliance upon sanctions awards, generates a large amount of sanctions activity.²²⁷ Of the 112 judges who responded to the poll, 74.3% either "agreed" or "strongly agreed" that the sanctions rules in Texas encouraged courts and practitioners to spend excessive time and expense on sanctions litigation.²²⁸ Likewise, of the 139 lawyers who responded, 74.5% either "agreed" or "strongly agreed" that the sanctions rules encouraged courts and practitioners to spend excessive time and expense on sanctions litigation.²²⁹ Although the poll does not reveal the extent to which the Texas sanctions rules might exert a chilling effect upon litigation, the poll does reveal that, even in hybrid states, objective standards in sanctions schemes create the same problems that they create in low threshold jurisdictions.

The procedural safeguards in hybrid sanctions schemes are, at best, an adhesive bandage over a gaping wound. While these safeguards give the subjects of sanctions motions greater protection against judicial abuse of the sanctioning power, the procedural safeguards in hybrid sanctions schemes do not change the oppressive nature of the

at least served to identify major points of dissatisfaction among the practicing bar and bench." *Id.* at 8.

226. TEX. R. CIV. P. 13. See *supra* note 203. In addition, the Texas sanctions rule requires that a signing individual attest that a legal document is neither "groundless and brought in bad faith" nor "groundless and brought for the purpose of harassment." TEX. R. CIV. P. 13 (emphasis added). The plain language of the rule thus seems to suggest that a groundless legal document does not warrant sanctions unless the signing individual also filed the document in bad faith or with the purpose of harassment. *Id.* "The only logical explanation for this grammatical formulation is that it represents a deliberate attempt by Texas Rule 13's drafters to make more difficult the separation of improper purpose from groundlessness under Texas Rule 13, thus giving the Texas rule a meaning different from Federal Rule 11." Rich, *supra* note 203, at 66.

227. REPORT OF THE TEXAS SUPREME COURT TASK FORCE ON SANCTIONS 2 (1993) ("Courts, attorneys and litigants [in Texas] have spent too much time, money, and other resources on sanctions proceedings, and too often procedural determinations have substituted for adjudications on the merits.").

228. *Id.* at App. J (noting that 37.6% of Texas judges "strongly agreed" and 36.7% "agreed" with the proposition that "current sanctions rules result in too much time and money spent on sanctions practice").

229. *Id.* at App. J (noting that 38.3% of Texas lawyers "strongly agreed" and 36.2% "agreed" with the proposition that "current sanctions rules result in too much time and money spent on sanctions practice").

objective standard for imposing sanctions. Even in hybrid states, courts can award large sanctions against litigants who acted honestly and innocently. The objective standard has the same effect in the hybrid states that it does in the low threshold states. The available empirical evidence suggests that hybrid sanctions schemes breed just as much sanctions litigation as the low threshold sanctions schemes.²³⁰ Moreover, despite the absence of specific empirical data, there seems little doubt that hybrid sanctions schemes exert just as much of a chilling effect as low threshold schemes.²³¹ While perhaps going the farthest to accommodate the competing goals of redressing litigation abuse and preserving free access, hybrid sanctions schemes still do not balance these competing goals appropriately.

III. THE COMPETING INTERESTS: PRESERVING FREE ACCESS AND REDRESSING LITIGATION ABUSE

Drafting a sanctions scheme that comprises a balanced approach to frivolous litigation is no simple task. On the one hand, a sanctions scheme must preserve free access to the courts.²³² American courts have, traditionally, been willing to entertain claims that were novel or unpopular. Indeed, if the courts had not been willing to hear novel claims from individuals such as Linda Brown²³³ or Alan Bakke,²³⁴ the landscape of American law would be much different.²³⁵ On the other hand, a sanctions scheme must provide courts an effective means with which to redress litigation abuse.²³⁶ While the line between a novel claim and a frivolous claim often is less than clear, no one doubts that

230. See *supra* text accompanying notes 224-29.

231. See *supra* text accompanying notes 206-23.

232. See *infra* Section III.A, pp. 1126-34.

233. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Linda Brown, one of several plaintiffs in the *Brown* school desegregation cases, argued that the Supreme Court should overrule its entrenched "separate but equal doctrine." See Vairo, *Where We Are*, *supra* note 105, at 475 n.3.

234. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Using a "reverse discrimination" argument that had been unsuccessful in previous lawsuits, Alan Bakke succeeded in challenging the quota-based affirmative action plan at a state medical school. See Vairo, *Where We Are*, *supra* note 105, at 475 n.4.

235. See Vairo, *Where We Are*, *supra* note 105, at 476 (People like Linda Brown and Alan Bakke "understood they might lose because of the novelty of their claims or defenses, or the lack of clear or specific proof, but they did not have to fear the immediate threat of sanctions for trying, because they asserted claims in good faith.").

236. See *infra* Section III.B, pp. 1134-52.

some novel claims cross the line and are in fact frivolous.²²⁷ The courts should not be compelled to tolerate the claims that cross the line and, more specifically, should not be prevented from taking appropriate steps to punish or deter the wrongdoers. This Section will examine the competing interests of preserving free access and redressing litigation abuse.

A. Preserving Free Access

Several of the developments in American civil procedure over the last dozen decades or so trace their origins to the goal of ensuring free access to the adjudicative process. The courts in the United States serve the function of providing a forum in which opposing parties can resolve disputes fairly and impartially.²²⁸ In fulfilling this function, the courts must exercise a neutral role in the adversarial process, detaching themselves from the parties and their grievances.²²⁹ The courts have avoided taking actions that would compromise their neutrality.²³⁰ Thus, at least historically, the courts have refused to make critical or injudicious comments about the motives of particular litigants.²³¹ The courts have refused to make premature judgments about the correctness of legal assertions.²³² And most significantly, recognizing that the law is elastic, the courts have been willing to entertain novel and uncertain claims.²³³ As Dean John W. Wade has observed, the American

227. See Shaneyfelt, *supra* note 1, at 446 (at least in some instances, "[a]n attorney's conduct may be conspicuously frivolous, despite our failure to articulate a definition of frivolous conduct").

228. See Wade, *supra* note 1, at 433.

229. See Weston, *supra* note 82, at 808 ("The legal system enjoys credibility in part because the judge is viewed as detached and objective, not only with regard to the subject matter of the litigation, but also with regard to the litigators and parties.").

230. See CODE OF JUDICIAL CONDUCT Canon 1 (1990) ("A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.").

231. See *id.* Canon 3(B)(4) ("A judge shall be patient, dignified, and courteous to litigants . . .").

232. While the various federal and state rules of civil procedure do not allow courts to make premature rulings, the rules do, of course, permit courts to make appropriate pretrial dispositive rulings. Nonetheless, even when the rules permit the courts to make pretrial dispositive rulings, the rules still encourage the courts to err in favor of trial proceedings. Moreover, the rules encourage the courts to make pretrial dispositive rulings in a manner that does not stigmatize the losing litigant. Courts in most American jurisdictions, for example, cannot impose summary judgment unless the filed documents reveal no genuine issue of material fact. See, e.g., FED. R. CIV. P. 56. A summary judgment suggests only that the losing litigant failed to assert a winnable case; it does not suggest either that the losing litigant abused the judicial process or offended the canons of legal ethics.

233. Cf. CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990) ("A judge shall accord to

notice pleading does the opposite

courts have tried to ensure that a person who believes he has been aggrieved can "approach the courts for relief without having to guarantee that he is correct."²⁴⁴

The goal of ensuring free access has been an important fixture in federal civil procedure since the Supreme Court adopted the Federal Rules of Civil Procedure in 1938. The first rule in the Federal Rules of Civil Procedure expresses the vision of its drafters: the federal courts should conduct their operations to effect "just, speedy, and inexpensive" dispute resolution.²⁴⁵ To achieve the goal of inexpensive and efficient justice, the drafters of the federal rules attempted to make the federal adjudicative process more accessible.²⁴⁶ For instance, the drafters replaced the formalistic fact pleading regime that existed in the federal courts before 1938 with a liberal notice pleading regime.²⁴⁷ In addition, the drafters expanded the scope of discovery in the federal courts to encourage a greater exchange of information between opposing parties.²⁴⁸ The drafters of the federal rules conceived that these reforms would elevate substance over form in resolving disputes, thus opening the adjudicative process to people whom procedural technicalities would have excluded under the old practice.²⁴⁹ Although the Fed-

every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law . . .").

244. Wade, *supra* note 1, at 433.

245. FED. R. CIV. P. 1.

246. See Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 26 HARV. C.R.-C.L. L. REV. 341, 356 (1990). Coinciding with the adoption of the Federal Rules of Civil Procedure were other factors that helped ensure greater access to the federal courts: "a powerful civil rights movement, the expansion of the contingency fee, a huge growth in the power of the bar, and a genuine sense of devotion by most members of the legal profession to the principle that all Americans have the right to vindication of what the substantive law in theory affords." Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 3 (1988).

247. See Yamamoto, *supra* note 246, at 357; see also FED. R. CIV. P. 8 ("A pleading . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.").

248. See Yamamoto, *supra* note 246, at 357; see also FED. R. CIV. P. 26 (permitting discovery of any relevant matter not privileged).

249. See Weinstein, *supra* note 246, at 2-3 ("When the Rules were first adopted, they were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to

eral Rules of Civil Procedure have evolved in the last decade to give courts expanded power to resolve disputes without reaching the merits,²⁵⁰ the rules continue to reflect elements that foster greater access to the federal courts.

Likewise, the goal of ensuring free access has become an important fixture in state civil procedure. The rules of civil procedure in the various states have, increasingly, followed the lead of the federal rules in adopting provisions that eliminate archaic procedural technicalities and open the adjudicative process to a wider range of aggrieved people. Several states have adopted procedural rules that mimic the Federal Rules of Civil Procedure.²⁵¹ The courts in these states follow the same liberal pleading and discovery requirements that have fostered greater access to the federal courts. Other states, while exercising their independence to craft procedural rules that deviates from the Federal Rules of Civil Procedure, have adopted liberal pleading or discovery requirements which are similar, if not identical, to the federal rules.²⁵²

Besides procedural rules that foster free access, most states have also adopted constitutional "open courts" or "remedies" provisions that, among other things, have the effect of guaranteeing reasonable access to the adjudicative process.²⁵³ Generally, open courts provisions, which

courts . . ."); Yamamoto, *supra* note 246, at 357 (the reforms reflected in the 1038 rules "responded to the technical rigidity of prior systems, which had fostered procedural manipulation and deemphasized decisions on the merits").

250. See Yamamoto, *supra* note 246, at 344 (noting that the federal rules have been retooled "in the name of systemic efficiency"). Rule 11 is, of course, the most obvious example of the evolution in the federal rules toward allowing judges to restrict free access. In addition, the United States Supreme Court has reformulated the summary judgment standards to give federal judges greater power to resolve disputes before trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The reformulation of the summary judgment standards has further restricted free access to the courts. See Yamamoto, *supra* note 246, at 376 ("One apparent effect of the changes has been to preclude trials of claims of public concern not supported by hard evidence. Another effect has been to deprive juries of opportunities to reassess the meaning of undisputed 'facts' in light of changing social conditions.").

251. See Oakley & Coon, *supra* note 132, at 1377. At the time of their article, Oakley and Coon identified 23 states, including the District of Columbia, that had adopted a set of procedural rules modeled, at least substantially, upon the Federal Rules of Civil Procedure. *Id.*

252. *Cf. id.* at 1377-78. Oakley and Coon identified 11 states that have adopted procedural rules which deviate from the federal model but nonetheless incorporate a regime of notice pleading. *Id.*

253. See ALA. CONST. art. I, § 13; ARIZ. CONST. art. II, § 11; ARK. CONST. art. 2, § 13; CALIF. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; GA. CONST. art. I, § 1, ¶ XII; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KY. CONST. § 14; LA. CONST. art. I, § 22; MAINE CONST. art. I, § 10; MD. CONST. DECL. OF RIGHTS art. 10; MASS. CONST. pt. I, art. XI; MINN. CONST. art. I, § 8;

trace their lineage back to the Magna Carta,²⁵¹ declare that the courts of a state should remain available to all,²⁵² should provide remedies to those who suffer injuries,²⁵³ and should treat litigants fairly and equally.²⁵⁷ Although state courts have reached differing conclusions about

MISS. CONST. art. 3, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 10; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

254. See Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202, 1203 (1964). Article 40 of the Magna Carta of 1215 provides: "Nulli vendemus, nulli negabimus, aut differemus, rectum aut iusticiam" ("to no one will we sell, to no one will we refuse or delay, right or justice"). *Id.* (quoting MAGNA CARTA art. 40 (1215)). Interpreting article 40, Sir Edward Coke commented that "every Subject . . . for injury done to him in bonis, terris, vel persona, by any other Subject . . . may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." *Id.* (quoting EDWARD COKE, SECOND INSTITUTE 55-56 (4th ed. 1671)). The interpretation that Coke gave the Magna Carta influenced American colonists. See John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 243 (1991). Some American colonists, indeed, urged that James Madison and his compatriots enact an open courts provision into the Federal Bill of Rights. Although unsuccessful in securing an open courts provision for the federal constitution, colonists did succeed in securing open courts provisions for the various state constitutions. See David Schuman, *The Right to a Remedy*, 65 TEMP. L. Q. 1197, 1199-1200 (1992) (citing BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 967-68 (1971)). States that were later admitted to the Union later often copied the open courts provisions in the state constitutions from the original colonies. *Id.*

255. See, e.g., COLO. CONST. art. II, § 6 ("Courts of justice shall be open to every person . . ."); DEL. CONST. art. I, § 9 ("All courts shall be open . . ."); OR. CONST. art. I, § 10 ("No court shall be secret, but justice shall be administered, openly . . .").

256. See, e.g., ARK. CONST. art. II, § 13 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character . . ."); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation."); MISS. CONST. art. III, § 24 ("All courts shall be open: every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law . . .").

257. See, e.g., ILL. CONST. art. I, § 12 ("Every person . . . shall obtain justice by law, freely, completely, and promptly."); MASS. CONST. art. XI, pt. 1 ("Every subject of the commonwealth . . . ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without

the scope of the various state open courts provisions.²⁵⁸ Several state courts have interpreted their open courts provisions to proscribe procedural barriers that prevent litigants from having a reasonable chance to pursue a colorable claim.²⁵⁹ Such procedural barriers, according to these courts, interfere with the right of free access guaranteed in state open courts provisions.²⁶⁰

Measures like liberal procedural rules and state open courts provisions that advance free access to the courts recognize that the law is not, and must not be, static; acts or omissions, which at one time were tolerable, might become intolerable with the passage of time.²⁶¹ If the

delay; conformably to the laws."); MO. CONST. art. I, § 14 ("That the courts of justice shall be open to every person . . . and that right and justice shall be administered without sale, denial or delay.").

258. See Schuman, *supra* note 254, at 1203 (the state courts have adopted a "daunting variety of remedy guarantee interpretations"). Some state courts read their open courts provisions to state nothing more than a suggestion that courts should conduct trials swiftly, without showing favoritism toward one side or another. See *Goldberg v. Musim*, 427 P.2d 698, 702 (Colo. 1967) (en banc) (construing COLO. CONST. art. II, § 6 as a mandate to the judiciary rather than to the legislature); *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (Interpreting TENN. CONST. art. I, § 17 as a mandate to the judiciary and not as a limitation upon the legislature, and citing *Scott v. Nashville Bridge Co.*, 223 S.W. 844 (Tenn. 1920) in support of this assertion). Other state courts read their open courts provisions expansively; indeed, the courts in some states have ruled that open courts provisions restrict state legislatures from abolishing or circumscribing common law causes of action. See *Grantham v. Denke*, 359 So. 2d 785, 787 (Ala. 1978) (reasoning that a statutory ban on actions against co-workers offends state open courts provision); *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) (reasoning that no-fault insurance legislation limiting recovery for property damage offends state open courts provision); *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988) (reasoning that damages cap in medical malpractice actions offends state open courts provision).

259. See Bauman, *supra* note 254, at 250-51. States impose many procedural barriers to litigation, including statutes of limitations, statutes of repose, notice requirements and special pleading rules. Usually, the courts will uphold these procedural barriers unless the barriers arbitrarily limit the rights of action for a particular class of plaintiffs. See, e.g., *Aldana v. Holub*, 381 So. 2d 231, 237 (Fla. 1980) (reasoning that a statute providing for the use of a screening panel for medical malpractice cases offends the state open courts provision because it had "proven unworkable and inequitable"); *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983) (reasoning that while statutes of limitations did not offend the state open courts provision generally, a strict two-year limitations statute offended the constitution when applied to a minor who could not bring a suit herself); *State ex rel. S.M.B. v. D.A.P.*, 284 S.E.2d 912, 913-14 (W. Va. 1981) (reasoning that a three-year statute of limitations for paternity actions offended the state open courts provision).

260. See *Sax*, 648 S.W.2d at 667 (holding a statute unconstitutional because it contained an arbitrary limitations provision that deprived a litigant of "having her day in court").

261. See *Johnson et al.*, *supra* note 47, at 676 ("There are few shades of black or white, and on the most difficult questions, there often are only varying shades of

law continues to maintain that an act or omission is tolerable long after the public has judged the act or omission intolerable, the public will perceive that the law is unfair and rebel against it.²⁶² Cultural mores change, and the law must not lag too far behind. Ensuring that litigants have free access to the courts, and in particular ensuring that litigants can raise novel or uncertain claims, allows the law to evolve along with changing cultural mores.²⁶³ Litigants might lose novel or uncertain claims initially, but if the courts at least are willing to entertain the claims, the litigants will have a forum in which to argue that social conditions warrant a change in the law.²⁶⁴ Eventually, as has happened

gray.").

262. Cf. Yamamoto, *supra* note 246, at 391. Professor Yamamoto has observed that if the law does not redress perceived grievances—and especially if the courts do not even entertain claims based upon perceived grievances—the frustration that the victims might experience could spill into violence. "Forcible protest is encouraged, or at least not discouraged, . . . when groups perceive that their grievances are not even likely to be addressed let alone redressed by those with decisional power." *Id.* This conclusion—that lack of access can breed violence—assumes a worst case scenario: people with minority perspectives are prevented from voicing their views in a peaceful forum.

Violence seems much less probable in the converse situation in which a majority of the public perceives that the law is outmoded or antiquated. More often than not, the public in that situation will express its dissatisfaction in more subtle ways—for example, resolving disputes through arbitration or alternative dispute resolution (ADR) rather than through the courts. See Joiner, *supra* note 5, at 18 (noting that the growth of ADR to some extent reflects public dissatisfaction with both procedural and substantive elements of the law). Nonetheless, violent solutions are not impossible. Some aggrieved individuals, believing that public opinion would support their extreme measures, may rebel against the law by turning to self help or vigilanteism. See *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring in dismissal of appeal for want of jurisdiction) ("The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help.").

Justice, of course, is not forged in the crucible of public opinion. While public opinion might compel the law to follow a new course, often the converse is just as true. Courts can be "great engines of social change." Johnson et al., *supra* note 47, at 650. Were it not for the courageous leadership of a handful of judges in the United States Court of Appeals for the Fifth Circuit, for instance, the dictates of *Brown v. Board of Education*, 347 U.S. 483 (1954) might never have been enforced in the racially polarized South. HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981 (1982). Even when judges are inclined to change the law, however, they cannot do so if they interfere with the goal of free access by erecting procedural barriers that preclude litigants from bringing novel or uncertain claims.

263. See Mallor, *supra* note 10, at 610 ("[D]isputed and uncertain claims are instruments for the development and refinement of the substantive law.").

264. Cf. Yamamoto, *supra* note 246, at 426 (observing that especially for minorities,

in the past,²⁶⁵ litigants might be able to persuade the courts to change the law—but for that to continue to happen, the courts must not erect procedural barriers that preclude litigants from bringing novel or uncertain claims.²⁶⁶

Unfortunately, sanctions provisions based on an objective standard of conduct offend the goal of free access.²⁶⁷ Because the objective standard is flexible,²⁶⁸ it fails to give litigants a clear line between frivolous and legitimate lawsuits. Rather than run the risk of a large sanctions award, some litigants will suppress their grievances and forego asserting novel or uncertain claims that a judge in an uncharitable mood might, conceivably, find frivolous.²⁶⁹ Conversely, some litigants, whether blindly or intentionally, will run the risk of sanctions and file novel or uncertain claims. Despite a subjective good faith belief that the law should redress their grievances, the litigants might find, perhaps quite to their astonishment, that a judge will decree their claims frivolous and assess large sanctions against them.²⁷⁰ In either event, sanctions provisions raise an impediment to free access: either the sanctions provisions induce litigants to relinquish their right to raise novel or uncertain claims or the sanctions provisions give judges a club with which to bludgeon litigants who exercise that right.

Sanctions provisions are no less an impediment to free access if the provisions purport to allow litigants to make a good faith or nonfrivolous argument "for the extension, modification, or reversal of existing law."²⁷¹ Judges have not found language of this kind to super-

courts provide a forum in which individuals with perspectives that diverge from the accepted view can articulate their positions and achieve a degree of legitimacy).

265. See *supra* notes 232-35 and accompanying text.

266. See Mallor, *supra* note 19, at 619 ("In a society in which flexibility and growth in the law are prized, it does not make sense to erect obstacles to the institution of such [disputed and uncertain claims]. This is particularly true in areas of the law, such as tort law, that are growing rapidly.")

267. See Sandra C. Segal, Comment, *It Is Time to End the Lawyer's Immunity from Countersuit*, 35 UCLA L. Rev. 90, 138 (1987) ("On its face, the policy of securing to all injured parties the freedom to vindicate their rights through the adversarial system is not in harmony with a policy of discouraging legal proceedings and encouraging settlements."); cf. Stein, *supra* note 71, at 329 (asserting that sanctions provisions based upon an objective standard have the "effect of stultifying the law").

268. See Honsinger, *supra* note 16, at 348.

269. See *supra* text accompanying notes 72-78 and 172-77.

270. Experience with the 1983 version of Federal Rule 11 suggested that litigants could not predict with any reliability whether a judge would find their claims sanctionable. Indeed, judges often expressed differing views whether particular claims were reasonable. See *supra* text accompanying notes 66-71.

271. FED. R. CIV. P. 11 (1983). Until the 1993 amendments, Federal Rule 11 stated that a signature in a pleading constituted a certificate that the pleading was either well grounded in law or supported by a "good faith" argument for modifying or

impose a subjective standard upon sanctions provisions that otherwise enforce an objective standard of conduct.²⁷² Accordingly, judges have not refrained from assessing sanctions against litigants who, despite a subjective good faith belief that the law should redress their grievances, advance a proposition that lacks a reasonable foundation in the established law.²⁷³ Language in sanctions provisions authorizing good faith arguments to change existing law, in essence, is insufficient to prevent judges from punishing litigants for pursuing novel or uncertain claims. If judges find that arguments "for the extension, modification, or reversal of existing law" are unreasonable or farfetched, the judges will assess sanctions against the litigants who advanced the arguments—just as the judges would assess sanctions against litigants who advanced arguments that lacked a reasonable factual basis. And if judges assess large sanctions against litigants who pursue good faith attempts to change existing law, litigants will think twice about pursuing novel or uncertain claims that challenge existing law.²⁷⁴

At the risk of stunting the growth in the law, sanctions measures must not give the courts so much power that the courts can, effectively if not intentionally, ban novel or uncertain claims. Admittedly, free access is not a talisman that precludes the courts from punishing frivolous lawsuits.²⁷⁵ Claims and defenses that serve no function other than

reversing existing law. *Id.* The 1993 amendments changed the term "good faith" to the word "nonfrivolous," suggesting that the drafters of the amendments desired to eliminate language that implied a subjective standard. See Tobias, *supra* note 92, at 1781.

Several state sanctions provisions, including both Rule 11 duplicates and other forms of sanctions measures, include language that authorizes good faith or nonfrivolous arguments for changing the law. See, e.g., GA. CODE ANN. § 9-15-14(c) (Michie 1990); MASS. GEN. L. ch. 231, § 6F (1986); MINN. STAT. § 549.21 (1988).

272. See Yamamoto & Hart, *supra* note 223, at 73 (observing that federal courts measure good faith arguments objectively, asking the question: "Did counsel, following reasonable inquiry, have any reasonable basis for her arguments to change the law?").

273. See *Beeman v. Fiester*, 852 F.2d 206, 211 (7th Cir. 1988) ("[T]he good faith requirement of the third prong of Rule 11 looks to the quality of the argument for the extension of a doctrine, not to the counsel's state of mind."); *Wisconsin v. Glick*, 782 F.2d 670, 673 (7th Cir. 1986) ("When a defendant makes an argument so empty that no responsible lawyer could think the argument supportable by any plausible plea for a change in the law the court may reply with a penalty."); cf. *Hughes v. City of Fort Collins*, 926 F.2d 986, 990 (10th Cir. 1991) ("An unadorned and forlorn hope that a court may change settled law" is not enough to avoid Rule 11 sanctions).

274. See *supra* text accompanying notes 72-78 and 172-77.

275. See *Clementson-Mohr & Cooke*, *supra* note 204, at 311 ("Our legal system is

to consume court time and stall the progress of justice do not fall within the class of litigation that the free access principle protects.²⁷⁶ The problem lies, however, in drawing the line between frivolous claims that fall outside the protected class of litigation and otherwise legitimate novel or uncertain claims. Drawing the line with an objective standard, such that litigants who bring "unreasonable" claims or defenses are subject to large sanctions awards, raises the threat that courts will find novel or uncertain claims sanctionable. If litigants cannot bring novel or uncertain claims without incurring the risk of sanctions, then the adjudicative process in the United States has failed in its goal of providing a fair and impartial forum in which opposing parties have free access to resolve disputes.²⁷⁷

B. Redressing Litigation Abuse

While sanctions schemes must preserve free access to the courts, sanctions schemes also must provide courts an effective means with which to redress litigation abuse. Federal and state court judges are becoming more and more frustrated with the increasing size of their dockets.²⁷⁸ Rightly or wrongly,²⁷⁹ judges perceive that a principal factor in the increasing size of their dockets is litigation abuse—in particular, frivolous filings.²⁸⁰ Judges desire sanctions measures that will

not enhanced by the toleration of genuinely meritless litigation, even when it is conducted with minimal competence, solely on the ground that the system requires a fearless bar, ready and willing to extend the law."); Greenberg, *supra* note 142, at 167 ("[S]triking a fair balance between requiring that all material facts be assembled at the filing stage and allowing for novel, creative and broad-based pleading does not preclude the need for a pleading control device to eliminate patently infirm claims."). In particular, states have not found that the open courts provisions in their state constitutions preclude sanctions schemes that punish lawyers or litigants for bringing frivolous actions. See, e.g., *Williams v. State*, 405 N.W.2d 615, 624-25 (N.D. 1987).

276. Lebeuf, *supra* note 202, at 251.

277. See *supra* text accompanying note 238.

278. Both federal and state courts have experienced regular and dramatic increases in their caseloads. See REPORT OF THE ABA WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 5-6, 46-48 (1992); cf. Levin & Colliers, *supra* note 46, at 227 n.24 & n.26 (observing that civil filings in federal court increased 145% between 1973 and 1983 and that civil filings in state court increased 20% between 1978 and 1983).

279. Several commentators have argued that litigation abuse plays little, if any, role in the increasing size of court dockets. See, e.g., Galanter, *supra* note 46, at 61 (a narrow elite of judges "tend to identify as general problems things such as discovery abuse that apply only in a tiny minority of cases"); Vargo, *supra* note 201, at 1631 ("U.S. courts are overcrowded; however, there is absolutely no empirical data from any source that indicates that the overcrowding is caused by nonmeritorious actions or defenses.").

280. See Gerber, *supra* note 1, at 6.

allow them to police their dockets, and even if litigation abuse is not as pervasive as judges might perceive, sanctions schemes should not be so circumscribed that judges feel powerless to control misconduct during the litigation process.²⁸¹ Sanctions schemes must effectuate a purpose that redresses litigation abuse. The federal and state courts have at various times identified three main purposes for sanctions awards and, especially, fee awards: (1) deterring frivolous filings,²⁸² (2) punishing lawyers and litigants who pursue frivolous filings,²⁸³ and (3) compensating the victims of frivolous filings.²⁸⁴ Of these purposes, both deterrence and punishment offer legitimate grounds for assessing a sanctions

281. Even if litigation abuse has not been a significant factor in rising court case-loads, that does not mean that litigation abuse should be either ignored or tolerated. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 39 n.47; Thomas M. Reavley, *Response to "One Year After Dondi: Time to Get Back to Litigating?"*, 17 PEPP. L. REV. 851, 851 (1990).

282. See, e.g., *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Canton Farm Equip., Inc. v. Richardson*, 601 So. 2d 1098, 1108-09 (Miss. 1987). Presumably, states that depend upon federal case law as a guide in interpreting their sanctions provisions would find that the main purpose of the sanctions provisions is deterring frivolous filings. Cf. Tausend & Johnsen, *supra* note 67, at 443 (suggesting that purpose of Washington version of Rule 11, like the federal rule, is to "curb abuses").

283. See, e.g., *Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1081 (1992); *Batson v. Neal Spelce Assocs.*, 705 F.2d 511, 516 (5th Cir. 1985); *Fagas v. Scott*, 597 A.2d 571, 584 (N.J. Super. Ct. Law Div. 1991).

284. See, e.g., *Collins v. Walden*, 834 F.2d 961, 966 (11th Cir. 1987) (noting that an award of fees under Rule 11 "is a means by which to return to the status quo the party which incurred legal expenses as a result of an action . . . which ought never have been filed"); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 939 (7th Cir. 1989) (stating that an award of fees is "designed to make the adverse party whole—to put the party opposing the motion in as good a position as it would have occupied had the motion never been made"). The Supreme Court in *Cooter & Gell* rejected the reasoning of the courts of appeal in *Collins* and *Mars Steel*, concluding that Rule 11 serves the function of deterrence, not compensation. See *supra* text accompanying note 282. Nonetheless, the decisions in *Collins* and *Mars Steel* reflect a belief that is common among judges and other commentators in the area of sanctions litigation. See Sofaer, *supra* note 44, at 706 (monetary sanctions "serve the important purpose of restitution, enabling courts to rectify the improper imposition of costs on one party by another"); cf. Shaneyfelt, *supra* note 1, at 455 ("The quickest way to a frivolous litigator's heart is through his pocketbook").

States that have adopted sanctions provisions authorizing fee awards as the sole form of sanction, see *supra* notes 170, 202 & 204, necessarily encompass a compensatory rationale. See Wade, *supra* note 1, at 492 (noting that granting fees as a sanction serves "to compensate the recipient of the award from [sic] the exact harm at which the wrongful conduct was aimed").

award so long as the sanction is commensurate with the offense. The predominance of fee awards under the existing sanctions schemes, though, limit the extent to which judges can achieve these purposes fairly and effectively.

1. Deterrence

Deterring frivolous filings is a legitimate purpose for sanctions schemes to serve. Regardless of whether frivolous litigation is a pervasive problem, the courts should not be expected to endure claims or defenses that lack conceivable merit.²⁸⁵ Instead, courts should be able to compel lawyers and litigants, through appropriate sanctions, to think twice before pursuing meritless claims or defenses. An ideal sanctions scheme would deter litigants from bringing frivolous claims or defenses but would not inhibit litigants from bringing colorable claims or defenses that challenge existing law. Regrettably, however, the existing sanctions schemes do not pursue their goal of deterrence effectively: they manage, at the same time, to deter too much licit litigation and to deter too little illicit litigation.²⁸⁶

Too Much Deterrence. As discussed earlier, the existing sanctions schemes that depend upon an objective standard of conduct—both low threshold and hybrid schemes—tend to chill creative advocacy.²⁸⁷ The 1983 version of Federal Rule of Civil Procedure 11, for example, discouraged lawyers and litigants from pursuing claims that, while tenable, stood a better than even chance of losing.²⁸⁸ According to one commentator, sanctions under the 1983 amendments “escalate[d] the professional and financial risk of litigating cases that are important to bring but difficult to win.”²⁸⁹ The recent 1993 amendments, which do not alter the prevailing objective standard for sanctions under Rule 11,²⁹⁰ seem unlikely to reduce the chilling effect of the rule significantly.²⁹¹ Even under the 1993 amendments, litigants continue to bear a large professional and financial risk for pursuing novel or uncertain claims. As long as sanctions measures create the risk that litigants will incur severe sanctions for conduct that does not rise to the level of subjective bad faith, sanctions measures will inhibit creative advocacy.²⁹²

285. See *supra* note 281 and accompanying text.

286. See Stein, *supra* note 71, at 327-28.

287. See *supra* notes 72-78 and 168-231 and accompanying text.

288. See, e.g., Hess, *supra* note 62, at 336-37; Marshall et al., *supra* note 64, at 971.

289. Yamamoto, *supra* note 246, at 370.

290. See *supra* Section II.A.3, pp. 1090-94.

291. See Lazaroff, *supra* note 71, at 1118-19.

292. See *infra* text accompanying notes 300-02.

Some commentators have reasoned that Rule 11 chills litigation because the rule encourages courts to impose sanctions excessively.²⁹³ Interestingly, though, the available empirical studies suggest that the frequency with which the federal courts impose Rule 11 sanctions—although a factor that lawyers consider in making their litigation decisions—does not itself explain the chilling effect that the rule exerts upon litigation. In an American Judicature Society study comparing sanctions activity in three federal circuits, Lawrence C. Marshall, Herbert M. Kritzer, and Frances Kahn Zemans found that Rule 11 produced a greater effect upon litigation decisions in the Fifth Circuit than it did in the Seventh Circuit²⁹⁴—even though district courts in the Fifth Circuit imposed sanctions far less frequently than district courts in the Seventh.²⁹⁵ Observing that lawyers in the Fifth Circuit were more likely than lawyers in the Seventh Circuit to be involved in lawsuits in which sanctions were threatened but not imposed,²⁹⁶ the researchers concluded that "attorneys are deterred not only by the fear of the actual imposition of sanctions, but by the fear of involvement in a proceeding in which sanctions are considered or threatened."²⁹⁷

Another empirical study, going one step farther than the American Judicature Society study, revealed that sanctions measures based upon

293. See, e.g., Nancy Burger-Smith, *Avoiding Sanctions Under Federal Rule 11: A Lawyer's Guide to the "New" Rule*, 15 WM. MITCHELL L. REV. 607, 636 (1989) ("While the rule serves to deter duplicitous litigation, to unclutter the court dockets, and to prevent unnecessary costs from being imposed upon innocent parties, its frequent enforcement and liberal interpretation may pose considerable risks to the free spirit of the adversarial system."). The drafters of the 1993 amendments seemed to accept this reasoning, tailoring their amendments to reduce the frequency with which courts imposed sanctions. See Johnson et al., *supra* note 47, at 680 (explaining that the 1993 amendments "call[] for greater restraint in considering the imposition of sanctions") (quoting Fed. R. Civ. P. 11 comment (Proposed Amendment 1991)).

294. Marshall et al., *supra* note 64, at 982-83. The researchers found, for example, that 22.0% of respondents from the Fifth Circuit had declined a case as a direct result of Rule 11, compared with 20.5% of respondents from the Seventh Circuit. *Id.* at 983. They also found that 34.1% of respondents from the Fifth Circuit had discouraged a client from pursuing a particular course of action, compared with 29.8% of respondents from the Seventh Circuit. *Id.*

295. *Id.* at 981-82 ("We found that the Seventh Circuit had the highest rate of sanctions imposed as a proportion of motions filed (24.5%), with the Fifth and Ninth Circuits having a considerably lower rate (14.6% and 14.4% respectively).").

296. *Id.* at 982 (finding that 28.2% of the respondents from the Fifth Circuit "had been involved in a case in which sanctions were formally proposed but not imposed," compared with 22.7% of the respondents from the Seventh Circuit).

297. *Id.*

an objective standard can chill litigation even if courts invoke the sanctions measures infrequently. Comparing sanctions practices in Washington state court with sanctions practices in Washington federal court, Professor Gerald Hess discovered that the Washington state sanctions scheme exerted almost the same chilling effect upon litigation in state court that Rule 11 exerted upon litigation in federal court.²⁹⁸ Professor Hess did not speculate about the reasons for this finding, but significantly, he observed both (1) that litigants in Washington state court threatened sanctions infrequently and (2) that Washington state courts imposed sanctions infrequently.²⁹⁹ The frequency with which courts impose sanctions, in sum, does not contribute meaningfully to the chilling effect that low threshold or hybrid sanctions schemes exert upon litigation.

A more important causal factor is, instead, the degree to which courts can impose severe sanctions against parties who proceed in good faith. Several prominent sanctions decisions, in both federal court and in state court, have involved substantial sanctions awards.³⁰⁰ While

298. Hess, *supra* note 62, at 345. See also *supra* notes 195-98.

299. Hess, *supra* note 62, at 322-23. Professor Hess found that during the 1990 calendar year, litigants filed 48 sanctions requests in civil cases in Spokane County Superior Court. The court granted 8% of the requests. *Id.* at 322-23.

Most state courts do not impose sanctions as often as their federal counterparts. Some state courts, for example, impose few sanctions because their judges are elected and do not wish to offend potential voters. See *id.* at 327 (stating that because Washington judges are elected, "it is difficult for them to come down hard on either attorneys or clients") (quoting a comment given in response to a survey about the effects of Washington Rule 11); see also Robertson, *supra* note 48, at 112 n.8 (discussing sanctions practices under the Mississippi system of elected judges); Timberlake & Pionk, *supra* note 201, at 1048 (1989) (discussing sanctions practices under the Illinois system of elected judges).

Some state courts impose few sanctions because their legal community is small, and as a result, lawyers do not file sanctions motions that might jeopardize existing friendships or business relationships. See Sanner & Tobias, *supra* note 75, at 314 (stating that Montana imposes few sanctions, reflecting a "local 'legal culture' in which most lawyers and many litigants know one another personally and are reluctant to jeopardize continuing relationships and civility among attorneys, parties and judges by invoking Rule 11").

Finally, some state courts impose few sanctions because their procedural rules require more specific fact pleading, allowing judges to dismiss insupportable claims or defenses before the litigation reaches a stage in which other, more severe, sanctions would be appropriate. See Walker, *supra* note 192, at 872 (Under Arkansas Rule 8, which imposes something of a code pleading regimen, "the threat of sanctions looms less for the very reason that 'facts sufficient to state a cause of action' calls implicitly for an inquiry sufficient to meet the pleading standard").

300. See *Winters v. Gould*, 539 N.Y.S.2d 686 (Sup. Ct. 1989) (affirming a \$10,000 sanction award); *Con-Tech, Inc. v. Sparks*, 708 S.W.2d 250 (Tenn. Ct. App. 1990) (affirming a \$31,510.93 sanction award); see also federal cases cited in *supra* note 53 in Section II. In another well publicized (but unpublished) sanctions decision, a state

these substantial awards perhaps fall outside the norm—the predominant form of sanction is a fee award that involves an amount less than \$10,000³⁰¹—they highlight the risk that litigants must bear in asserting novel or uncertain arguments. Recognizing that the objective standard is imprecise, litigants fear that some arguments, even if asserted in good faith, might offend the sensibilities of a particular judge and thus incur sanctions that the litigants could ill afford.³⁰² If litigants perceive that the objective standard in a sanctions provision will allow a court to impose severe sanctions against them for asserting certain arguments, then regardless whether the court imposes severe sanctions frequently, the litigants will decline to run the risk of asserting the arguments. As one practitioner has observed, "The power of the sword of Damocles is not in that it falls, but rather in that it hangs."³⁰³

The empirical evidence is consistent with this conclusion. One possible explanation for the results from the American Judicature Society study, for instance, is that large sanctions awards can inhibit lawyers—even those who practice in another federal circuit—from asserting claims that advance unusual or unprecedented propositions. Thus, severe sanctions that a judge in the Seventh Circuit imposes against a litigant can, if well publicized, affect the litigation decisions of a lawyer in the Fifth Circuit, especially after opposing counsel threatens the lawyer with sanctions.³⁰⁴ Likewise, one possible explanation for the results from the Hess study is that large sanctions awards in federal court can inhibit lawyers practicing in state court from asserting novel or unusual claims: a Spokane lawyer, realizing that the Washington sanctions provision is based upon Federal Rule 11, might be disinclined to advocate in state court a position that has incurred substantial sanctions in federal court.³⁰⁵

court judge in Texas assessed a \$994,000 sanction against two solo practitioners and their client for filing a frivolous pleading. See Mark Ballard, *Losers Face \$1M Fine for Trial Tactics: Rule 13 Sanctions Catches Task Force's Eye*, TEX. LAW., May 25, 1992, at 1, 30.

301. Marshall et al., *supra* note 64, at 957.

302. Cf. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 48 ("Rule 11 allows severe sanctions in indefinite situations—a dangerous combination.").

303. Personal Conversation with J. Stephen Ravel, a member of the firm Bickerstaff, Heath & Smiley in Austin, Texas (Nov. 5, 1993).

304. See *supra* text accompanying notes 204-07.

305. See *supra* text accompanying notes 298-99.

Unavoidably, sanctions schemes that allow courts to impose severe sanctions against a litigant who offends an objective standard of conduct exert a chilling effect upon litigation. Reducing the frequency with which the courts impose sanctions under these schemes will not vitiate their chilling effect. Even in jurisdictions—such as Washington state—that impose sanctions infrequently, sanctions schemes based upon an objective standard tend to inhibit lawyers and litigants from asserting novel arguments. To lessen the chilling effect that these sanctions schemes exert upon litigation, therefore, federal and state courts must attempt to divorce the objective standard from remedial language that permits severe sanctions. In other words, sanctions schemes must limit the most severe sanctions, such as large fee awards, to situations involving subjective bad faith.³⁰⁶ Absent such a limitation, sanctions schemes will continue to deter too much legitimate litigation.

Too Little Deterrence. While sanctions schemes sometimes can chill litigants from pursuing legitimate arguments, the same schemes often might have little deterrent effect upon litigants who desire to pursue illegitimate arguments. At some level, all commentators—no matter their perspective about free access to the courts—would agree that certain motions or pleadings have no business consuming court attention: “nut” cases that raise exotic factual or legal allegations,³⁰⁷ groundless claims or defenses that a litigant files to gain leverage in legal or business negotiations,³⁰⁸ and unfounded sanctions motions

306. See *infra* Section IV, pp. 1162-69.

307. The commentators who have criticized the perceived increase in frivolous litigation often cite a series of “nut” cases to illustrate the dangers that frivolous litigation poses to the judicial process. See, e.g., Gerber, *supra* note 1, at 6; Partridge et al., *supra* note 1, at 233; Shaneyfelt, *supra* note 1, at 443. But while “nut” cases are frivolous and, certainly, should be subject to some kind of sanctions, it seems doubtful that “nut” cases alone pose much of a threat to the judicial process. Cf. Galanter, *supra* note 46, at 64 (stating that the “reappearance of the same atrocity stories [suggests] that the ‘litigation explosion’ might be thought of as an item of elite folklore”).

308. See Miller, *supra* note 6, at 17. A defendant in a civil lawsuit, for example, might file a large counterclaim to induce the plaintiff to settle the original claim for a lesser amount. See Gerber, *supra* note 1, at 8. Consider a situation in which the plaintiff files a wrongful termination action seeking damages in the form of \$150,000 in lost wages. The defendant, in turn, files a \$200,000 counterclaim alleging that the plaintiff breached an employment contract or interfered with prospective business relations. Even if the counterclaim is groundless, the defendant will gain leverage in settlement negotiations against the plaintiff, who suddenly finds that he is just as subject to a potential damages award as the defendant. The plaintiff might agree to a quick \$20,000 or so settlement, rather than take his chances with a jury. Cf. Brecher, *supra* note 6, at 113 (discussing the increasing number of intimidation counterclaims, which developers and other commercial defendants use to punish public interest litigants for challenging development projects).

Similarly, corporations have learned to use lawsuits affirmatively as a means of business competition. See Miller, *supra* note 6, at 7 (“Intercompany warfare in the

that a lawyer files as a hardball tactic during litigation.³⁰⁹ The existing sanctions schemes, however, do not deter litigants from pursuing these kinds of motions or pleadings. As long as sanctions schemes continue to encourage courts to assess fee awards as the exclusive form of sanction, some litigants will continue to pursue arguments that serve no function other than to consume court time and stall the progress of justice.

As might be expected, a high threshold sanctions scheme that requires proof of subjective bad faith as a prerequisite to sanctions is the least effective kind of sanctions scheme in deterring litigation abuse.³¹⁰ Because the subjective standard limits the range of conduct that merits sanctions, a high threshold scheme will not intimidate litigants who believe in good faith that their conduct is appropriate.³¹¹ Even if aware that the sanctions scheme exists,³¹² litigants who act in good faith will conclude, correctly, that their conduct is impervious to sanctions. A high threshold sanctions scheme therefore fails to deter pro se litigants from filing “nut” cases that raise exotic factual or legal allegations.³¹³ Most pro se litigants—even including those pro se litigants who assert outrageous claims—possess a quixotic belief that their arguments are legally sound and factually correct.³¹⁴

courts, particularly in the antitrust and competitive tort fields, also has mushroomed. Virtually unknown ten or fifteen years ago, waging intercorporate lawsuits has become “business by other means” for many corporations.”). A corporation might decide, for example, to file an antitrust suit against its principal competitor, alleging an “avant garde” theory of liability. Concerned about adverse publicity, as well as potential liability in an evolving area of the law, the defendant competitor might offer the plaintiff corporation concessions in the marketplace. See Arthur R. Miller, *Of Frankensteins Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 672 (1979).

309. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 35. Lawyers have learned to use sanctions motions as a means of deflecting attention from their own actions. *Id.* at 48. See also Hinerfeld, *supra* note 62, at 33 (“Some judges say the same combative attitudes that necessitated the rule in the first place have led to excessive requests for sanctions under Rule 11.”); Segal, *supra* note 267, at 150 (“Any shield against abuse can become a sword for abuse.”); Weston, *supra* note 82, at 890 (“Even more troublesome is the use of attorney sanctions as a weapon Lawyers threaten one another to force or prevent specific conduct.”).

310. See Lebeuf, *supra* note 202, at 277 (arguing that the subjective standard is insufficient to deter litigants from taking a frivolous position).

311. See *supra* text accompanying note 150.

312. See *infra* text accompanying note 315.

313. See Mallor, *supra* note 19, at 642-43.

314. Cf. Eric J.R. Nichols, Note, *Preserving Pro Se Representation in an Age of*

The existing sanctions schemes that depend upon an objective standard, though, are not much more effective in deterring litigation abuse. Low threshold and hybrid sanctions schemes are no more effective than high threshold sanctions schemes, for instance, in deterring litigants from filing "nut" claims. Two factors limit the general deterrence value of sanctions schemes in cases involving "nut" claims.³¹⁵ First, because pro se litigants file a large proportion of the nut claims,³¹⁶ the litigants, lacking legal training, might not even be aware that their claims are susceptible to sanctions.³¹⁷ Second, because the predominant form of sanction is a remedial fee award,³¹⁸ litigants who file "nut" claims, even if aware that their claims are susceptible to sanctions, cannot conceive that a potential sanctions award would pose them a threat. Unlike parties who might face financial devastation and social disapprobation after incurring a sanctions award,³¹⁹ litigants

Rule 11 Sanctions, 67 TEX. L. REV. 351, 351 (1988) (stating that pro se litigants "may seek out courtrooms as forums to vent strongly held but legally unfounded social and political theories or as battlegrounds to satisfy private, legally unredressable vendettas").

315. "General deterrence" is a kind of deterrence under which, in a sanctions situation, a litigant refrains from taking a position because the litigant fears being sanctioned. Stein, *supra* note 71, at 327. In contrast, "specific deterrence" is a kind of deterrence under which a litigant abandons a position because that specific litigant has been sanctioned or threatened with sanctions. *Id.* Just as sanctions schemes have little general deterrence value against "nut" claims, sanctions schemes also have little specific deterrence value. Because "nut" claims often can be resolved quickly through a motion for summary judgment or dismissal, the parties defending against the claims seldom need to request sanctions. Accordingly, the litigants who file "nut" claims frequently avoid sanctions threats that might compel them to abandon their claims. *Id.* at 330.

316. See Nichols, *supra* note 314, at 359 (noting that pro se litigants file many of the more "nonsensical" claims in federal court). A large proportion of these pro se litigants are, in turn, prison inmates filing civil rights claims. See Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 937 (1990).

317. See Nichols, *supra* note 314, at 373. Most pro se litigants have received no formal legal education. Accordingly, pro se litigants do not understand the complexities of court procedural rules. *Id.* at 361-62. Even if these litigants manage to discover that procedural rules allow courts to sanction frivolous pleadings, pro se litigants will have trouble ascertaining whether their own pleadings are sanctionable. *Id.* at 372 ("Attorneys and judges often disagree on the questions of which claims lack basis in law and of what constitutes a 'good faith' attempt to change the law. Untrained pro se parties doubtless have no less difficulty.").

318. See *supra* text accompanying notes 73 and 176.

319. Large fee awards can produce "devastating professional and financial consequences." Cochran, *supra* note 67, at 6. Moreover, they can have a profound stigmatizing effect. In a recent case, a federal district court in North Carolina assessed substantial sanctions under Rule 11 against a respected law professor who, in good faith, had represented a class of Native Americans in a civil rights action. See Johnson,

who file claims that raise exotic factual or legal allegations, especially if proceeding pro se, often are indigent and have little social status to lose.³²⁰

Similarly, both the existing sanctions schemes that use a subjective standard and the existing sanctions schemes that use an objective standard are ineffective in deterring litigants from filing groundless claims or defenses for the sole purpose of gaining leverage in legal or business negotiations. If there were one kind of pleading that sanctions schemes should deter, it would be groundless pleadings that litigants file to gain leverage against their opponents. Leverage suits represent litigation at its worst: the parties who bring these suits have no interest in vindicating justice or otherwise effecting justice. Rather, the parties who bring leverage suits desire to effect advantageous economic ends, even if achieving those ends requires pursuing illegitimate means.³²¹ The threat of sanctions, however, is not a large enough stick with which to chastise parties who bring leverage suits. The largest sanction that a court might impose under most sanctions schemes, whether based upon an objective standard or a subjective standard, is an award of fees.³²² To parties who file leverage suits, the cost of expending a potential fee award does not even begin to approach the benefit of compelling opposing litigants to settle embarrassing legal disputes or to concede larger shares of the relevant market.

An example of a leverage suit that can produce benefits which exceed the risk of sanctions is a public interest intimidation suit, sometimes called a SLAPP.³²³ The most common form of SLAPP—Strategic Lawsuit Against Public Participation—is a claim that a real estate developer asserts against public interest activists either to punish them for

supra note 47, at 650 (citing Memorandum Regarding Nature of Sanctions, Robeson Defense Committee v. Britt, No. 89-06 CIV-3-II (E.D.N.C. 1991)). As a consequence of the sanctions, the professor for a time was unable to attend classes and other school and community functions. *Id.*

320. See Nichols, *supra* note 314, at 369-70; see also Blaze, *supra* note 316, at 988 ("Monetary sanctions simply are not effective in the case of indigent litigants."); cf. Mallor, *supra* note 19, at 643 (observing that because litigants who bring "nut" claims "are not likely to be proceeding on rational bases anyway, it would seem that they are not likely to be deterred by the possibility that they may be liable for their opponents attorneys' fees").

321. See, e.g., Brecher, *supra* note 6, at 105.

322. See *supra* text accompanying notes 73 and 176.

323. See George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988); George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989).

opposing past development projects or to discourage them from challenging future projects.³²⁴ Such intimidation suits might allege that the public interest activists abused civil process, interfered with contractual or other prospective business relations, or libeled the developer.³²⁵ Usually, these SLAPPs are patently groundless. Nonetheless, developers continue to file SLAPPs, invariably knowing that the claims are groundless and therefore sanctionable. The developers perceive that the sanctions a court might impose against them for filing a SLAPP are, simply, an unavoidable cost of doing business.³²⁶

Additionally, and perhaps most curiously, sanctions schemes are ineffective in deterring lawyers from filing unfounded sanctions motions. Although unfounded sanctions motions are just as sanctionable under the existing sanctions schemes as unfounded pleadings,³²⁷ lawyers have persistently used sanctions motions as a means for gaining a

324. See Brecher, *supra* note 6, at 105; see also *supra* note 152. "These suits are effective for four main reasons: (1) they transform the position of the parties; (2) they increase the risks involved; (3) they divert the attention of the [public interest activists]; and (4) they delay resolution of the original issue." Victor J. Cosentino, Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W.L. REV. 399, 403 (1991).

SLAPPs are distinguishable from intimidation counterclaims, which a developer might file to intimidate a plaintiff in an ongoing legal challenge to a development project. Cosentino, *supra* at 405. The purpose of an intimidation counterclaim, though, is identical to the purpose of a SLAPP. Both are intended to allow a developer to gain leverage against public interest activists. See Brecher, *supra* note 6, at 113-14.

325. See Brecher, *supra* note 6, at 113. Professor Pring has cited several examples of SLAPP suits in the New York City area, including an \$11,200,000 libel and conspiracy suit that a developer brought against nine homeowner groups for testifying against a luxury development project and a \$6,652,000 business interference and defamation suit that another developer brought against seven private citizens for lobbying against a two-home development. See Pring, *supra* note 323, at 13.

326. See Cosentino, *supra* note 324, at 416. Fee awards do not present a significant threat to developers who pursue SLAPP suits. Cosentino notes that the average damages request in a SLAPP is \$9 million, while the average amount of fees expended in defending a SLAPP is \$8500. *Id.* "Even assuming that the plaintiff's actual damages due to the defendant's petitioning action are only a fraction of those claimed, the economic incentive to sue vastly outweighs the costs of suing and paying attorney's fees." *Id.* Cf. Barker, *supra* note 152, at 420 ("Sanction amounts, when awarded, are too small to deter."); Brecher, *supra* note 6, at 137 ("[T]he typical sanction award is a relatively minimal amount and is usually imposed against an attorney, rather than his client. Thus, a determined developer is not likely to be discouraged from filing a retaliation suit by the remote possibility of sanctions.").

327. See Woods, *supra* note 40, at 666 n.2 (noting that sanction motions are often themselves frivolous). Some jurisdictions include in the text of their sanctions provisions a specific warning that groundless sanctions motions are sanctionable. See, e.g., N.Y. Ct. RULES § 130-1.1(c) ("Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section.").

procedural advantage in litigation.³²⁸ Even if they know that their motions are groundless, they believe that the benefits of filing the sanctions motions outweigh the risks. More often than not, they are right. A sanctions motion, even if unfounded, can intimidate an opposing litigant who fears incurring a large fee award.³²⁹ It can stall pre-trial proceedings while the judge examines the law and facts.³³⁰ It can influence the judge to reach a favorable decision on the merits.³³¹ Taken together, or even individually, these benefits can far exceed the risks of a sanctions award that, typically, would amount to a minimal award of the fees that opposing counsel expended in challenging the sanctions motion.

Sanctions schemes, in sum, cannot achieve effective deterrence as long as the predominant form of sanction that courts impose under the sanctions schemes is a fee award. Some individuals, such as litigants who file "nut" cases, might not even think about the risk of a fee award before filing suit. These individuals often lack the competence or sophistication to understand that their pleadings are sanctionable.³³² Imposing a large fee award against these individuals is akin to beating a deaf child for failing to respond to a dinner bell: like the deaf child, these individuals do not possess the skills to know that their conduct is

328. See Fitzwater, *supra* note 81, at 798-801; see also David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 838 (1992) (stating that "adversaries may gain a number of strategic advantages from reporting lawyer misconduct").

329. See *supra* text accompanying notes 287-306.

330. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 47; see also Schwarzer, *supra* note 30, at 183-84 (a lawyer seeking to stall litigation "may welcome the resulting proliferation of proceedings as serving his purposes"); cf. Fitzwater, *supra* note 81, at 800 ("Practitioners should recognize that unfounded Rule 11 motions must be ruled upon and that district courts are required to give the motions sufficient attention to facilitate appellate review. This likewise diminishes available resources and gives rise to the dual evils of delay and excessive cost."). A lawyer often might find it desirable to stall pre-trial proceedings. Although the ethical merit of the practice is questionable, stalling pre-trial proceedings can increase litigation costs, compelling a less well financed opponent to initiate settlement negotiations. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 37.

331. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 45. Stein argues that lawyers seek sanctions not against frivolous arguments, but rather against dangerous arguments. A motion for sanctions thus is a form of emphatic behavior, suggesting that the challenged argument is so wrong that it is frivolous. Stein, *supra* note 71, at 315. The judge hearing the motion may use it "as an opportunity to 'split the difference' by ruling for the party requesting sanctions on the merits but denying sanctions." *Id.*

332. See *supra* text accompanying notes 316-17.

disfavored. Rather than assessing fee awards to deter "nut" cases generally,³³¹ courts should consider alternative sanctions that would deter specific litigants from pursuing additional "nut" claims in the future—e.g., reprimanding the offenders, requiring the offenders to read materials that cover the appropriate substantive legal area and to prepare a report about them, requiring the offenders to seek court approval before filing future claims. Sanctions schemes that encourage these alternative sanctions would continue to allow courts to redress groundless "nut" claims, but at the same time, the sanctions schemes would achieve their deterrence function through educating the offenders, not coercing them.³³²

Other individuals might think about the risk of a fee award before filing suit and nonetheless conclude that the potential benefits are worth running the risk. Thus, while a fee award might deter private individuals from filing a public interest class action that raises a novel or uncertain claim, it might not deter a large corporation from filing a bad faith leverage suit. Corporations, in general, are much better able to afford the expense of a fee award.³³³ Likewise, a fee award might not deter a lawyer from filing a sanctions motion that the lawyer knows is unfounded. The amount of fees that opposing counsel would expend in challenging an unfounded sanctions motion in most cases will not be as prohibitive as the amount of fees opposing counsel would expend in challenging a frivolous claim or defense.³³⁴

333. For the differences between general deterrence and specific deterrence, see *supra* note 316.

334. Repeated frivolous filings, notwithstanding intervening non-monetary sanctions designed to educate the offender, might suggest that the offender is acting with a bad faith intent to abuse the judicial process. Even then, however, courts should entertain sanctions that would have a prospective, rather than remedial, effect upon the offender. For example, a sanction that imposes a limit upon the number of lawsuits a litigant can file, absent court approval, might be more effective than a fee award or other monetary sanction. See Blaze, *supra* note 316, at 988.

335. See Cosentino, *supra* note 324, at 402.

336. Most jurisdictions use the lodestar method to calculate fee awards. See, e.g., *White v. General Motors Corp.*, 908 F.2d 676, 684 (10th Cir.) (applying the "reasonableness (lodestar) calculation"), *cert. denied*, 111 S. Ct. 788 (1991). Under the lodestar method, a court calculates attorney fees by multiplying the customary hourly rate for the services rendered and the number of hours reasonably expended. The court can then adjust this figure, taking into account several factors:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of

For individuals who make a conscious decision to abuse the judicial process, courts must impose a sanction that is more stringent than a fee award. Courts might consider imposing a fine that would exceed the amount of a fee award and, accordingly, create a larger disincentive against litigation abuse. In egregious cases, courts might consider suspending the lawyers who brought the offensive pleadings or motions from practicing in those courts. But regardless of the sanction, the federal and state courts must do a better job of tailoring the sanction to fit the offense and the offender. Otherwise, sanctions schemes, whether based upon a subjective or objective standard of conduct, will continue to be ineffective in deterring illegitimate litigation.

2. Punishment

Another valid purpose for sanctions measures is to punish individuals who abuse the judicial process. Although one goal of punishment is to deter offensive behavior³³⁷—and, to that extent, the terms "deterrence" and "punishment" are often used interchangeably³³⁸—punishment also serves the larger goal of condemning offensive behavior.³³⁹ Punishment, in short, is retribution. Regardless whether it deters offensive behavior, it satisfies the collective societal desire for revenge against the offender.³⁴⁰ Judicial sanctions measures allow the

the professional relationship with the client; and (12) awards in similar cases.

Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980)).

337. Traditionally, punishment serves four goals: deterrence, incapacitation, rehabilitation and retribution. Michele H. Kalstein et al., Comment, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 576 (1992).

338. Compare *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990) ("It is now clear that the central purpose of Rule 11 is to deter baseless filings . . .") with *Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1081 (1992) ("Rule 11 is designed to punish a party who has already violated the court's rules").

339. See Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1050, 1063 (1992). In most cases, emphasizing punishment will not produce a result different from emphasizing deterrence. Nonetheless, in some circumstances, the two goals might produce different results. Conceivably, harsh sanctions might be appropriate to punish a recalcitrant litigant even where the litigant is so intent upon abusing the judicial process that the sanctions would have little deterrent effect.

340. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (1776); A.C. EWING, THE MORALITY OF PUNISHMENT: WITH SOME SUGGESTION FOR A GENERAL THEORY OF ETHICS 32-35 (1920); see also OLIVER W. HOLMES, JR., THE COMMON LAW 40 (1881) ("It certainly may be argued, with some force, that it

courts to condemn abusive litigation behavior. With sanctions, the courts can exact some measure of vengeance against individuals who have consumed court time and docket space despite lacking a colorable reason for doing so.

But while sanctions measures can and should serve a retributive function, the range of sanctions available for particular offenses must be circumscribed. Punishment, in other words, must be commensurate with the moral guilt of the offender.³⁴¹ If the sanction is not severe enough for the offense, the sanction will have little retributive effect upon the offender. Perceiving that the sanction is, in context, equivalent to a mere slap on the wrist, the offender will be encouraged to commit in the future the same abusive behavior for which she received the sanction. Conversely, if the sanction is too severe for the offense, the sanction will "dehumanize" the offender.³⁴² Perceiving that the sanction is unfair, the offender will feel victimized and might, in fact, suffer some measure of emotional trauma. The federal and state appellate courts have for these reasons recognized the need to circumscribe the range of sanctions, concluding that sanctions should be no more severe than is adequate to punish the offender effectively.³⁴³ Unfortunately, the trial courts often fail to assess sanctions that bear a reasonable relationship with the seriousness of the offense.³⁴⁴

Just as it limits their deterrence value, the predominance of fee awards limits the retributive value of sanctions schemes. In most instances in which a sanction scheme authorizes a trial court to assess a

has never ceased to be one object of punishment to satisfy the desire for vengeance.").

341. See Crocker, *supra* note 339, at 1101 ("[T]here is widespread agreement that the severity of punishment should bear some relationship to the seriousness of the crime"); Kalstein, *supra* note 337, at 650 ("Rather than punish offenders for the sake of some other end, the system should punish offenders to the extent that they deserve it").

342. Kalstein, *supra* note 337, at 646.

343. See, e.g., *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 788 (1991); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 860, 878 (5th Cir. 1988) (en banc); *Bryant v. Joseph Tree, Inc.*, 829 P.2d 1090, 1107 (Wash. 1992) (en banc); *Williams v. Board of Trustees*, 589 A.2d 901, 911 (D.C. Ct. App.), *cert. denied*, 112 S. Ct. 190 (1991). The 1993 amendments to Federal Rule 11 include language that codifies the "least severe sanction adequate" requirement. FED. R. CIV. P. 11(c)(2) ("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."). Cf. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1053 (1978) ("[A] sanction aimed at vindicating the authority of the law . . . may be no more severe than necessary to achieve that end.").

344. See Johnson et al., *supra* note 47, at 655 (noting lower courts' failure to observe "the 'least severe sanction adequate' requirement").

sanction award against a litigant for pursuing frivolous litigation, the court will assess a sanction that reimburses the victim for his legal expenses. Some litigants, though, will not view a fee award as a compelling sanction. A developer who files a SLAPP suit to induce public interest activists to cease their opposition to a development project, for example, might find that a fee award is nothing more than a minor irritation—an expense of doing business that the profits from the development project will more than offset.³⁴⁵ For such a litigant, a fee award does not serve the purposes of punishment at all: the developer is not forced to experience a pain or loss that is commensurate with his moral guilt. Especially when the developer has filed its action in subjective bad faith, the developer ought to be subject to a more fitting sanction.

In comparison, individuals who have acted in good faith, and thus possess far less moral guilt, might find that a fee award is an unbearable sanction. Besides the fact that a fee award can in some circumstances pose a large financial obstacle, a fee award can also produce devastating emotional consequences.³⁴⁶ The weight of a punitive fee sanction on the shoulders of an individual who has pursued a course of conduct in good faith, in particular, can be enormous. To state the obvious, an individual who acts in good faith neither knows nor believes that her conduct is improper. Assessing a sanction that suggests that her conduct is not just wrong, but so wrong that it justifies a fee award that resembles a criminal fine, implies that the individual possesses a higher degree of moral guilt than in fact she possesses. A rebuke of that magnitude against an individual who neither knew nor believed that her conduct was improper is a bitter pill. While the conduct might in fact support some kind of sanction, the weight of a fee award in that instance far exceeds the seriousness of the offense, whether the individual filed a "nut" claim that raises exotic factual assertions or filed a novel claim that raises legal arguments which offend an objective standard of reasonableness.

Sanctions schemes, in sum, give courts a means with which to punish litigation abuse, but the sanctions that courts impose under these schemes must be appropriate. If a sanction is not commensurate with the offense, then the sanction both ignores the nature of the offense and the individual circumstances of the offender. In essence, the sanction fails to be a reasoned response to the offensive conduct and

345. See *supra* notes 323-26 and accompanying text.

346. See Johnson et al., *supra* note 47, at 650.

stead becomes punishment for the mere sake of punishment. Although fee awards sometimes can be an appropriate sanction, fee awards are too often a mindless form of punishment that courts impose against offenders for the mere sake of punishing the offenders. In focusing upon a sanction that considers the expenses of the victim and the nature of the offense or the circumstances of the offender, federal and state courts have abdicated their duty to ensure that the punishment they impose against litigation abuse is commensurate with the offense.

3. Compensation

Of the three main purposes that the courts have identified for sanctions awards, the third purpose—compensating the victims of litigation abuse—is the least justifiable. The compensation rationale purports to “make whole” the victims of litigation abuse—i.e., to reimburse the victims for the expenses that they incurred in challenging the abusive conduct.³⁵⁰ Unlike the general policies of deterrence and punishment, therefore, the compensation rationale requires that courts impose fee awards as the sanction for litigation abuse. Because it emphasizes the victim rather than the offender, the compensation rationale abrogates judicial discretion to craft a sanction, other than a fee award, that would balance the competing interests in preserving free access and lessening litigation abuse. Predictably, fee awards produce the same undesirable consequences under a compensation rationale that fee awards produce under a deterrence or punishment rationale.³⁵¹ In requiring that courts impose fee awards as the sanction for litigation abuse, though, the compensation rationale magnifies these consequences considerably.

First, the compensation rationale suggests that the law is indifferent to litigation abuse.³⁵² As under the deterrence and punishment theories, the predominance of fee awards under the compensation rationale offers little disincentive against abuse of the judicial process. As

³⁵⁰ See Sofaer, *supra* note 44, at 706 (fee awards “serve the important purpose of tuition, enabling courts to rectify the improper imposition of costs on one party or another”). The compensation rationale thus conflicts with the “American rule” for attorney fee shifting. Under the American rule, each side in litigation must bear its attorney fees. See *Alaska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 39 (1975); see also DAN B. DOBBS, *LAW OF REMEDIES* § 3.10(1), at 276 (1993) (observing that the rule in the United States “is that the losing party . . . is not liable for the winner’s attorney fee”).

³⁵¹ See *supra* Section III.B.1. & 2, pp. 1136-50.

³⁵² See Robertson, *supra* note 48, at 121 (“Compensation theory says to the frivolous filer that the law does not care if he signs, files, serves and pursues a frivolous . . .”).

long as individuals are willing to reimburse their victims, then the threat of a fee award will not intimidate the individuals from filing a frivolous motion or pleading in bad faith.³⁵³ At least under sanctions schemes that give courts the discretion to impose a sanction other than a fee award there remains some minimal threat that a court in a particular case might impose a sanction which would exceed a mere fee award. Sanctions schemes that follow a compensation rationale remove all doubt. Knowing that the sole possible sanction is a fee award, individuals can calculate the exact cost of abusing the judicial process and decide whether the cost justifies the potential rewards. The compensation rationale thus implies that the courts will tolerate abuse if the offenders can “pay their own way.”

Second, the compensation rationale further increases the administrative burdens that the courts must bear. Although the compensation rationale abrogates judicial discretion to craft a sanction other than a fee award, it nonetheless requires that for each sanctionable offense, a court must calculate an appropriate fee award. This process consumes valuable court time,³⁵⁴ and moreover, it is itself ripe for abuse.³⁵⁵ Because the compensation rationale ensures that courts will assess a fee award for violations of a sanctions provision, it entices litigants to flood the courts with sanctions motions, hoping to recover some or all of their legal expenses.³⁵⁶ The courts must wade through these motions, dividing the wheat from the chaff. Even when the sanctions motions are

³⁵⁰ *Id.*

³⁵¹ See Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 489.

³⁵² Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 53.

³⁵³ See Dobbs, *supra* note 351, at 436 (noting the “considerable secondary litigation over attorney fees”); Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 53. Fee awards are a “tempting carrot.” Fitzwater, *supra* note 81, at 799. In Alaska, the one American jurisdiction that allows prevailing parties in civil litigation to recover part of their attorney fees as a matter of course, fee awards are “the single most appealed issue in civil cases.” Hughes, *supra* note 201, at 145 (quoting James Blair, former president of the Alaska Bar Association). See also Kordziel, *supra* note 201, at 438 (“[T]he ambiguity inherent in determining a reasonable fee resulted in a large number of appealed awards. According to a 1982 survey, more than one-fifth of the cases coming before the Alaska Supreme Court contained attorney fee issues.”); cf. *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1190 (5th Cir. 1990) (“Perhaps the fiercest legal battles emerge not from knotty questions of a plaintiff’s right to justice, but rather from comparatively trivial questions of an attorney’s right to compensation.”).

laid, the documents that support the motions often contain exaggerated claims of expenses and billable hours.³⁵¹

The legislative and judicial bodies that draft sanctions measures must eliminate the language in their statutes and rules that encourages courts to assess fee awards. Certainly, in some instances, a fee award will be an appropriate sanction. But even then, the award must serve the policies of deterrence and punishment, not compensation. A sanction should be a reasoned response to the nature of the offense and the circumstances of the offender, not an automatic attempt to reimburse the victim. To ensure a balanced approach to frivolous litigation, sanctions schemes should compel courts to emphasize sanctions other than fee awards. For conduct that does not reflect subjective bad faith, sanctions schemes should require courts to impose minor sanctions, such as nonmonetary sanctions or a nominal monetary fine. For conduct that reflects subjective bad faith, sanctions schemes should authorize courts, where the circumstances warrant, to impose monetary sanctions even larger than a fee award.

IV. A BALANCED APPROACH: COMBINING THE BEST ASPECTS OF THE OBJECTIVE AND SUBJECTIVE STANDARDS

To represent a balanced approach to frivolous litigation, a sanctions scheme must respect both the interest in preserving free access to the courts and the interest in redressing litigation abuse. Thus, a sanctions scheme should not threaten large sanctions against litigants whose conduct does not reflect subjective bad faith. Even if large sanctions are assessed infrequently, the mere threat of large sanctions can chill litigants from pursuing novel or uncertain claims. But at the same time, a sanctions scheme should give courts appropriate means with which to punish and deter frivolous litigation. If a litigant abuses the judicial process, whether in bad faith or in good faith, a court should be able to respond with a sanction that is commensurate with the offense. Ultimately, in balancing the competing interests of preserving free access to the courts and redressing litigation abuse, a sanctions scheme must combine the best aspects of the objective and subjective standards for imposing sanctions.

The 1993 amendments to Federal Rule 11 do *not* provide a workable model for drafting a balanced sanctions scheme. Although it is too soon to measure the effects of the 1993 amendments, the 1993 amendments will, undoubtedly, continue to exert a chilling effect upon litiga-

351. See Dobbs, *supra* note 351, at 436 n.11 (characterizing such exaggerated claims "common").

tion.³⁵⁵ Rather than confine large sanctions to individuals whose conduct reflects subjective bad faith,³⁵⁶ the 1993 amendments attempt to lessen the chilling effect of the rule with various procedural devices—among other things, a "safe harbor" provision and a provision that gives judges the discretion to refuse a sanctions award.³⁵⁷ These procedural devices do not eliminate the conditions that inhibit litigants from filing novel or uncertain claims. While the "safe harbor" provision might allow litigants to withdraw an erroneous pleading,³⁵⁸ it does not ensure that litigants can assert a novel legal argument—after the safe harbor period has expired—without bearing the risk of a large fee award.³⁵⁹ While the provision that gives judges discretion to refuse an award might allow judges to ignore de minimis violations,³⁶⁰ it does not ensure that judges will refrain from assessing large fee awards against litigants who act in good faith.³⁶¹ The 1993 amendments to Rule 11, in

355. See *supra* Section II.A.3.

356. The 1993 amendments provide that federal district courts should limit sanctions awards to a form "sufficient to deter repetition" of the sanctioned behavior. FED. R. CIV. P. 11. But while this language is an improvement over the 1993 version of Rule 11, which contained no express language limiting sanctions awards, it remains little more than an exhortation that courts should act reasonably. See Johnson et al., *supra* note 47, at 666 ("emphasis alone will not bring any real change to Rule 11 practice"). Nothing in the 1993 amendments prevents district courts from imposing fee awards against litigants who act in good faith. See *id.*; see also Lazaroff, *supra* note 71, at 1118-19.

357. FED. R. CIV. P. 11.

358. See Bunch, *supra* note 109, at 966.

359. While on the whole the "safe harbor" provision is a significant protective mechanism, it does not in itself ensure that sanctions provisions will preserve the right of free court access. See Tobias, *supra* note 92, at 1784-85. Indeed, the "safe harbor" provision might increase, rather than decrease, the chilling effect of Rule 11 sanctions. The provision might inspire some lawyers to file sanctions motions as a tactical maneuver to coerce opposing counsel to withdraw undesirable pleadings. See *id.* at 1785; see also Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 48 n.112. But see Bunch, *supra* note 109, at 966 (arguing that fears that the safe harbor provision might invite abusive litigation tactics are "highly speculative").

Similar to the 1983 version of Rule 11, the 1993 amended version purports to allow litigants to make a nonfrivolous argument "for the extension, modification, or reversal of existing law." FED. R. CIV. P. 11. This language, however, is insufficient to prevent judges from assessing sanctions against litigants for pursuing novel or uncertain claims. See *supra* text accompanying notes 62-64.

360. See Simpson, *supra* note 109, at 511.

361. See Tobias, *supra* note 92, at 1786 ("[T]he decision to reinstate discretionary sanctioning may be less significant than numerous observers . . . have suggested. For

short, do not represent a balanced approach to frivolous litigation.

A sanctions scheme that represents a balanced approach to frivolous litigation would, first, limit the most severe sanctions to individuals whose conduct reflects subjective bad faith—i.e., a willful intent to harass the opposing side or to stall pre-trial or trial proceedings. If the evidence establishes bad faith,³⁶² the sanctions scheme would authorize a court to impose any sanction that the court in its discretion found appropriate to deter future litigation abuse and punish the offender, subject to the requirements that the sanction be commensurate with the offense and consistent with due process.³⁶³ Among the kinds of sanctions that a court could impose against an individual whose conduct reflected bad faith would be a fee award. But in the interest of advancing the policies of deterrence and punishment, the sanctions scheme should not emphasize fee awards as the predominant form of sanction. Even against individuals whose conduct reflects bad faith, other kinds of sanctions—such as a large fine payable to the court or an order precluding an offending lawyer from practicing before the court—might be more appropriate in some circumstances than a fee award.

Conversely, in some circumstances, a sanction even greater than a fee award might be appropriate. Against a corporate litigant that abuses the judicial process to produce desirable economic ends, for instance, a fee award would have little or no deterrent effect. Indeed, if the corporate litigant possesses substantial assets, a potential fee award would have about the same effect as a mosquito bite on the hind leg of an ele-

instance, there is little reason to think that trial judges who impose substantial sanctions on civil rights plaintiffs under existing Rule 11 will exercise this discretion differently . . .").

362. To avoid allowing individuals to hide bad faith conduct behind a facade of good faith, courts should be able to examine protestations of innocence critically. Thus, if the preponderance of the evidence—either direct or circumstantial—establishes that the offender acted in bad faith, the courts should be able to enforce a severe sanction, regardless of whether the offender claims the mantle of good faith. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 62.

363. Conceivably, due process requires, at least to some extent, that sanctions awards be reasonable in size and amount. See Keeling, *Due Process Requirements*, *supra* note 62, at 383. Cf. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (in deciding whether a punitive damages award satisfies due process, "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus"). Presumably, though, a sanctions award that is commensurate with the nature of the offense and the circumstances of the offender will meet the requirements of due process. Cf. *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1382 (5th Cir. 1991) (concluding that a punitive damages award is not unreasonable if some "circumstances of probative force" support the amount of the award).

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phant. A sanctions scheme should not prevent courts from assessing a sanction that is commensurate with the offense and the circumstances of the offender. If a litigant acts in subjective bad faith and the facts establish that a fee award—or any lesser sanction—would neither deter nor punish the litigant adequately, then a court should be able to assess a fine or other monetary sanction that is even larger than a fee award.

Certainly, confining the most severe sanctions to conduct that reflects bad faith would allow some egregious conduct to go unpunished—or at least to incur nothing more than a comparable slap on the wrist—where the offender is able to suppress evidence of its subjective bad faith.³⁶⁴ This disadvantage, however, does not offer a compelling reason for clinging to the existing sanctions models. First, few bad faith offenders will be able to escape a punishment that is commensurate with their offense. Just as criminal offenders find it almost impossible to pull off a crime without leaving some evidence that would establish their criminal intent, litigants will find it almost impossible to abuse the judicial process intentionally without leaving some evidence that would establish their bad faith.³⁶⁵ And because judges—perceiving that litigation practice has become too confrontational—are more than willing to look behind false protestations of good faith, litigants should expect that if they abuse the judicial process intentionally, judges will more often than not find sufficient evidence of bad faith to impose severe sanctions.³⁶⁶

Moreover, confining the most severe sanctions to conduct that reflects bad faith preserves the goal of ensuring that sanctions schemes will not inhibit litigants from pursuing novel or uncertain claims. The existing low threshold and hybrid sanctions schemes exert a chilling effect upon litigation because they raise the threat that litigants might

364. For this reason, some commentators, including the author, have argued that the legal profession itself should be more diligent in punishing lawyers who act unprofessionally. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 74; Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 *PEPPERDINE L. REV.* 637, 643-44 (1990).

365. See *supra* notes 161-62.

366. Judges in high threshold states have not complained that bad faith litigation abuse slips through the cracks of their sanctions schemes—indeed, in some of these states, judges have imposed several large sanctions awards against litigants whose conduct reflects bad faith. See Woods, *supra* note 40, at 673-74. Rather, the judges in these states have complained that high threshold sanctions schemes do not allow them to reach conduct that, while troubling, does not rise to the level of bad faith. See *supra* text accompanying notes 161-65.

be required to bear a large fee award or other severe sanction for pressing a position that a judge finds unreasonable. If litigants were reassured that courts could not impose the most repressive sanctions absent evidence that the sanctioned individual intended to harass the opposing side or to stall trial proceedings, then the litigants would feel more free to pursue claims and defenses that pushed the outer boundaries of the existing law. As long as the litigants believed in good faith either that their arguments were valid or that their arguments reflected legitimate grounds for changing the law, the litigants would be immune from the kinds of sanctions that otherwise might inhibit their free access to the courts.

Finally, while a sanctions scheme that represents a balanced approach to frivolous litigation should confine the most severe sanctions to conduct that violates a subjective standard, it does not confine *all* sanctions to conduct that violates a subjective standard. If the evidence fails to establish that the offender acted in subjective bad faith, but nonetheless establishes that the offender failed to conduct a reasonable investigation into the law and facts supporting his motion or pleading,³⁶⁷ a sanctions scheme should give a court a limited range of less severe sanctions that the court could impose against the offender. The sanctions that a court could impose against an individual who violates an objective standard of reasonableness might include the following: (1) a nominal fine, (2) a public or private reprimand, (3) an order requiring the offender to send the victim of her conduct a formal written apology, (4) an order requiring the offender to read materials that cover the appropriate substantive area and to prepare a written report on them, (5) an order requiring an offending lawyer to attend continuing educational instruction in the relevant substantive area, and (6) an order requiring the offender to seek court approval before filing future motions or pleadings. While the sanctions scheme would not permit a judge to assess a fee award that was greater than a nominal amount, it would not require that a judge sit on her hands if she perceived that a litigant had acted unreasonably.³⁶⁸

367. The objective standard should be directed toward prefilling conduct, not the final product. See *supra* note 57.

368. Presumably, there would be no harm in assessing a \$1000 fee award against a deep pockets litigant whose conduct, while offending an objective standard of reasonableness, does not rise to the level of subjective bad faith. But while a \$1000 sanction might be insignificant to some litigants, it might be unbearable to others. To avoid a situation in which litigants might haggle over whether a sanction is "large" enough to require subjective bad faith as a prerequisite, a sanction scheme should prescribe some nominal amount—\$50 or \$100—that would define the upper limit of a monetary sanction for individuals whose conduct does not reflect subjective bad faith. Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 61.

Limiting the range of sanctions for conduct that offends an objective standard of reasonableness does not leave courts powerless to redress litigation abuse. A reprimand, in particular, can be an effective sanction. As one federal court has observed, the "biggest sanction" often is a formal rebuke in open court that tells the sanctioned individual that her conduct was inappropriate.³⁶⁹ Although more and more lawyers seem to be willing to abuse the judicial process whatever the costs to their reputation, most lawyers remain conscious of their public image.³⁷⁰ While a reprimand is not so severe that its threat would chill litigation, it can nonetheless sting its proud victims. Moreover, it satisfies the desire that judges feel to react to conduct that they find unreasonable. Especially when the offensive conduct is nothing more than mere neglect or oversight, a reprimand generally is sufficient to compel its victims to be more attentive in the future.³⁷¹ In many circumstances, therefore, a reprimand will both adequately punish lawyers whose conduct violates an objective standard and deter them from committing future violations.

Even if judges find that a reprimand is an unacceptable sanction, they retain a wide range of options other than fee awards. With an appropriate order requiring a lawyer to attend continuing legal education classes, for example, a judge could ensure that the lawyer receives instruction in the nuances of the relevant substantive area, but at the same time, would not inhibit the lawyer from handling novel or creative claims. Against a pro se litigant who files repeated meritless claims, albeit in good faith, a judge could require that the litigant seek court approval before filing future claims, thus limiting the amount of time that the judge must devote to meritless claims but not preventing the litigant from exercising his right to test the limits of the law. In each instance, the sanction allows the judge to redress perceived litigation abuse. Because the sanctions do not involve fee awards or other financial penalties, though, the sanctions pose a lesser threat of chilling litigation. While these sanctions will sting their recipients, and perhaps even embarrass them, these sanctions remain a much more bearable risk than a potential fee award that might devastate its recipients financially.

369. *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 841 (1st Cir. 1990).

370. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 66.

371. See Keeling, *A Prescription for Healing the Crisis in Professionalism*, *supra* note 6, at 66-67.

If a sanctions scheme incorporated the best aspects of both the objective and subjective standards, then the sanctions scheme would represent a more balanced approach to frivolous litigation than the existing sanctions models. The drafters of the sanctions scheme can, of course, add procedural devices that might further temper its repressive effects. In particular, the drafters might consider adding a provision that would require a trial court to draft factual findings in cases in which it imposes a severe sanction, ensuring that the appellate court will have adequate information with which to review the sanction.³⁷² Additionally, the drafters of a sanctions scheme might consider adding a provision that would require a trial court to give the offender notice and an oral hearing before imposing a severe sanction, ensuring that the offender receives adequate due process protection.³⁷³ While these procedural devices in themselves would be insufficient to cure the ills inherent in sanctions schemes that use an objective standard of conduct, these procedural devices might be useful additions to a sanctions scheme that incorporates both an objective and subjective standard.

At a minimum, however, a sanctions scheme must combine the best aspects of the objective and subjective standards. If a sanctions scheme limited the most severe sanctions to conduct that reflected subjective bad faith, it would preserve the goal of ensuring free access to the courts. At the same time, if the sanctions scheme authorized a

372. See Johnson et al., *supra* note 47, at 673-74. In the absence of factual findings that explain the basis for a sanctions award, meaningful appellate review is almost impossible. An appellate court more often than not must affirm the sanctions award "because the record—bare as it is—provides no basis on which to determine whether the district court abused its discretion." *Id.* at 661. In cases that involve a harsh sanction, such as a large fee award, the appellate court must have some means of determining both that the offender in fact acted in bad faith and that the sanction is appropriate to the offense. See *id.* at 676.

373. See Keeling, *Due Process Requirements*, *supra* note 92, at 374. Due process is a flexible concept. However, in general, "The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due." Donaldson v. Clark, 819 F.2d 1551, 1558 (11th Cir. 1987). Particularly in cases involving harsh sanctions, due process might require comprehensive procedural safeguards: harsh sanctions can produce devastating professional and financial consequences, and the risk that a court will impose an unjust sanction is high. Keeling, *Due Process Requirements*, *supra* note 92, at 352-53. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (requiring that a court consider three factors in determining the amount of process due: (1) the individual interest of the recipient, (2) the risk of erroneous deprivation, and (3) the government interest). But even if due process does not require comprehensive procedural safeguards as a prerequisite to harsh sanctions, notice and an oral hearing can still serve valuable functions, including (1) permitting the subjects of the proposed sanctions to explain their conduct, (2) allowing the trial court judge the time to consider the severity and propriety of the proposed sanctions, and (3) ensuring that the facts supporting the sanction will appear in the record. Miranda v. Southern Pac. Transp. Co., 710 F.2d 510, 522-23 (9th Cir. 1983).

range of lesser sanctions against conduct that violated an objective standard, it would preserve the goal of permitting the courts some means of redressing perceived litigation abuse. The existing schemes, which predicate sanctions awards upon one or the other standard, have failed to balance these competing goals and often have engendered more problems than they have cured. Only a scheme that manages to incorporate both an objective and subjective standard will reflect a balanced approach to frivolous litigation.

V. CONCLUSION

In sanctions schemes, as in life itself, moderation is a virtue. An ideal sanctions scheme would attempt to balance two competing goals: redressing litigation abuse and preserving free access to the courts. While it would allow courts to control the judicial process, it would not inhibit litigants from pursuing novel or uncertain claims. The existing sanctions schemes in the federal and state courts, however, fail to steer a moderate course, either defining "frivolous" litigation too narrowly or too broadly. As might be expected, therefore, the existing schemes sacrifice one of the two goals for the other. The sanctions schemes that confine sanctions to situations in which a litigant acts in subjective bad faith leave courts unable to redress conduct which, while harmful to the judicial process, does not rise to the level of bad faith. Conversely, the sanctions schemes that define "frivolous" litigation with respect to an objective standard exert a chilling effect upon litigants who, despite possessing legitimate claims or defenses, fear incurring a large fee award.

To balance the competing goals of redressing litigation abuse and preserving free access to the courts, sanctions schemes must incorporate the best aspects of the subjective and objective standards. Sanctions schemes should confine the most severe sanctions to conduct that reflects subjective bad faith. At the same time, sanctions schemes should give courts a range of lesser sanctions enforceable against litigants whose conduct, while perhaps not reflecting subjective bad faith, violates an objective standard of reasonableness. If sanctions schemes were to pursue this moderate course, then the schemes would allow judges to redress litigation abuse—regardless of whether the abuse reflected subjective bad faith. But in addition, the schemes would reduce judicial dependence upon the kinds of severe sanctions most apt to chill legitimate litigation.

Sanctions schemes, in sum, must reflect a balanced approach to

"frivolous" litigation. The schemes should not ignore frivolous litigation: while frivolous litigation might not be as pervasive as some have feared, it need not be condoned when it arises. Neither should sanctions schemes, however, attempt to punish frivolous litigation more severely than the circumstances might require. In most instances, preserving the integrity of the judicial process does not require imposing sanctions that demean individual offenders or threaten them with bankruptcy. Moderation should be the goal for which sanctions schemes strive. Rather than discourage too much licit litigation and encourage too much illicit litigation, sanctions schemes should attempt to encourage licit litigation and discourage illicit litigation.

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Grant C. Baker
P.O. Box 240986
Anchorage, Alaska 99524

February 4, 1997

RE: Support for SB43 and HB60 (increasing fines against attorneys that violate court rules)

To the 1997 Alaska Legislature:

It is my understanding that part of tort reform (SB43 and HB60) calls for an increase in fines that can be levied against attorneys for violation of court rules. This letter is one of strong support for increasing these fines.

For the past three years, I have been in a legal battle with the University of Alaska (UA) administration and its hired attorneys. The case was recently decided in my favor by the Alaska Superior Court on January 2, 1997. The Court REVERSED UA's action and determined UA had breached its contract. Now, the Court's record shows what the faculty and students knew before this went to court; UA administration was wrong. Unfortunately, UA administration is easily swayed by attorneys that are willing and able to abuse the legal system to cover up its wrong doing.

The documents from this case show UA attorneys falsified, fabricated, concealed, and altered evidence. See Ex.84, Ex.85-89, and Ex.90. The Superior Court on September 14, 1995 found that the UA administration and their hired attorneys (See Ex.84):

"failed to follow any of the rules in preparing the record."

Consequently, the Court threw out the entire record submitted by UA administration and UA attorneys. UA attorneys also withheld the transcript of the university hearing while stating they had complied with court rules for submitting the transcript. The hearing had found in my favor on all issues. See Ex.17-19. Incredible as it may seem, after being caught, the excuse UA attorneys used to justify the deception was that they thought UA administration had destroyed the hearing tapes.

The Court ordered UA attorneys to submit the transcript with (See Ex.90):

"the recognition that the record will not be complete until the transcript is prepared".

But when they submitted the transcript to the Court, it was illegible. UA attorneys then attempted to prevent the transcript from being corrected. Finally, after about eight months of delay by UA attorneys, the Superior Court approved our corrections over their continued

objections on March 4, 1996. The Court concurred with us and found that our corrections were (See Ex.97-98):

"necessary and appropriate to correct known factual errors
in the official transcript submitted by UAF"

The above described documents barely scratch the surface. There are many more documented instances of obstruction of evidence and violations of court rules by UA attorneys hired by UA administration.

Among the many common reasons that breed corruption, the problems in this case stem in part from current limits on fines being too low. The current limits pose no threat or deterrent to attorneys inclined to profit by abusing the legal system. This is reflected by the sanctions imposed by the Court have not stopped UA administration or its attorneys from continuing to obstruct evidence and proceedings.

From my review of SB43 (Sec.26) and HB60 (Sec.26), both propose an increase in the fines for violation of civil procedure court rules from \$1000 to \$10,000 [CR 95(b)]. I think that this is an excellent start. Although, I believe an even greater increase is justified and may be needed to turn the current tide of abuse.

The damage done to an innocent party due to an opposing attorney's obstruction of evidence can easily far outweigh a \$10,000 fine. Thus, it becomes a financially viable option for an attorney to choose to violate court rules for personal gain. But, as I mentioned above, the increase to \$10,000 is certainly a welcomed move in the right direction and I support it.

** However, I do not see anything in the proposed bills that increases the fines for violation of appellate procedure rules. In particular, Alaska Rule of Appellant Procedure AR 510(c), which seems to be analogous to CR 95(b) for civil procedure, is restricted to \$500 with no proposed increase. I strongly suggest that the AR 510 fines be increased to \$10,000 as well. In fact, there is as great, or greater need to put more bite into the appellant procedure fines. The procedure is strongly dependent upon good faith actions of attorneys to make material documents available to the court because discovery methods are not available as there are with civil proceedings. My case is a perfect example of the nose thumbing done by attorneys to the courts due to the inadequate \$500 fine limit.

I want to make it clear that this is not an anti-University letter. In fact, the exact opposite is true. It is an attempt to help the University by stopping UA administration and hired UA attorneys from dumping a needless burden on the backs of the rest of the University. They have chosen to abuse the legal system for their personal gain at the University's and the public expense. Doing nothing would certainly allow the abuses to continue and would further damage the University. There is a need, and a duty, to act.

If anyone investigates this case there is sure to be contrary stories created by UA administration and UA attorneys. It is hard to fight such overwhelming numbers especially since shaping public

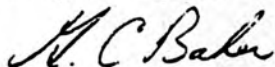
perception is their profession. But, I have faith that common sense can and should prevail. Hence I suggest that this case be viewed with the following in mind.

If claims by UA administration and UA attorneys were true, then they would not have concealed, altered, falsified, fabricated, and withheld evidence so severely that their entire record had to be thrown out by the Alaska Superior Court.

Doing nothing will allow the problem to grow and make things get worse and worse. Thus, I urge all of you to do what is necessary to prevent the abuse of the legal system by attorneys such as that which has occurred in this case. The courts need effective tools to enforce court rules. Increased fines are needed before they will have any real impact against attorneys that have chosen to blatantly violate court rules, and indulge in other abuses of the legal system, for their personal gain. Thus, I support the proposed increases in fines described by SB43 and HB60 to CR 95(b) and recommend that the same increases be made to AR 510.

If you would like to discuss the above, I can be contacted at the numbers listed below. Thank you for your time and attention.

Respectfully submitted,



Dr. Grant C. Baker

Tele:

(907) 786-1056 (wk)

(907) 563-2640 (hm)

E-mail: baker@alaska.net

Case No. 4FA-94-469-CV

cc: 1997 Alaska legislature
enclosures

UNIVERSITY OF ALASKA FAIRBANKS

97



Accounting & Business Operations
First Floor Signers' Hall • Fairbanks, Alaska • 99775-0380
Telephone • (907) 474-7551

MEMORANDUM

December 13, 1993

To: Chancellor Wadiow

From: Tim Bauer, Chair *LTB*
UAF Grievance Council

CONFIDENTIAL

ITEM AND ISSUE

Findings from grievance hearing - Grant Baker

BACKGROUND AND SUMMARY

A hearing panel was convened and heard the matter of Grant Baker's grievances dated October 25, 1993 and November 10, 1993. In Dr. Baker's October request for a hearing he alleged that his non-retention on June 29, 1993 was not valid as it was in conflict with Regents Policy 04.04.04.C.1.c.

Dr Baker's November request for a hearing asserts that Dean Williams' 1991 and 1992 evaluations of his (Dr. Baker's) performance were not consistent with "documented facts" such as student evaluations and the evaluations from his Department Head. Dr. Baker makes the point that these evaluations would present a detriment to his efforts to seek employment elsewhere. He also alleged that these inconsistent evaluations contributed to his being selected as one of the 3 non-tenured faculty members who were non-retained.

On November 10, 1993 Interim Provost Reichardt indicated that his attempts to informally resolve the situation had proved to be unproductive. In retrospect it appears that this letter was referring to the first (October) request for a hearing. Because of the interrelationship of these issues and the fact that Dr. Baker's second (November) grievance included documentation of his appeal of "inaccurate evaluations" to Interim Provost Reichardt, the grievance council met to consider both requests for a hearing.

At that meeting, the council found that there was a reasonable likelihood of a grievable act in the matter of the timeliness of Dr. Baker's notice of non-retention. The council was divided as to the question of evaluations and Dr. Baker's assertions that these predicated his non-retention and adversely affected future employment opportunities. The council decided that we would also include these in the hearing leaving the burden of proof on Dr. Baker to show a correlation to his non-retention and future employment.

The hearing was held on December 10, 1993. On the basis of the testimony of the parties, witnesses and documents submitted, the hearing panel deliberated and came to the following conclusions:

Ex. 17

IN THE MATTER OF THE TIMELINESS OF NOTIFICATION OF NON-RETENTION:

It was clear to the hearing panel that although UAF procedures provide for non-retention notice "not later than June 30 in the year preceding the expiration of an academic year appointment after two or more years of uninterrupted service ...", Regents Policy 04.04.04.C.1.c. sets this deadline for notification at "Twelve months prior to the expiration of an appointment...".

The panel was made aware of the fact that the Board of Regents was not only aware of UAF procedures, but in fact approved the UAF policies in August 1989. However, it was the decision of the hearing panel that the Board of Regents Policy takes pre-eminence over UAF Policy when there is a conflict.

Therefore, the panel finds in favor of Dr. Baker and recommends his retention for at least another academic year.

IN THE MATTER OF EVALUATIONS IN REGARD TO NON-RETENTION:

UAF regulation Section III (E) provides for consultation with the tenured faculty prior to a decision by the dean to not renew a faculty member's appointment. Based on the evidence presented, we could find no documentation that this step was ever taken by the Dean. Although, the Dean did discuss the possibility of non-tenured reductions with the department heads, it would appear that consultation with the tenured faculty was not performed as required by UAF regulation.

In view of the fact that the panel has already recommended that Dr. Baker's appointment be renewed for at least another academic year, the panel recommends that the Dean consult with tenured faculty before any additional non-retention of non-tenured faculty.

IN THE MATTER OF EVALUATIONS AND THEIR EFFECT ON FUTURE EMPLOYMENT OPPORTUNITIES:

Dr. Baker alleged that his evaluations by the Dean indicated a teaching effectiveness that was not reflective of similar evaluations by students and his department head. He also produced a letter from UAF Personnel Services which indicated that prospective employers often request and are provided information from an employee's personnel file including work performance history.

The hearing panel agrees that Dean Williams' 1991 and 1992 evaluations are not consistent with other indicators of Dr. Baker's teaching effectiveness, and concentrate almost exclusively on negative aspects of Dr. Baker's performance. Dr. Baker has asked that his evaluations be corrected. However, since evaluations are a subjective judgement, "correction" by the Dean might still not be acceptable to Dr. Baker, and could result in a new grievance request.

Therefore, the hearing panel recommends that the 1991 and 1992 performance appraisals prepared by the Dean be removed from Dr.

Baker's personnel file to eliminate any negative effect on his future employment opportunities.

In addition, it was clear to the hearing panel that the Dean was acting from data and advise that he believed was appropriate for the non-retention of a non-tenured faculty member with two or more years of university service. To prevent future conflicts of this nature, the hearing panel also recommends that you seek revision to Regents Policy 04.04.04.C.1.c to allow campuses discretion to set a shorter timeframe.

ACTION REQUESTED

For your information.

cc: Grant Baker
Frank Williams
Darlett Powell, Grievance Council Member
Loren Johnston, Grievance Council Member
Harikumar Thiagarajan, Grievance Council Member
Sheri Schuyler, Grievance Council Member
Jacob Joseph, Grievance Council Member
Deb Watson, Grievance Council Member
Gary Copus, Hearing Panel Member
Bill Kauffman
Jeanne Freeman
Patty Kastelic

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

SEP 18 1995

GRANT C. BAKER,

Appellant,

vs.

UNIVERSITY OF ALASKA-FAIRBANKS,
et al,

Appellee,

Filed in the Trial Courts
STATE OF ALASKA, FOURTH DISTRICT

SEP 14 1995

Clerk of the Trial Courts
By _____ Deputy

Case No. 4FA-94-469 Civil

ORDER

Based upon the objections submitted by Appellant to the agency record prepared and filed by the Appellees in this matter and the court's review of the record, as well as the objections and the Appellees response to the objections, the court determines that the objections are meritorious; accordingly

IT IS HEREBY ORDERED that the court accepts as the alternative record submitted by Appellant which shall be used as the official record in this appeal; and ^{the record} prepared by the university is to be returned to them.

IT IS HEREBY FURTHER ORDERED that the bill for \$1,882.50 submitted by Appellees for the preparation of the record which was filed on August 12, 1995 is unreasonable and shall not be paid, ^{particularly in light of the fact that the} or, alternatively, is reduced to \$ ^{university failed to follow any of the rules in preparing the record.}

Dated: September 13, 1995

Mary E. Greene
Mary E. Greene
Superior Court Judge

I certify that on 9/14/95
copies of this form were sent to
CLERK: CS

Jerman
Jane Powell

Ex. 84

LAW OFFICES OF
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(907) 563-8844
FAX (907) 563-7322

-dy
9-5-95

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

GRANT C. BAKER,

Appellant,

vs.

UNIVERSITY OF ALASKA-FAIRBANKS,
et al,

Appellee,

Case No. 4FA-94-469 Civil

OBJECTIONS TO AGENCY RECORD

COMES NOW Grant Baker, Appellant, by and through his attorneys, Jermain, Dunnagan & Owens, P.C., pursuant to Rule 210(i) of the Alaska Rules of Appellate Procedure and the Court's order entered at the hearing before the Court on August 3, 1995 concerning issues of the proper record on appeal, who submits the following objections to the record assembled by Appellee's counsel and transmitted to the Court on July 12, 1995:

1. In the transmittal of agency record filed with the Court on July 12, 1995 and signed by Appellee's counsel, the Appellees certify that the agency record submitted to the Court is in compliance with Rule 604(b)(1)(B)(ii) and (iii) of the Alaska Rules of Appellate Procedure. However, the agency record assembled and submitted by counsel for Appellees does not consist of copies of the original papers and exhibits filed with the administrative agency, but appears to be an assemblage of documents

taken from a variety of sources other than the original documents submitted to Interim Provost Paul Reichardt prior to his decision on January 31, 1994 (hereafter "decision"). A comparison of the record assembled by Appellee's counsel with the alternative record submitted by Appellant reveals that at least 44 documents are missing from the agency record and that 18 of these documents were either addressed to or copied to Dr. Reichardt and pertained to the decision.

2. Volume I of the agency record is the deposition of Ron Johnson, including all exhibits to the deposition, which was taken on June 16, 1994, almost five months after the decision.

3. Volume II of the agency record is the deposition of Grant Baker, including all exhibits to the deposition, which was taken on May 22, 1995, almost 17 months after the decision (and six days after the Court entered its order on May 16, 1995 converting this civil action to an administrative appeal.

4. Volume III of the agency record includes a 20-page document in a sealed envelope which purports to be the Accreditation Board for Engineering and Technology, Inc. (ABET) report dated August 28, 1991; however, there is nothing to indicate whether and, if so, how this report was utilized in reaching the decision.

5. The following documents in Volume IV are improperly included in the agency record for the following reasons:

a) The affidavit of Paul Reichardt (pp. 000001-000010) dated June 29, 1995, signed almost 17 months after the decision (and more than one month after the Court entered its order on May 16, 1995 converting this civil action to an administrative appeal).

b) pp. 000016-000024 is not a copy of the original document submitted by Appellant to Dr. Reichardt, but a copy obtained from the Chancellor's office (and two cover letters dated December 16, 1993 and December 21, 1993 have been removed).

c) pp. 000025-000066 is not a copy of the original document submitted by Appellant, but a copy provided to Appellee's counsel during Appellant's deposition on May 22, 1995.

d) pp. 000067-000086 are not copies of original documents submitted by Appointment, but are copies provided to Appellee's counsel by Appellant during his deposition on May 22, 1995.

e) p. 000088 did not exist at the time of the decision.

f) pp. 000092-000098 are an affidavit of Linda M. Armstrong with attached exhibits which was prepared and signed on June 20, 1995, almost 17 months after the decision and one month after the Court entered its order on May 16, 1995 converting this case from a civil matter to an administrative appeal.

g) pp. 000099-000100 is not a copy of an original document, but one which appears to have been faxed to, received by and obtained from the UA General Counsel.

h) pp. 000180-000181 is not a copy of an original document, but appears to be a copy of a document previously used as "Ex. 9" from some deposition or proceeding in the civil matter.

i) pp. 000182-000184 are not copies of original documents, but are copies provided to Appellee's counsel by Appellant during his deposition on May 22, 1995.

j) pp. 000217-000223 did not exist at the time of the decision.

k) pp. 000225-000226 did not exist at the time of the decision.

l) pp. 000227-000265 is a completed 1993 faculty evaluation report that did not exist at the time of the decision.

m) pp. 000319-000326 appear to be draft copies of UAF Policies and Procedures, but there is no indication of any approval by the UA Board of Regents.

n) pp. 000335-000381 appear to be the 1989 edition of the UAF Policies and Regulations, rather than the 1993 reprinted version.

o) pp. 000382-000395 appears to be a document from the UAF archives but of unknown origin and with no indication concerning whether and, if so, how it was utilized in reaching the decision.

p) p. 000418 pertains to an individual other than Appellant.

6. The following documents have not been included as part of the agency record assembled by counsel for the Appellee:

a) A transcript of the Grievance Council hearing of Appellant's grievance on December 10, 1993.

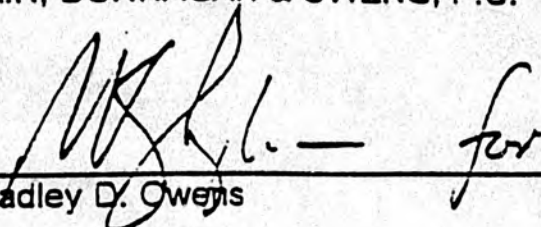
b) Copies of any notes or records of the interviews held by

Dr. Reichardt with Dean Williams, all SOE department heads and John Zarling.

Dated at Anchorage, Alaska this 14th day of August, 1995.

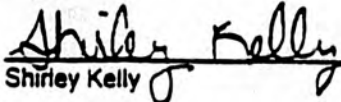
JERMAIN, DUNNAGAN & OWENS, P.C.

By


Bradley D. Owens

I hereby certify that on the 14th day
of August 1995 a true and correct copy of
the foregoing was mailed to:

Ann S. Brown, Esq.
Lane Powell Spears Lubersky
250 Cushman, Ste 4-H
Fairbanks, AK 99701


Shirley Kelly

LAW OFFICES OF
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

GRANT C. BAKER,

Appellant,

vs.

UNIVERSITY OF ALASKA-FAIRBANKS,
et al.

Appellees.

Filed in the Trial Courts
STATE OF ALASKA, FOURTH DISTRICT

OCT - 5 1995

Clerk of the Trial Courts
By _____ Deputy

Case No. 4FA-94-469 Civil

ORDER DIRECTING UAF TO PREPARE AND FILE TRANSCRIPT

The court having considered the motion filed by Baker in this matter,
hereby orders UAF to prepare and file a transcript of the December 1993 grievance
hearing within 5 days of ^{the distribution of} this Order, with a copy to Baker and without cost to Baker.*

Further, the Clerk shall enter a new briefing schedule of the ^{recognition} ~~recognition~~
DATED at Anchorage, Alaska this 4 day of Oct, 1995. ^{that the} ~~that the~~
^{order} ~~order~~ will not
^{be complete} ~~be complete~~ until the
^{transcript} ~~transcript~~ is prepared.

Mary E. Greene
MARY E. GREENE
SUPERIOR COURT JUDGE

If the Univ. prevails on appeal, it may apply to recover
this as a "cost."

I hereby certify that on the 20 day
of September 1995 a true and correct copy of
the foregoing was mailed to:

Ann S. Brown, Esq.
Lane Powell Spears Lubersky
250 Cushman, Ste 4-H
Fairbanks, AK 99701

Shirley Kelly

I certify that on 10-5-95
copies of this form were sent to

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Ex. 90

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

FILED in the Trial Court.
State of Alaska, Fourth District

GRANT C. BAKER,

Appellant,

vs.

UNIVERSITY OF ALASKA-FAIRBANKS,
et al,

Appellees,



MAR 5 1996

Clerk, Trial Courts

By _____ Deputy

MAR 08 1996

Case No. 4FA-94-469 Civil

ORDER

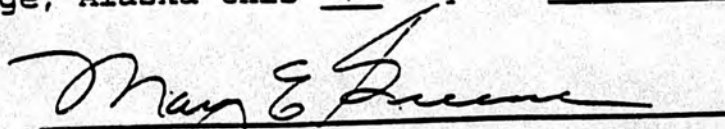
23-7
The Appellees, having moved this court to strike Appendix B and Grant Baker's affidavit in support of Appendix B, from the Appellant's opening brief; and the court having considered the opposition submitted by Baker thereto and being fully advised in the premises finds the corrections made by Baker in Appendix B are not contested as inaccurate by UAF and it is proper to supplement the transcript with these corrections; that the corrections submitted by Baker in Appendix B to his brief are necessary and appropriate to correct known factual errors in the official transcript submitted by UAF; accordingly,

IT IS ORDERED that Appellees' Motion to Strike is DENIED and that Appendix B, and Grant Baker's affidavit in support of Appendix B, shall remain part of Baker's brief for consideration by this court.

Ex. 97

IT IS FURTHER ORDERED that Baker shall file and serve his reply brief within 20 days after the date of the Clerk's certificate of distribution of this order.

Dated at Anchorage, Alaska this 4 day of March 1996.


MARY E. GREENE
SUPERIOR COURT JUDGE

I certify that a copy of the foregoing was distributed via:

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Robert A. Mintz

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

February 10, 1997

Jim Sourant
Alaska State Legislature
State Capitol, Room 216
Juneau, AK 99801-1182

RE: HB 31

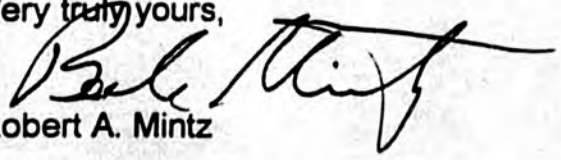
Dear Jim:

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 contains an excellent historical discussion of Civil Rule 11 and the litigation surrounding interpretation of the 1983 version of the rule. According to the author, a lot of the litigation was caused by various circuits interpreting the rule differently. The 1993 amendment was designed to address this by leaving less room for inconsistent interpretations.

It is not fair to say that the portion of HB 31 that is based on Rule 11 will result in a flurry of litigation for several reasons. As a state law, it will be interpreted only by the Alaska Supreme Court, not various federal district courts. Also, keep in mind that Alaska Civil Rule 11 is based upon the 1983 version of Federal Rule 11 and has not been changed to comport with the 1993 amendments to the federal rule. (See enclosed footnote 201 in 21 Pepperdine Law Review 1067 at 1111 "Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions".) Thus, even though the Alaska rule is based on the litigious 1983 version of the federal rule, it has not resulted in a lot of litigation in Alaska. (See the enclosed annotations to Alaska Rule 11.) In summary, the argument that HB 31 will result in a lot of litigation because it is based on Civil Rule 11 is a red herring.

If you have any questions please feel free to call.

Very truly yours,


Robert A. Mintz

cc: Representative Brian Porter, w/o enclosures

SECTIONAL ANALYSIS - HB 60 and SB 43

An Act relating to civil actions; amending Rules 49 and 68, Alaska Rules of Civil Procedure; amending Rule 702, Alaska Rules of Evidence; and providing for an effective date

Section 1. Outlines purpose of legislation.

Section 2. Repeals and reenacts AS 09.10.050. Removes actions on contracts and on damage to personal property from the current six-year statute of limitation. Retains six-year statute of limitation for waste or trespass on real property.

Section 3. Establishes statute of limitation for actions on contracts at three years.

Section 4. Amends AS 09.10.070(a) to establish statute of limitation for actions for damage to personal property at two years.

Section 5. Amends AS 09.17.010(c) by adding "severe" before "disfigurement" to clarify that the cap on noneconomic damages may be exceeded only in cases of severe disfigurement or severe physical impairment.

Section 6. Repeals and reenacts AS 09.17.020 - Punitive damages. Establishes a cap on punitive damages of three times the amount of compensatory damages or \$500,000, whichever is greater, except in cases where the conduct being punished was motivated by financial gain. In such cases, the cap is as high as the average annual net income earned by the defendant in the five years prior to the date of trial or two times the financial gain the defendant received or expected to receive as a result of the conduct.

In employment-related cases affecting a single employee, the cap on punitive damages is the same as for cases not involving financial gain. If the employer has engaged in a pattern or practice affecting more than one employee, however, the alternate caps can be used.

Establishes that awards of punitive damages are to be made in a separate proceeding by the same fact finder that heard the initial case and that information on financial gain and the financial condition of the defendant are to be considered only after the fact finder has determined that an award of punitive damages is appropriate.

Section 7. Amends AS 09.17.900 to clarify that a percentage of fault in civil lawsuits may be allocated to those who acted intentionally as well as to those who acted negligently or recklessly.

Section 8. Amends AS 09.30.065 to make interest rate enhancements or penalties greater for early settlement offers to encourage parties to make their best offers early in the litigation process.

Section 9. Amends AS 09.30.070(a) to allow for a floating rate of interest on judgments and decrees for the payment of money instead of the current statutory rate of 10.5 percent.

Section 10. Establishes the rate of interest on judgments and decrees for payment of money at 1.5 percent above the five-year constant maturity U.S. Treasury note. The rate is to be determined monthly by the court system. The rate in effect when prejudgment interest begins to accrue shall remain constant on the claim until the judgment or decree is satisfied.

Section 11. Establishes a five-year pilot project to apply alternative dispute resolution techniques (specifically mediation and early neutral evaluation) in the third judicial district. Defines which types of cases are to be excluded from the program and authorizes the court system to establish the program in such a way that at least 50 percent of covered cases will be referred to alternative dispute resolution as a first step in the civil litigation system. Most costs will be borne by the parties to the litigation; indigent litigants will repay their share of the costs from any recovery. Requires the Alaska Judicial Council to gather data on the pilot program and evaluate the efficacy of the program annually.

Section 12. Amends AS 09.50.280 to specify that the floating interest rate established by Section 10 applies when the defendant is the state.

Section 13. Amends AS 09.55.536(a) to clarify that health care providers employed by governmental entities are entitled to access to expert panels in medical malpractice actions.

Section 14. Amends AS 09.55.536(c) relating to expert panels in medical malpractice actions to revise the questions the panel is required to answer.

Section 15. Amends AS 09.55.536(f) to impose a 60-day limit for response from the expert panel in medical malpractice actions. If no response is received within 60 days after the panel is selected, discovery is no longer stayed in the action.

Section 16. Adds new section to AS 09.55.536 to clarify that health care providers in both the private and government sectors are entitled to review of the claim by an expert advisory panel.

Section 17. Repeals and reenacts AS 09.65.210 to expand the affirmative defense against plaintiffs injured during or after commission of a felony. Includes persons committing serious felonies who were not charged, persons fleeing from commission of felonies, and persons being apprehended for the commission of felonies, when the conduct, flight, or conduct during apprehension substantially contributed to the injuries.

Section 18. Requires the Alaska Judicial Council to collect and evaluate information relating to the settlement of all civil litigation (with certain stated types of cases excepted) to analyze the effect of changes in the law on litigation behavior.

Section 19. Amends AS 22.15.030(a) to increase the jurisdictional authority of district courts to cases not exceeding \$100,000 (current limit is \$50,000).

Section 20. Adds new section AS 21.06.087 which requires the division of insurance to collect and compile specific factual information on insurers doing business in Alaska. Information to be collected includes premiums, claims, expenses, and allocation of investment profits or losses by line of business written in the state.

Section 21. Amends Alaska Rule of Civil Procedure 16.1(c) to require a meeting of the parties and issuance of a scheduling order prior to a motion to set trial. This and changes in Civil Rule 16.1(n) (Section 21) are intended to require early judicial management and communication between the parties in cases that fall under the "fast-track" rule (Rule 16.1) governing most cases in Anchorage courts.

Section 22. Repeals and reenacts Alaska Rule of Civil Procedure 16.1(n) to require meetings of the parties in cases that fall under the "fast-track" rule. Requires discussion of the nature and basis of claims and defenses and the possibilities for a prompt settlement or resolution of the case. Also requires a proposed discovery plan addressing specific issues.

Section 23. Amends Alaska Rule of Civil Procedure 41(a) to require that parties seeking dismissal of their case submit to the Alaska Judicial Council the information required under AS 09.68.130 (Section 18) regarding the terms of settlement prior to having the case dismissed. Settlement information will be kept confidential and will be reported in the aggregate, so that individual cases cannot be identified.

Section 24. Repeals and reenacts Alaska Rule of Civil Procedure 68 relating to offers of judgment. Includes provisions to make court rules parallel to AS 09.30.065 (as amended by Section 8). Intent is to equalize attorney fee provisions for prevailing plaintiffs and defendants and to make the attorney fee enhancements or penalties greater when an offer is made earlier in the litigation process.

Section 25. Amends Alaska Rule of Civil Procedure 72 to make it parallel to AS 09.55.536(f) (as amended by Section 15) by imposing a 60-day limit for response from the expert panel in medical malpractice actions. If no response is received within 60 days after the panel is selected, discovery is no longer stayed in the action.

Section 26. Amends Alaska Rule of Civil Procedure 95(b) to increase the upper limit on judges' authority to fine attorneys for litigation misconduct from \$1,000 to \$10,000.

Section 27. Amends District Court Civil Rule 1(a)(1) to limit discovery in district court cases to make litigation of smaller cases quicker and less expensive..

Section 28. Amends District Court Civil Rule 4 to require that parties to a lawsuit file a memorandum to set the case for trial no later than 180 days after service of the complaint and that the court set the trial date no less than 30 days nor more than 90 days after the filing of the memorandum.

Section 29. Amends Alaska Rule of Appellate Procedure 511 to require that parties submit to the Alaska Judicial Council settlement information required under AS 09.68.130 (Section 18) for cases settled while on appeal.

Section 30. Repeals Alaska Rule of Civil Procedure 16.1(k)(4), which exempted "fast track" cases from the requirement that parties meet and develop a discovery plan.

Sections 31-34. These sections explain the effect of the statutory amendments on specific court rules.

Section 35. Specifies applicability of various sections of the bill.

Section 36. Severability provision establishes that if any provision of the Act is found to be invalid the remainder of the Act shall not be affected.

Section 37. Establishes January 1, 1998, as effective date for collection of settlement information (Sections 23 and 29).

Section 38. Establishes immediate effective date for remainder of Act.

January 15, 1997

The Honorable Brian Porter
House Of Representatives
State Capitol
Juneau, Alaska

Re: HB 158, Section 19

Dear Mr. Porter:

I am contacting you as a citizen of your district, and as a neighbor, having recently moved to 2927 Madison Way in the College Village subdivision of Anchorage.

I am an attorney practicing in the area of tort and insurance law. I have done so for nearly fourteen years. I represent insurance companies and the Alaska citizens they defend and protect from tort lawsuits. I have seen many well-founded lawsuits and just as many unfounded and unjustified suits. Accordingly, I favor well-reasoned efforts at tort reform. I have watched with interest as HB 158 has followed the path toward our statute books. I believe it is a good bill that could be made better by re-thinking Section 19: Civil Liability For False Claims And Improper Practice.

Alaska Rule of Civil Procedure 11 and the common law tort of malicious prosecution used to cover the same concerns now addressed by Section 19. Rule 11 provides that a person who signs a civil pleading must do so only after reasonable inquiry or investigation to determine whether the words contained in it are well grounded in fact and in law. We lawyers often refer to this as "the truth in pleading rule." A violation of the rule is supposed to result in a sanction against the person signing - typically a lawyer.

Federal Civil Rule 11 provides that the court must sanction one who violates the rule. The judge's only discretion involves what the sanction will be. In my experience, the rule tends to be effective in federal court, where I have seen it enforced.

Alaska's Civil Rule 11 was amended to conform to Federal Rule 11, but the amendment was later repealed in order to let the judge decide whether or not he or she will impose any sanction. My understanding is that this change was prompted by complaints from plaintiffs' attorneys that Rule 11 was unduly oppressive, chilling their "right" to push for new and creative theories of recovery.

*Roger -
What are your
thoughts on
this?
Jan S.*

Hon. Brian Porter
State House of Representatives
January 15, 1997
Page 2

Whatever the reason for the change to discretionary enforcement, the state version of Rule 11 has become largely unenforced, prompting the desire for some stronger rule against frivolous lawsuits.

Apparently to remedy this situation, Section 19 of HB 158 would resurrect Alaska's truth in pleading rule. But instead of putting it into the hands of the court to enforce, section 19 would create a new cause of action by which litigants could add a new claim against one another, and/or sue their opponents' attorney(s), when they feel the other side isn't playing fair.

I strongly urge you to rethink section 19. The goal of enforcing truth in pleading is a necessary and proper one. But the means adopted are antithetical to the key goals of limiting unnecessary or unreasonable litigation, and of limiting litigation costs.

Our Alaska Supreme Court has a history of expanding existing remedies, and creating new ones. This is part of the need for tort reform. But even that body knows better than to allow litigants to add claims against one another for malicious prosecution - the more limited equivalent of the new cause of action expressed in section 19.

It is inherent in civil litigation that most parties come into the court system with a feeling of animosity toward one another. They have been unable or unwilling to resolve their differences, and their suspicion of the motives of one another is extreme. Emotions run high, and the motives of the other party are impugned in the mind of each litigant. At minimum, they mistrust one another. All too often, they may even hate one another.

When the parties were able to add claims for taking "malicious" positions in the original litigation, they regularly did so, due to the passion and prejudice just mentioned. This escalated the cost and complexity of litigation, and used up valuable court resources, by tying the litigants and the court system to expensive discovery and delay in order to get at the suspected evil intentions of the other party.

Over time, American courts adopted a rule that, in order to make a case for "malicious prosecution", one must first prevail in the underlying claim(s) that brought the litigants to court in the first place. This rule had the effect of limiting the number of such emotionally-based claims. Alaska's courts now follow this rule, and to the best of my knowledge there has been no desire by the court system to re-open the floodgates as to such claims.

Hon. Brian Porter
State House of Representatives
January 15, 1997
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In existing practice, if one party or the other litigates "frivolously", "in bad faith", or "vexatiously", the court may award actual attorney's fees to the prevailing party under Civil Rule 82. This often has the effect of mooted out the need for a second lawsuit, for malicious prosecution, to recover actual litigation costs. This usually resolves the dispute, and the concern about suspected motives.

In Alaska there has been one notable exception to this limitation. Until recently, it was unsettled whether plaintiffs, when suing insurance companies for denial of insurance coverage, could get damages for emotional distress and punitive damages even when the insurer had an objectively reasonable basis in the insurance policy for the denial of insurance coverage. The theory was referred to as "subjective bad faith." It allowed an insured to sue his insurance company for damages even if the insurance company did not owe coverage under the contract, on the theory or accusation that the real reason for denying insurance coverage (even if not owed under the contract) was some ill will toward the insured. This claim was merely an application of the old "malicious prosecution" theory, limited in other contexts. In effect, such "bad faith" claims were designed to require an insurer to cover losses they did not agree to insure, and to pay additional tort damages as well. This radically increased the cost and complexity of insurance coverage litigation. If you like, I can provide many examples of this from past lawsuits.

Finally, in Hillman v. Nationwide Ins. Co., the Alaska Supreme Court ruled that an insurer is privileged to deny coverage if there exists an objectively reasonable basis for the insurance company's position. In other words, the insurance company was allowed to rely on the terms of the insurance contract when deciding whether insurance coverage exists. A copy of that decision is enclosed. The supreme court said that in the face of a good faith basis to deny coverage in the terms of the insurance contract, it simply did not matter whether the insurer allegedly had ill will toward its insured. This decision is fairly consistent with the common law rule of limiting malicious prosecution lawsuits, and has led to simplified litigation to decide insurance coverage, focusing on the terms of the insurance contract instead of conspiracy theories and the like.

Section 19 would tend to re-open, and expressly support, the theory of "subjective bad faith". I believe our courts would interpret it to overrule the Hillman case. This will, once again, radically raise the cost and complexity of insurance coverage litigation. This is especially problematic because the Ninth Circuit Court of Appeals has recently ruled that insurance companies may no longer

Hon. Brian Porter
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go to federal court to have their insurance coverage obligations decided. (The federal court approach to summary judgment tends to weed out meritless claims, while the state approach is to allow far more cases to go to jury trials.)

I have just explained the foreseeable impact of section 19 on insurance litigation. But the greatest impact may foreseeably occur in divorce litigation. In a divorce, the parties tend to be so emotionally distraught that they will readily add this claim against both their spouse and the spouse's lawyer, injecting the right to a jury trial in divorce proceedings, a place so far unfettered with this added expense and complexity.

The ability to sue opposing counsel is a nearly unprecedented step, with inherent opportunities to tactically derail fair and reasonable legal proceedings. A lawyer cannot properly function on behalf of his or her client when the lawyer knows a claim is to be brought against the lawyer. It injects an element of distraction and conflict between the interests of attorney and client.

I encourage you to seek an advisory opinion from the Alaska Bar Association about this issue. I believe Bar Counsel will foresee that when threatened with a lawsuit, the threatened lawyer may tend to compromise the legitimate interests of his client in order to defuse the delayed claim against the lawyer. This puts the attorney in a dilemma. To stay in is problematic, but to withdraw will foreseeably result in the same accusations against replacement counsel, unreasonably running up the client's litigation expenses.

The lawyer will be especially intimidated by such a claim because the lawyer will have no insurance protection from such claims. The insurer will foreseeably deny coverage on two grounds. First, it will be said that intentional and non-accidental conduct is not covered. There is generally such limiting language in all liability insurance policies. Second, it will be said by the lawyer's malpractice insurer that this is not a malpractice claim, because malpractice involves a suit by one's client, not by the client's opponent. I have seen this happen in actual cases, which I would be glad to share with you.

Section 19 would therefore create a new cause of action, closely resembling the old claim of malicious prosecution, but without the court-imposed limitations that once held back the floodgates of so dangerous a claim. Having created that cause of action, and actually increased the amount and the scope of unreasonable litigation instead of limiting it, we would find that there would not be insurance to protect the people sued under this new theory.

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January 15, 1997
Page 5

Accordingly, the application of section 19 will tend to undermine the real goals of tort reform.

The proviso in section 19 that the prevailing party on such a claim can collect actual damages is small help. The defendant in such a suit must still pay for litigation expenses in the meantime. Those expenses can be formidable, especially because plaintiff can by sharp tactics force the defendant to change counsel.

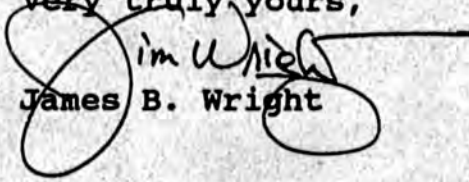
Most cases settle, and this class of claim lends itself to misuse in order to force an unreasonable settlement by a sort of blackmail. The threat goes something like this: "I'll sue you for taking an improper position, and your attorney, too. This will pressure him to withdraw as your lawyer. Then you'll have to pay for new counsel to learn this case. Then maybe I'll put that lawyer on notice that he'll be sued too, because he is continuing to assert the same position (and the lawyer after that, etc.). This will destroy you with expense to defend each time you change counsel. You'd better settle on my terms."

I have seen this tactic used for years in the insurance coverage field, under the old "subjective bad faith" theory of liability. The lawyer was made a witness to prove his client's "bad faith", or the lawyer was actually made a defendant. In effect, it forced an unreasonable settlement because the cost and complexity was simply too great to go on. Again, I am willing to provide examples from past lawsuits in order to demonstrate how this is used in practice, if you wish.

For the foregoing reasons I encourage you to rethink the wisdom of Section 19. The goal is laudable, but I do not think this section will in fact serve that goal in practice. Rather, I believe it will tend to work against the larger purposes of tort reform, and be used by the enemies of tort reform to denounce future efforts at limiting the excesses of our tort system.

Thank you for your consideration of the foregoing. If you wish to discuss this matter further, I would like to do so. This area is a complex one, and I imagine it would be helpful to hear more from those who deal in the trenches of the tort system on an ongoing basis. If so, please feel free to contact me.

Very truly yours,


James B. Wright

Phone: 276-3222 (office)
276-0546 (home)

HILLMAN v. NATIONWIDE MUT. FIRE INS. CO. Alaska 1321

Cite as 666 P.2d 1321 (Alaska 1993)

John A. HILLMAN and Janet Hillman,
individually and Janet Hillman as Personal Representative of the Estate of Julie G. Hillman, a deceased minor, Appellants,

v.

**NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY,**

Appellee.

No. S-4555.

Supreme Court of Alaska.

July 9, 1993.

Insureds brought action against uninsured motorist insurer for bad faith in handling uninsured motorist claim filed after the death of their daughter. The Superior Court, Third Judicial District, Peter A. Michalski, J., granted insurers motion to dismiss and designated insurer as prevailing party for purposes of awarding attorney's fees. Insureds appealed. The Supreme Court, Matthews, J., held that: (1) insurer's denial of coverage was not unreasonable; (2) insurer's arbitration demand was reasonable and not in bad faith; and (3) trial court erred in designating the insurer rather than the insured as prevailing party.

Affirmed in part, reversed in part, and remanded.

Compton, J., filed an opinion dissenting in part, in which Burke, J., joined.

1. Insurance §602.5

The tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive, but it necessarily requires that insurance company's refusal to honor a claim be made without a reasonable basis.

2. Judgment §185(2, 6)

If, when viewing evidence most favorably to opponent of motion for summary judgment, trial court finds that reasonable jury could only conclude that challenged conduct must be characterized in one way,

then summary judgment in accordance with that conclusion should be entered, although questions of reasonableness must often be resolved at trial.

3. Insurance §602.12(2)

Where insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

4. Insurance §602.5

Insurer did not act in bad faith in denying coverage under policy exclusion for injury suffered while occupying motor vehicle not insured for uninsured motorist coverage, where insureds did not present any evidence suggesting unreasonableness, trial court found that only reasonable interpretation of exclusion was that advanced by insurer, and two of the five members of the court had previously believed that the exclusion was valid, even though insurer did not follow its standard procedures in denying coverage, did not forward its attorney's letter to insureds as promised, and conditioned \$50,000 offer on settling all of insureds' claims rather than just their uninsured motorist claim.

5. Insurance §567.1

Insurer's demand for arbitration was reasonable and not in bad faith, where insurer could reasonably have concluded that uninsured motorist was only partially responsible for accident from initial police report, insurance policy only covered insureds to the extent that the uninsured motorist was liable, and in fact arbitrators determined that decedent was 66% at fault for the accident, and insureds were 85% at fault for their emotional distress.

6. Costs §194.12

An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or manifestly unreasonable.

7. Costs §194.14

Designation of prevailing party for purposes of awarding attorney's fees to prevailing party is committed to the broad

discretion of the trial court. Rules Civ. Proc., Rule 82(a).

8. Costs $\Rightarrow$ 194.14

It is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party for purposes of attorney fee award. Rules Civ.Proc., Rule 82(a)(2).

9. Insurance $\Rightarrow$ 675

Insureds prevailed against vigorous opposition on their claim of policy coverage and received \$50,000 on that claim, and thus were prevailing parties entitled to award of attorney's fees, even though they did not receive compensatory and punitive damages on their claim of bad faith. Rules Civ.Proc., Rule 82(a).

Michael J. Schneider, Mestas & Schneider, P.C., Anchorage, for appellants.

Peter J. Maassen, Burr, Pease & Kurtz, Anchorage, for appellee.

Before RABINOWITZ, C.J., and
BURKE, MATTHEWS, COMPTON and
MOORE, JJ.

OPINION

MATTHEWS, Justice.

John and Janet Hillman sued their insurer, Nationwide Mutual Fire Insurance Company (Nationwide), for bad faith in the handling of their uninsured motorist claim filed after the death of their daughter. The superior court granted Nationwide's motion to dismiss the claim, concluding that the insurer's decisions to deny coverage and to demand arbitration were reasonable. The Hillmans appeal this decision along with the trial court's designation of Nationwide as the prevailing party for attorney's fee purposes. We affirm on the merits but reverse the award of attorney's fees.

1. The pertinent exclusion stated that
(t)his Uninsured Motorists insurance does not apply as follows:

....

4. It does not apply to bodily injury suffered while occupying a motor vehicle owned by

I. FACTS AND PROCEEDINGS

On August 14, 1983, while driving an ATV owned by her father, eleven-year old Julie Hillman collided with an uninsured pickup truck driven by William Amis. Julie died six days later as a result of her injuries.

Nationwide had issued an automobile insurance policy to Julie's father, John Hillman, which provided uninsured motorist coverage up to \$25,000 per person or \$50,000 per occurrence. However, when on August 10, 1984, Janet Hillman, Julie's mother, contacted Nationwide to inquire about coverage and claim procedures, Maury Hafford, Nationwide's local adjustor, indicated that Nationwide had no liability. This denial was based on one of the "coverage exclusions" in the uninsured motorist section.¹ On February 7, 1985, after further inquiries by Mrs. Hillman, Hafford referred the claim to Nationwide's legal counsel in order to "clarify this issue of coverage for your understanding and satisfaction," as he wrote Mrs. Hillman. When, in late March 1985, Nationwide's attorney informed Hafford that "the question of coverage appears to be a roughly 50/50 proposition," Hafford wrote Hillman "seeking ... further details with regard to Julie's accident." However, he did not relay the attorney's opinion to Mrs. Hillman.

On April 1, 1985, the Hillmans filed a complaint against Nationwide for bad faith. The following month Nationwide offered the Hillmans \$50,000 as a "compromise payment." The Hillmans rejected the offer, claiming that they were entitled to \$150,000 under the insurance policy, plus medical benefits, incidental, consequential, and punitive damages.

The following April Judge Katz granted Nationwide's motion for summary judgment and dismissed the Hillmans' claims. The Hillmans appealed the decision.

you or a relative living in your household, but not insured for Uninsured Motorist coverage under this policy. It does not apply to bodily injury from being hit by any such vehicle. (Emphasis deleted.)

On July 1, 1988, this court held that the Hillmans were covered by the Nationwide policy. *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248, 1250 (Alaska 1988) (*Hillman I*). We agreed with Nationwide's interpretation of the contractual language. However, a majority of the court refused to give effect to the uninsured owned motor vehicle exclusion contained in the policy for statutory and public policy reasons. *Id.* at 1251-52.

Once coverage was established, Nationwide chose to pursue the arbitration procedure mandated by the policy for determining liability.² Arbitration was held on January 30, 1989. The arbitrators concluded that Amis was 33% at fault with regard to the claims related to Julie's estate. As for John and Janet's claims for negligent infliction of emotional distress, the panel agreed that Amis' negligence accounted for 15% of the harm. The arbitrators awarded \$92,500 to the Hillmans. Two weeks later Nationwide paid the Hillmans \$50,000, the maximum amount of the uninsured motorist coverage provided by the policy.³

Following arbitration, the Hillmans' bad faith litigation began anew. On June 21, 1990, Judge Michalski granted Nationwide's motion for partial summary judgment, dismissing the bad faith claims associated with Nationwide's denial of coverage and decision to arbitrate.

After several pre-trial motions, Judge Michalski reconsidered an earlier ruling and granted Nationwide's motion for summary judgment on the remaining bad faith claims.⁴ Dismissal of the claims was based

on Judge Michalski's belief that the Hillmans failed to demonstrate that they could show damages. After issuing the Final Judgment, the superior court identified Nationwide as the prevailing party and awarded costs and partial attorney's fees in the amount of \$154,899.57.

This appeal followed.

II. DISCUSSION

A. Dismissal of the Hillmans' Bad Faith Claims

1. Denial of Coverage

In *State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152 (Alaska 1989), we held that insurance companies could be liable for the tort of bad faith in so-called "first-party" cases—cases in which insureds seek compensation from their own insurers for losses which they have suffered. *Id.* at 1156.

We had no occasion to comprehensively define the elements of the tort of bad faith in a first-party insurance context in *Nicholson*; we have not done so in subsequent cases, see e.g., *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992); nor do we do so now. In recognizing the tort of bad faith in first-party cases, we aligned Alaska with those jurisdictions that have followed *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (Cal.1973), apparently the first case to apply bad faith as a tort in first-party cases.⁵ *Gruenberg* articulated the tort in a manner that seemed to require unreasonable conduct and bad

no error in the trial court's reasoning or conclusion.

2. In *Hillman I*, we rejected the Hillmans' argument that Nationwide had waived its right to arbitration. *Hillman I*, 758 P.2d at 1253. The trial court held that although "Nationwide acted in bad faith in failing to disclose the availability of the arbitration procedure in four separate pieces of correspondence to Mrs. Hillman," arbitration should proceed because the Hillmans were represented by counsel who "simply made a calculated decision to attempt to obtain relief through the court system, knowing that the policy actually required dispute resolution through arbitration." *Id.* The court added that since "none of the litigants herein has clean hands," "[t]he balance tips in favor of submitting appropriate issues to the contractually mandated arbitration process." *Id.* We found

3. On June 12, 1989, Judge Gonzalez granted Nationwide's motion for partial summary judgment and barred the Hillmans from recovering arbitration damages for emotional distress. The arbitration award was consequently reduced to \$55,000.

4. What these claims consisted of is not brought into focus in the briefs before us.

5. The jurisdictions that have followed *Gruenberg* are listed in William M. Shernoff, et al., *Insurance Bad Faith Litigation*, § 5.01 at 5.3 n. 4 (1984 and Supp.1992).

faith: "Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Gruenberg*, 510 P.2d at 1038.

A similar double requirement was imposed in *Noble v. National American Life Insurance Co.*, 128 Ariz. 188, 624 P.2d 866 (1981), another case on which we relied in *Nicholson*. The Arizona Supreme Court adopted the standard expressed by the Wisconsin Supreme Court in *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (Wis.1978):

The *Anderson* Court states:

To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one....

The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.

271 N.W.2d at 376-77.

Under the *Anderson* standard an insurance company may still challenge claims which are fairly debatable. The tort of bad faith arises when the insurance company intentionally denies, fails to process, or pay a claim without a reasonable basis for such action.

Noble, 624 P.2d at 868.

A leading text has this to say about the standard in first-party bad faith cases:

6. The Wisconsin Supreme Court may have modified the *Anderson* standard. In *Fehring v. Republic Insurance Co.*, 118 Wis.2d 299, 347 N.W.2d 595 (1984), the court held that proof that a reasonable insurer would not have acted as the defendant did under the circumstances establishes bad faith.

7. In *Loyal Order of Moose v. International Fidelity Insurance Co.*, 797 P.2d 622 (Alaska 1990), a case involving the somewhat analogous relationship between a surety and its obligee, we stated: "A surety may satisfy its duty of good faith to its

In third party situations, an insurer can be liable for an excess judgment when it has failed to settle a third party action against its insured. However, courts have not agreed on the standard for imposing such liability. Some courts impose liability for a negligent failure to settle the third party action; others apply a "bad faith" test that, in practical terms, amounts to a negligence test; and a third group of courts applies a fairly strict requirement of subjective bad faith. A similar divergence of views concerning the level of wrongdoing necessary to impose tort liability on insurers for denial of benefits appears to exist among courts that have adopted the tort of first party bad faith.

Although bad faith is not fully defined in some jurisdictions, courts have consistently held that a refusal to pay benefits based on a reasonable interpretation of the insurance contract is not bad faith.

Sherhoff, Insurance Bad Faith Litigation, § 5.02[1] at 5-6 (1992) (footnotes omitted).

[1] The above authorities make it clear that while the tort of bad faith in first-party insurance cases may or may not require conduct which is fraudulent or deceptive,⁶ it necessarily requires that the insurance company's refusal to honor a claim be made without a reasonable basis.⁷ Neither party takes issue with this proposition. Instead, the Hillmans argue that summary judgment should not have been granted because (a) reasonableness is always a question of fact for the jury and, alternatively, (b) under the facts and circumstances of this case there was a fact ques-

obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear." *Id.* at 628. In a footnote, we quoted an Arizona decision, *Dodge v. Fidelity and Deposit Co. of Maryland*, 161 Ariz. 344, 778 P.2d 1240 (1989), which uses language mirroring the rule of law employed in today's opinion: "So long as a surety acts reasonably in response to a claim made by its obligee, the surety does not risk bad faith tort liability." *Loyal Order of Moose*, 797 P.2d at 627 n. 8.

tion as to whether Nationwide had a reasonable basis for denying the claim.

[2] The Hillmans' argument that reasonableness always presents a question of fact is without merit. Although questions of reasonableness often must be resolved at trial, we have not held that they are never an appropriate subject for summary judgment procedures. If, when viewing the evidence most favorably to the opponent of a motion for summary judgment, the trial court finds that a reasonable jury could only conclude that the challenged conduct must be characterized in one way, then summary judgment in accordance with that conclusion should be entered. *Schneider v. Pay 'N Save Corp.*, 723 P.2d 619, 623 (Alaska 1986).

The Hillmans also argue that the superior court tacitly accepted the standard of bad faith articulated in *National Savings Life Insurance Co. v. Dutton*, 419 So.2d 1357 (Ala.1982). In *Dutton*, the Alabama Supreme Court held that, except in extraordinary circumstances, "if the evidence produced by either side creates a fact issue with regard to the validity of the claim ... the [bad faith] tort claim must fail and should not be submitted to the jury." *Id.* at 1362. In short, under the *Dutton* test, the plaintiff must prove that plaintiff is "entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law." *Id.*

[3] We need not address whether the superior court adopted the *Dutton* standard. *Dutton* does not state the Alaska rule of law. Our position is merely that where the insurer establishes that no reasonable jury could regard its conduct as unreasonable, the question of bad faith need not and should not be submitted to the jury.

[4] The Hillmans' alternative argument—that they presented sufficient evidence to raise a fact question as to whether Nationwide's denial of coverage had a reasonable basis—requires more discussion.

8. The Hillmans maintain that Nationwide's District Claims Manager and its Regional Claim Attorney concede that Nationwide failed to fol-

The Hillmans argue that they presented evidence showing that Nationwide denied coverage before making *any* investigation of the facts or the law and that Nationwide made subsequent, formal denials of coverage without having conducted significant investigation. They also argue that Nationwide's agents violated its guidelines and policies, which are intended to guarantee fair, honest and reasonable claims handling. Among others, this included violating the company policy requiring local adjusters to consult with higher echelons in the company before denying a death claim; failing to resolve all reasonable doubts about coverage in favor of the policy holder; withholding from the file any explanation for why the policy holder was required to sign a nonwaiver agreement; obtaining a legal opinion just to "paper the file" and for the main purpose of denying the claim; failing to provide a policy holder with a previously promised letter from Nationwide's attorney regarding coverage; lying to the policy holder about whether that letter was available; and "stonewalling" the claim for four years because of vindictiveness towards the Hillmans' attorneys.⁸ Finally, the Hillmans argue that even after Nationwide had given its personnel the authority to concede coverage and settle the underlying case for the \$50,000 policy limits, its Regional Claims Attorney unilaterally decided not to do so.

In our view none of these facts suffice to raise a factual question as to whether Nationwide's denial of coverage lacked a reasonable basis. The denial was based on an explicit exclusion in the policy. The question in this case is whether Nationwide was unreasonable in treating the exclusion as valid. As to this question, the Hillmans have directed us to no evidence suggesting unreasonableness. We have found that "the only reasonable interpretation" of this exclusion was that advanced by Nationwide. *Hillman I*, 758 P.2d at 1250. We also concluded in *Hillman I* that the exclusion was invalid on statutory and public policy grounds. Two of the five members

low its own policies and procedures in all these respects.

of this court disagreed that the exclusion was invalid. *Id.* at 1255 (dissenting opinion of Justice Burke, joined by Justice Moore). See also *State Farm Mut. Auto. Ins. Co. v. Bass*, 231 Ga. 269, 201 S.E.2d 444, 445 (1973) (where appellate court was divided on interpretation of uninsured motorist statute, "insurer was legally justified in litigating the issue and cannot, as a matter of law, be liable for ... bad faith"). Further, as we acknowledged in *Hillman I*, a respectable minority of jurisdictions have reached the same conclusion as the dissent. *Hillman I*, 758 P.2d at 1251. The facts that Nationwide did not follow its standard procedures in denying coverage, that it did not forward its attorney's letter to the Hillmans, and that its \$50,000 offer was conditioned on settling all of Hillmans' claims rather than their uninsured motorist claims, do not suffice to create a fact question as to whether Nationwide's decision to deny coverage lacked a reasonable basis, as they have little or no relevance on that point. We conclude, therefore, that there are no genuine issues of material fact as to whether Nationwide's denial of coverage was reasonable.⁹

2. Demand for Arbitration

[5] In the same order dismissing the bad faith claim related to coverage denial, Judge Michalski also dismissed the bad faith claim based on Nationwide's demand for arbitration. Judge Michalski found that the arbitration demand was not in bad faith because Nationwide "merely exercised its right." The court reiterated the decision in its March 7, 1991 order dismissing the Hillmans' remaining bad faith claims.

The Hillmans contend that Nationwide had no reasonable basis to demand arbitra-

tion. Instead, they argue, Nationwide's agents insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims and because of vindictiveness and aggravation with their attorneys.

However, the insurance policy covered the Hillmans "only to the extent the uninsured motorist was liable." Based on evidence from the initial police report, Nationwide could reasonably conclude that Amis was only partially responsible for the accident.¹⁰ The subsequent findings of the arbitrators, that Julie was 66% at fault for the accident and her parents 85% at fault for their emotional distress, lend additional support to Nationwide's claim that its demand for arbitration was reasonable. See *Sullivan v. Allstate Ins. Co.*, 111 Idaho 304, 723 P.2d 848, 850 (1986) (a subsequent arbitrator's decision that a claimant was partially negligent was clear evidence that an insurer's denial of liability was not in bad faith). Consequently, Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith.

B. Award of Attorney's Fees

[6, 7] An award of attorney's fees will be reversed if the trial court's determination is an abuse of discretion or "manifestly unreasonable." *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1138 (Alaska 1989). Designation of the prevailing party "is committed to the broad discretion of the trial court." *Apex Control Systems, Inc. v. Alaska Mechanical, Inc.*, 776 P.2d 310, 314 (Alaska 1989).

The determination will be affirmed on appeal "unless it is shown that the court abused its discretion by issuing a decision which is arbitrary, capricious, mani-

9. This conclusion is consistent with *State Farm Mutual Automobile Insurance Co. v. Bass*, 231 Ga. 269, 201 S.E.2d 444 (1973) and *Aetna Casualty & Surety Co. v. Superior Court*, 161 Ariz. 437, 778 P.2d 1333 (App.1989). In both cases, courts found that an insurer was not liable for bad faith when it denied coverage to an insured on the basis of an uninsured motorist exception which was later held invalid. See also *Hanson v. Prudential Insurance Co. of America*, 772 F.2d 580 (9th Cir.1985) (applying California law).

10. The report stated that Julie had "failed to yield when entering Long Lake Road from a side road." The Hillmans note that the information available to Nationwide when it insisted on arbitration was insufficient to prove that Amis was not at all at fault. This is true but irrelevant. Nationwide was entitled to arbitration if it could reasonably maintain that Amis was not completely at fault.

festly unreasonable, or improperly motivated."

Howard S. Lease Constr. Co. & Assoc. v. Holly, 725 P.2d 712, 720 (Alaska 1986) (quoting *City of Yakutat v. Ryman*, 654 P.2d 785, 793 (Alaska 1982)).

After the Final Judgment was issued, Judge Michalski awarded Nationwide approximately \$155,000 in costs and partial attorney's fees.¹¹ The Hillmans argue that the trial court abused its discretion when it determined that Nationwide was the prevailing party. The Hillmans claim that since they prevailed on two of the three issues in the case, coverage and liability, but not on bad faith, they were the "prevailing party."

Civil Rule 82(a) directs that attorney's fees be awarded to the prevailing party.¹² "[T]he prevailing party is the one 'who has successfully prosecuted or defended against the action, the one who is successful on the 'main issue' of the action and 'in whose favor the decision or verdict is rendered and the judgment entered.'"¹³ *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1989) (quoting *Adoption of V.M.C.*, 528 P.2d 788, 795 n. 14 (Alaska 1974)).

[8, 9] This court has recognized that "it is not an immutable rule that the party who obtains an affirmative recovery must be considered the prevailing party." *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 313-14 (Alaska 1972). We have been cited to two cases¹³ where the party who obtained an affirmative recovery was held not to be the prevailing party by the trial court and this decision was affirmed on appeal. The cases are *Owen Jones* and *Hutchins v. Schwartz*, 724 P.2d 1194 (Alaska 1986). In *Hutchins*, the plaintiff sought

\$275,000 in compensatory damages. After a trial the jury returned a verdict in favor of the plaintiff, awarding some \$1,900, which in turn had to be reduced by 40% because of the plaintiff's comparative negligence. *Id.* at 1204. Thus the plaintiff's affirmative award was only approximately \$1,100. This recovery is so small in comparison with what was sought that it may properly be considered *de minimis*. The verdict essentially was a defense verdict.¹⁴

Owen Jones may not be so easily distinguished. There, Jones-Western, a contractor, sued its subcontractor, C.R. Lewis Co., to recover approximately \$120,000 in progress payments that Jones-Western had paid C.R. Lewis in connection with construction of a building that was destroyed by an earthquake before it was completed. The subcontractor counterclaimed for services rendered and materials furnished before the collapse. The trial court held that Jones-Western was not entitled to recover progress payments and that the subcontractor had a claim in *quantum meruit* for the reasonable value of the services and materials supplied prior to the earthquake. The trial court fixed this sum at approximately \$142,000. Thus, the subcontractor would have been entitled to an affirmative recovery of some \$22,000 except for the fact that it salvaged some materials from the building after the earthquake on which the court placed a value of \$30,000. Because of this, Jones-Western was left with a small affirmative recovery. We described this recovery in *Owen Jones* as merely "incidental": "This recovery based on the accounting can be classified as an incidental recovery which will not be a sufficient recovery to bar a party who has defended a large claim from being consid-

11. The total consisted of \$44,448.57 in costs and \$110,451.00 in fees. The attorney's fees award was 40% of the total amount of attorney's fees Nationwide incurred after July 1988.

12. Alaska R.Civ.P. 82(a)(2) states:

In actions where the money judgment is not an accurate criterion for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

13. *Buoy v. ERA Helicopters, Inc.*, 771 P.2d 439 (Alaska 1989), is not a case in which the plain-

tiff received an affirmative recovery. The \$141,676 jury verdict the plaintiff received in that case was reduced to nothing because of prior settlements which the plaintiff had made. *Id.* at 441.

14. In addition, in *Hutchins* the defendant had made an offer of judgment under Civil Rule 68 for \$35,000 and therefore under that rule he was in any case entitled to attorney's fees incurred after the date of the offer. *Id.* at 1203.

ered a prevailing party." *Owen Jones*, 497 P.2d at 314, n. 5. We also noted that the "main issue" in the case below was whether the subcontractor had an obligation to refund the progress payments. The subcontractor prevailed on this issue. *Id.* at 314. Accordingly, we affirmed the trial court's holding that the subcontractor was the prevailing party. *Id.*

In reaching our conclusion in *Owen Jones*, we distinguished *Buza v. Columbia Lumber Co.*, 395 P.2d 511 (Alaska 1964). *Buza* was a suit brought for conversion of a quantity of logs. The plaintiff sought the return of the logs, worth some \$8,000, plus compensatory and punitive damages of \$31,000. After a trial the plaintiff was awarded the logs, but no damages. We held, nonetheless, that the plaintiff was the prevailing party, defining that term to mean the party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention." *Buza*, 395 P.2d at 514.

In *Owen Jones* we distinguished *Buza* as follows:

The main issue in that case was the ownership of a quantity of logs, and the plaintiff proved his right to the logs although he was not able to obtain compensating or punitive damages.

The instant case differs because the recovery of appellants was based only on an accounting for materials salvaged by the appellee. It was clear that the main issue had been resolved against appellants when the court found that appellee had no obligation to refund its progress payments under the contract....

Owen Jones, 497 P.2d at 314 (footnote omitted).

In our view the present case more closely resembles *Buza* than *Owen Jones*. Here,

as in *Buza*, plaintiff prevailed on the basic liability question and received an affirmative recovery based on its successful litigation of that question, which was substantial in amount. *Owen Jones* is distinguishable because the plaintiff's affirmative recovery there was based on a minor accounting issue, not on the liability theory which plaintiff tried unsuccessfully before the court.

In the present case, the Hillmans are no doubt disappointed that they did not receive compensatory and punitive damages against the insurance company on their claim of bad faith. Nonetheless, they prevailed against vigorous opposition on their claim of policy coverage and received \$50,000 on that claim. This recovery cannot be classified as an incidental one unrelated to the main focus of the litigation in this case. We conclude therefore that the trial court erred in refusing to designate the Hillmans as the prevailing party.¹⁵ Accordingly the award of attorney's fees must be reversed and this case remanded so that an award of reasonable attorney's fees may be made in favor of the Hillmans.

III. CONCLUSION

We affirm the decision of the superior court granting Nationwide's motion for summary judgment on the Hillmans' bad faith claims. Nationwide's decisions to deny coverage and then to demand arbitration were reasonable. In light of our decision, there is no reason to consider the damages issue.¹⁶

The superior court's designation of Nationwide as the prevailing party was an abuse of discretion. Since the Hillmans prevailed on two of the three issues central to the case and won a substantial affirmative recovery based on these issues, they were the prevailing party. The trial court

15. The fact that Nationwide made an offer of settlement of \$50,000 is irrelevant to the question of who the prevailing party is since this offer was not made under Civil Rule 68. *Myers v. Snow White Cleaners & Linen Supply, Inc.*, 770 P.2d 750, 753 (Alaska 1989) ("no offers not in compliance with Civil Rule 68 should be considered in determining questions of costs and attorney's fees").

16. In addition, we decline to address the Hillmans' claim that several of the superior court's evidentiary rulings were an abuse of discretion. Even if the superior court's rulings concerning the admissibility of evidence during trial were erroneous, such error was harmless where the case was never submitted to the jury.

should make a new award reflecting this determination.

The superior court's decision granting summary judgment on the bad faith claims is **AFFIRMED**. The award of attorney's fees is **REVERSED** and **REMANDED**.

COMPTON, Justice, with whom, BURKE, Justice, joins, dissenting in part.

While declining to comprehensively define the elements of the tort of bad faith, the court has actually eliminated the implied covenant of good faith and fair dealing in insurance contracts. The court concludes that summary judgment is appropriate if the insurer has a reasonable (colorable) contractual basis for denying liability. In other words, the insurer may enforce a contractual basis for denying liability regardless of any subjective bad faith. Because the court's analysis is contrary to law and not supported by policy, and because a reasonable jury could find that Nationwide acted with subjective bad faith, I dissent.

The court concludes that the tort of bad faith in the context of first party insurance claims necessarily includes a requirement that the insurer's refusal to honor the claim be made without a reasonable basis. It should be noted that the Hillmans do not accept this proposition, because contrary to the court's conclusion, the Hillmans do not accept that a reasonable basis can exist if actions are motivated by improper purposes. The Hillmans argue that because evidence was presented that shows Nationwide's denial was motivated by self serving, dishonest and improper purposes, summary judgment was inappropriate. "Where the record supports plaintiff's contention that acts or omissions by the carrier were for a bad-faith purpose or motive, the matter should be submitted to a jury for its determination." Thus the issue is properly before us.

Until today the covenant of good faith and fair dealing, which we have implied in every contract including insurance contracts, has imposed duties above and beyond express contractual duties. *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979).

The additional duties imposed by the covenant of good faith and fair dealing were not eliminated when this court accepted the argument that in insurance contracts, a breach of the covenant sounds in tort. "That responsibility is not the requirement mandated by the terms of the policy itself—to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 485, 510 P.2d 1032, 1037 (1973).

The covenant of good faith and fair dealing requires that the party act with both *subjective* good faith and *objective* fairness. *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1225 (Alaska 1992). It is objectively reasonable to rely on contractual rights. Contractual rights, therefore, provide a reasonable basis for a position. But this does not end our inquiry. The covenant of good faith and fair dealing requires that contractual rights be pursued with subjective good faith. In *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983), even though the employment at will contract allowed the firing of Mitford for no reason at all, "the circumstances surrounding Mitford's termination give rise to an inference that he was fired ... for the purpose of preventing him from sharing in future profits," thereby violating the duty of good faith and fair dealing. In *Loyal Order of Moose v. International Fidelity Insurance Co.*, 797 P.2d 622, 629 (Alaska 1990), we noted that while the surety had a contractual right to demand arbitration, "the demand for arbitration may not itself be made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim."

We have declined to hold that a breach of the covenant of good faith and fair dealing sounds in tort in the context of employment contracts. However, because of the special nature of insurance contracts, a breach of the covenant of good faith and fair dealing in first party insurance claims does sound in tort. *State Farm Fire & Cas. Co. v.*

Nicholson, 777 P.2d 1152, 1156-57 (Alaska 1989).

The adhesionary aspects of the insurance contract, including the lack of bargaining strength of the insured, the contract's standardized terms, the motivation of the insured for entering into the transaction and the nature of the service for which the contract is executed, distinguish this contract from most other non-insurance commercial contracts. These features characteristic of the insurance contract make it particularly susceptible to public policy considerations.

Id., quoting *Louderback & Jurika, Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L.Rev. 187, 200-01 (1982). The reason for holding that such claims sound in tort is because "an action in tort provides a remedy for harm done to insureds though no breach of an express contractual covenant has occurred and where contract damages fail to adequately compensate insureds." *Id.*, quoting *White v. Unigard Mutual Insurance Co.*, 112 Idaho 94, 730 P.2d 1014, 1017-18 (1986).

Nicholson is consistent with our policy that because of the special nature of insurance contracts, they are particularly susceptible to public policy considerations. *Hillman v. Nationwide Mutual Fire Ins. Co.*, 758 P.2d 1248, 1250 (Alaska 1988) (invalidating uninsured motor vehicle exclusion on the basis of public policy); *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993) (granting an insured the unilateral right to select independent counsel in cases where an insurer has reserved its rights, despite the insurer's express contractual right to select counsel); *Estes v. Alaska Ins. Guar. Ass'n*, 774 P.2d 1315 (Alaska 1989) (concluding

that a time limitation on commencement of suit will only be enforced on a showing of prejudice); *Alaska Energy Authority v. Fairmont Insurance Co.*, 845 P.2d 420 (Alaska 1993) (concluding that the failure to file suit within the time limitation of the contract does not bar a claim without a showing of prejudice).

In spite of these cases, this court now concludes that as long as there exists a reasonable contractual basis for a denial of liability, a bad faith claim sounding in tort will fail regardless of any evidence of subjective bad faith. The court interprets our adoption of *Gruenberg* as "seem[ing]" to require proof of both objectively unfair conduct and subjective bad faith. *Gruenberg* was the first case to hold that a breach of the covenant of good faith and fair dealing sounds in tort, giving the plaintiff broader remedies than those in contract. While in *Gruenberg* there may have been evidence of both unfair conduct and bad faith, the court clearly articulated "the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." 510 P.2d at 1037 (emphasis added).

Instead of providing more protection for an insured by adopting the proposition that a bad faith claim may sound in tort, in fact we are providing less protection. In the context of first party insurance claims, the court has actually limited the covenant of good faith and fair dealing by imposing a twofold requirement which it has not required in any other contract. The covenant of good faith and fair dealing is meaningless if existence of a reasonable contractual basis for denial of liability is alone sufficient to defeat a bad faith claim.¹

1. This court stated in *State Farm Mutual Auto Insurance Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992), that an insured may bring a bad faith claim "in tort as well as in contract." The duty of good faith and fair dealing implied in every contract requires the insurer to act with subjective good faith and objective fairness, unlike the tort of bad faith which, as now defined, permits the insurer to act with subjective bad faith. If *Weiford* is still a correct statement of the law, then the proper disposition of this case would be to remand it to the superior court for

further proceedings. The Hillmans should be permitted to proceed on a claim based on a breach of the implied covenant of good faith and fair dealing arising out of the contractual relationship, distinct from a claim based on the tort of bad faith. They have set forth specific facts which, viewed in a light most favorable to them, raise genuine issues of material fact. Contractual damages based on a breach of the implied covenant of good faith and fair dealing may be narrower in scope than tort damages, yet some relief may be available to the Hill-

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Cite as 855 P.2d 1321 (Alaska 1993)

This is contrary to our previous holdings. For example, in *State Farm Mutual Auto Insurance Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992), we reaffirmed that "bad faith claims brought by insured persons against their insurance companies may be brought in tort as well as in contract." We vacated the award of punitive damages because "the \$20,000 offer clearly was reasonable. While the suspect note to the file might be reflective of bad motive, since the offer in question was reasonable, the note cannot independently form the basis for a punitive damages award." *Id.* at 1268. However, we noted that "the crux of Weiford's bad faith case was the testimony of her expert, George Broatch. Broatch testified that no single act of State Farm amounted to bad faith, but that cumulatively State Farm's actions did: 'It—to me it was a matter of the company philosophy. I don't really have any quarrel with the day to day handling of the file particularly.'" *Id.* at 1267. We concluded "that there was sufficient evidence to support a jury finding that State Farm acted in bad faith." *Id.* at 1269. The court is correct in rejecting the Hillmans' assertion that reasonableness is always a question of fact for the jury. But the proper question is whether a reasonable jury could conclude that Nationwide acted unreasonably, i.e. either objectively unfairly or with subjective bad faith.

In reviewing a grant of summary judgment we view the facts in the light most favorable to the non-prevailing party. *Loyal Order of Moose*, 797 P.2d at 628. The Hillmans presented evidence that Nationwide denied coverage before making an investigation of the facts or law. Nationwide violated its internal guidelines and policies which guarantee fair, honest and reasonable claims handling. Specifically, Nationwide: (1) failed to follow internal procedures when local adjusters failed to consult with higher echelons in the company before denying the death claim; (2)

failed to resolve all reasonable doubts about coverage in favor of the policy holder; (3) failed to explain why a nonwaiver agreement was required; (4) obtained a legal opinion in order to justify denying the claim; (5) failed to provide the Hillmans with previously promised information from its attorney; (6) lied about whether a letter from its attorney was available; (7) stonewalled for four years because of alleged vindictiveness toward the Hillmans' attorneys; and, (8) even after authority to concede coverage and settle the case was granted, the Regional Claims Attorney unilaterally decided not to settle.

Taking these assertions as true,² a reasonable jury could conclude that by failing to investigate, lying to the policy holder and stonewalling for four years, Nationwide acted with subjective bad faith. The grant of summary judgment was improper. Yet this court concludes that as long as Nationwide had a reasonable contractual basis for denying liability, evidence of bad faith and unfair dealings "have little or no relevance."

The court applies this same standard to the question of arbitration. Again, on summary judgment we view the facts in a light most favorable to the non-prevailing party. *Loyal Order of Moose*, 797 P.2d at 628. The Hillmans claim Nationwide insisted on arbitration in order to discourage the Hillmans from proceeding with their legitimate claims, and because of vindictiveness and aggravation with Hillmans' attorneys. Again, a reasonable jury could conclude that Nationwide acted with subjective bad faith. Yet because Nationwide's insurance policy contained an arbitration provision, "Nationwide's decision to demand arbitration was reasonable and therefore not in bad faith." This conclusion ignores *Loyal Order of Moose*, 797 P.2d at 629, which specifically states that even though a surety may have a right to arbitration, "the demand for arbitration may not itself be

mans. However, the correctness of the statement in *Weiford* is now doubtful, despite this court's assertion that it is declining to "comprehensively" define the elements of the tort of bad faith.

2. While the Hillmans have not at this point presented convincing evidence of their assertions, they have set forth specific facts which, viewed in the light most favorable to the Hillmans, raise a genuine issue of fact.

made in bad faith, or serve to defeat an otherwise timely and sufficient bad-faith claim." The court's conclusion again effectively eliminates the covenant of good faith and fair dealing.

The Hillmans presented evidence from which a reasonable jury could conclude Nationwide acted with subjective bad faith. There are genuine issues of material fact which preclude summary judgment.



Debbie M. NIX, Appellant,

v.

Daniel L. NIX, Appellee.

No. S-4916.

Supreme Court of Alaska.

July 23, 1993.

Mother appealed from order of the Superior Court, Third Judicial District, Anchorage, Elaine M. Andrews, J., granting father's motion to vacate child support arrearage. The Supreme Court, Matthews, J., held that letter from mother partially waiving father's child support obligation was ineffective.

Reversed and remanded.

1. Parent and Child ¶3.1(8)

Child support waiver is not valid and enforceable until court has reviewed and approved waiver's substantive adequacy. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

2. Divorce ¶311.5

Where child support award has been established through initial dissolution proceeding, any subsequent proposed waiver must be presented to court for review un-

1. The letter is dated February 1, 1989. Both parties agree, however, that the date "1989" was incorrect and that the letter was actually written

der modification procedures provided for in applicable rule. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

3. Divorce ¶311.5

Child support waiver presented after initial dissolution proceeding will be given only prospective effect from date of judicial approval. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

4. Divorce ¶311.5

Letter from mother partially waiving father's child support obligation was ineffective, where mother revoked waiver as to any future child support before waiver was approved by superior court. Rules Civ.Proc., Rules 90.3, 90.3(h)(1, 2).

Maryann E. Foley, Anchorage, for appellant.

Allen M. Bailey, Law Offices of Allen M. Bailey, Anchorage, for appellee.

Before MOORE, C.J., and
RABINOWITZ, BURKE, MATTHEWS and
COMPTON, JJ.

OPINION

MATTHEWS, Justice.

Debbie and Daniel Nix were married in 1984 and have one child, born in 1986. Debbie and Daniel petitioned for dissolution of their marriage and the superior court entered a decree of dissolution in February 1990. The decree required Daniel to pay Debbie monthly child support in the amount of \$936.

A letter written sometime after the hearing on their petition for dissolution,¹ signed only by Debbie, states her agreement to reduce the child support payments to \$300 per month until such time that Debbie asks Daniel to increase the amount back to \$936 per month. Daniel acknowledges that Debbie eventually exercised this right. He then increased the child support payment to the full \$936 per month. After a period of time, the Child Support Enforcement

and signed after the dissolution hearing, but before entry of the decree, in 1990.