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The 1983 Amendments to Rule 11: Answering the Critics' Concern With Judicial Self-Restraint

The Supreme Court promulgated Rule 11 of the Federal Rules of Civil Procedure¹ pursuant to the Rules Enabling Act of 1934.² The original Rule 11 required attorney certification that the pleadings were well grounded and not interposed for delay, and eliminated the prior pleading practice of using affidavits to verify pleadings.³ Under the original Rule 11, courts had power to strike unsigned or unfounded pleadings and to impose "appropriate disciplinary action" on an attorney for willful violations.⁴ Before imposing sanctions beyond striking the pleadings, however, courts required a showing of bad faith on the part of the attorney.⁵ Because the original Rule 11 did not expressly define "appropriate disciplinary action," courts were reluctant to impose opponent costs and attorneys' fees without an additional showing of abuse of process.⁶

Concern over the growing amount of frivolous litigation and

1 For the text of Federal Rule of Civil Procedure 11 as originally enacted, see note 8 *infra* [hereinafter referred to as Rule 11].

2 Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064. Rule 11 remained unchanged until amended in 1983.

3 See Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 9-13 (1976). For an analysis of Rule 11 as originally enacted, see Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751, 753-55 (1985).

4 Only twenty-three cases involving an attempt to strike a pleading under Rule 11 were reported from 1938 to 1976. Risinger, *supra* note 3, at 25. A review of all reported federal cases involving Rule 11 from 1970 to 1978 revealed that fewer than twenty cases were reported in any one year. In 1979 to 1982, thirty to forty cases reported each year involved Rule 11. Note, *supra* note 3, at 755 n.35. See also R. RODES, K. RIPPLE & C. MOONEY, *SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE* (Federal Judicial Center) (1981) (finding only two cases where counsel had been disciplined under original Rule 11).

5 The Seventh Circuit held that for an award of attorney's fees to qualify as an "appropriate disciplinary action" under the original Rule 11, a court must find subjective bad faith or "willful" misconduct. *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160 (7th Cir. 1983). See also *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32 (1st Cir. 1981); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677 (9th Cir. 1980); *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980). See Note, *Nemeroff v. Abelson, Bad Faith and Awards of Attorney's Fees*, 128 U. PA. L. REV. 468 (1979) (must show bad faith to receive attorney's fees under the original Rule 11). See generally Rotschild, Fenton & Swanson, *Rule 11: Stop, Think, and Investigate*, 11 LITIGATION 13 (Winter 1985).

6 See R. RODES, K. RIPPLE & C. MOONEY, *supra* note 4, at 64-65. For a general discussion of exceptions to the American Rule that prevailing parties should bear their own attorney's fees, see Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 205 (1985) (Appendix A).

abuse of process through improper litigation tactics⁷ spawned the 1983 amendments to Rule 11.⁸ The amendments allow the court, as well as either party, to initiate a Rule 11 motion, whereas the original Rule 11 only expressly allowed a party to initiate the motion.⁹ Also, the standard for judging possible Rule 11 violations changed from that of subjective bad faith under the original Rule 11 to an objective standard of reasonable inquiry into the factual and legal bases for every pleading, motion, and other paper filed.¹⁰ While limiting judicial discretion by making the imposition of sanctions mandatory, the amended Rule 11 increases the variety of expressly articulated sanctions imposable for a Rule 11 violation.¹¹ Moreover, Rule 11 now expressly applies to pro se litigants in addition to litigants represented by counsel.¹² It also applies to "mo-

7 See generally P. ROTHSTEIN, *THE NEW AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE* (1983); Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments of the Federal Rules of Civil Procedure*, JUDICATURE, Mar. 1983, at 363; Note, *Detering Dilatory Tactics in Litigation: Proposed Amendments to Rules 7 and 11 of the Federal Rules of Civil Procedure*, 26 ST. LOUIS U.L.J. 895 (1982); Miller & Culp, *Litigation Costs, Delay Prompted the New Rules of Civil Procedure*, Nat'l L.J., Nov. 28, 1983, at 24, col. 1.

8 The following text shows the additions and deletions effected by the 1983 amendment (italics show additions, brackets deletions):

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 his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, *motion, or other paper* and state his 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 him that he has read the pleading, *motion, or other paper*; that to the best of his knowledge, information, and belief [there is good ground to support it; and that it is not interposed for delay] *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase 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. [or is signed with the intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

2A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* § 11.01[3] (2d ed. 1984). The 1983 amendments were effective August 1, 1983. 97 F.R.D. 165 (1983).

9 See notes 46-56 *infra* and accompanying text.

10 See notes 22-24 *infra* and accompanying text.

11 See note 69 *infra*.

12 See notes 78-94 *infra* and accompanying text.

tions and other papers" as well as to initial pleadings.¹³

Several policy concerns are behind the amendments to Rule 11, which expanded the reach of the court and imposed compulsory sanctions for frivolous or improper filings.¹⁴ The advisory committee felt that mandatory sanctions would encourage judicial control of the docket by requiring public admonishment of attorneys and parties whose filings abuse or misuse the litigation process.¹⁵ The advisory committee believed that increased judicial willingness to impose Rule 11 sanctions would deter future frivolous litigation.¹⁶ Compulsory sanctions would additionally compensate the victim by reimbursing him for the expenses incurred in opposing the improper pleading or motion.¹⁷

Although conservation of judicial resources, reduction of frivolous litigation, and compensation of parties forced to defend against a frivolous filing are seemingly incontrovertible goals, the 1983 amendments to Rule 11 met with substantial criticism.¹⁸ Commentators expressed concern that the extended reach of Rule 11 would excessively restrict access to the judicial system and in-

13 See note 95 *infra* and accompanying text.

14 *Westmoreland v. CBS, Inc.* 770 F.2d 1168, 1180 (D.C. Cir. 1985) (Rule 11 "serves a dual purpose: punishment and deterrence."); *Taylor v. Prudential Bache Sec., Inc.*, 594 F. Supp. 226, 229 (N.D.N.Y. 1984), *appeal dismissed mem.*, 751 F.2d 371 (2d Cir. 1984) ("[D]ual purposes served . . . both to discourage frivolous litigation and to compensate the victims of such abuse."). See also Schwarzer, *supra* note 6, at 201.

15 Letter from Walter R. Mansfield, Chairman, Advisory Comm. on Civil Rules, to Judge Edward T. Gignoux, Chairman, and Member of the Standing Comm. on Rules of Practice and Procedure (Mar. 9, 1982), reprinted in 97 F.R.D. 190, 192 (1983) ("mandating sanctions . . . is viewed as a healthy deterrent . . . and worth the risk of satellite litigation").

16 See *Advisory Comm. Note on Fed. R. Civ. P. 11 Submitted to the Standing Comm. on Rules of Prac. and Proc. of the U.S. Judicial Conf.*, reported at 97 F.R.D. 198 (1983) (Amended Rule 11 will "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.") [hereinafter cited as *Advisory Comm. Note*]; Mansfield letter, *supra* note 15, 97 F.R.D. at 192 (Amendments to Rule 11 "would reduce frivolous claims, defenses or motions by leading litigants to stop, think and investigate more carefully before serving and filing papers.").

17 In *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985), the court upheld a bankruptcy court ruling imposing costs and fees for filing two sets of frivolous amended pleadings that merely repeated earlier frivolous claims. The court stated that "courts will ensure that each party really does bear the costs and does not foist expenses off on its adversaries. One cost of a lawsuit is research . . . Suits are easy to file and hard to defend." *Id.* at 446.

18 See Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1011 (1983) (suggesting that the mandatory nature of the sanctions exceeds the authority of the judicial rulemakers and should be made by Congress); Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 701 (1983) (requiring certification of all papers exacts a disproportionately great effort to prevent smaller amounts of abuse); Patton, *New Rules Intended to Streamline Pretrial Process*, LEGAL TIMES, May 16, 1983, at 17, col. 2. But see Parness, *Groundless Pleadings and Certifying Attorneys in Federal Courts*, 1985 UTAH L. REV. 325 (arguing that the amendments to Rule 11 did not go far enough).

crease the potential for judicial abuse.¹⁹ The most widespread concern, however, centered on expanded Rule 11's potential for retarding the development of innovative theories and applications of law.²⁰ The commentators were not reassured by the advisory committee's assertion that they did not intend Rule 11 to have a chilling effect on attorney creativity in arguing new theories of law.²¹

This note examines how the courts have applied Rule 11 since its amendment in 1983. Part I outlines the major changes in Rule 11, examining the major criticisms of the amendments, how courts have dealt with them, and how the courts' application of Rule 11 comports with the policy behind the amendments. Part II concludes that the courts have answered the valid questions raised concerning the 1983 amendments by exercising judicial caution in utilizing the full power of expanded Rule 11.

I. The 1983 Amendments to Rule 11

A. *Reasonable Inquiry Standard*

The 1983 amendments to Rule 11 changed the standard for finding a violation from that of bad faith to one of failure to make "reasonable inquiry" into the factual and legal bases of the filing.²² Some commentators have argued that this shift from a subjective test to an objective inquiry would unfairly punish inartful pleadings and innovative legal theories.²³

Most courts applying amended Rule 11, however, have imposed a requirement that the inquiry be reasonable given the circumstances in place at the time of filing.²⁴ Courts have interpreted

19 Marcus, *supra* note 7, at 370 (Rule 11 "may tempt judges to take too much control from the parties and their lawyers"). *But see* Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 629 (1982) (suggesting that greater judicial control is the key to curbing abusive litigation tactics).

20 See Snyder, *The Chill of Rule 11*, 11 LITIGATION 16, 55 (Winter 1985) ("One lawyer's novel extension of the law is another's unwarranted abuse of the judicial system . . . Punishing a lawyer for the legal theory he pleads . . . will also stifle legitimate innovation."); Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 FORDHAM L. REV. 23 (1985) ("Lawyers are trained to be creative and to be aggressive for their clients. It is that process that brings about meaningful changes in the law, changes which society requires in order to move forward. Unfortunately, I believe Rule 11 may stifle this evolutionary process.").

21 *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 199 ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.").

22 *Id.* at 198 ("The standard is one of reasonableness under the circumstances."). For a discussion of the "reasonable inquiry" distinction, see Note, *supra* note 3, at 756-68. See also Schwarzer, *supra* note 6, at 759-61.

23 See note 20 *supra* and accompanying text.

24 *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985) (appellate court reversed district court award of fees under Rule 11 and held that appellants had

reasonable inquiry as requiring not perfect nor exhaustive legal research, but merely a reasonable attempt to ascertain the present state of the law.²⁵ In *Pudlo v. Commissioner*, the district court refused to impose Rule 11 sanctions on the plaintiff for filing an untimely motion to quash an Internal Revenue Service lien.²⁶ Although a recent decision by a higher court had rejected an argument similar to the plaintiff's, the court declined to impose sanctions.²⁷ In *Taylor v. Belge Cartage Service, Inc.*,²⁸ however, the district court did impose Rule 11 sanctions for failure to Shepardize a six-year-old case that the plaintiff relied upon as his principal authority.

Although courts have applied Rule 11 sanctions to attorney statements of current or controlling law, these cases have involved questionable motives or intentional misstatements.²⁹ In *Golden Ea-*

reasonable grounds to believe in the complaint at the time that it was submitted due to ambiguous nature of the court order granting leave to amend). In *Sendi v. NCR COM-TEN, Inc.*, 624 F. Supp. 1205 (E.D. Pa. 1986), the court declined to impose Rule 11 sanctions on a party who filed a second claim ten days before a virtually identical lawsuit involving the same parties was dismissed. The court held that the decision to file was "misguided" but understandable given the pressure of a running statute of limitations. *Id.* at 1207. See also *El Greco Leather Products Co. v. Shoe World, Inc.*, 623 F. Supp. 1038, 1040 (E.D.N.Y. 1985) (court refused to impose sanctions as not clear that the claim was patently baseless at the time it was filed).

25 See, e.g., *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (Although the "pleader need not be correct in his view of the law . . . the conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit."); *Wagner v. Allied Chemical Corp.*, 623 F. Supp. 1407 (D. Md. 1985) (holding sufficient inquiry into factual basis to support filing of a personal injury claim to talk with one doctor who examined the claimants); *Ring v. R.J. Reynolds Indus., Inc.*, 597 F. Supp. 1277, 1281-82 (N.D. Ill. 1984) (imposing sanctions where minimal inquiry would have shown that action for wrongful discharge unwarranted under established precedent); *Kuzmins v. Employee Transfer Corp.*, 587 F. Supp. 536, 538 (N.D. Ohio 1984) (finding that counsel failed to make minimal inquiry into the bases for claim of right to jury trial in a sex discrimination case).

26 587 F. Supp. 1010 (N.D. Ill. 1984).

27 *Id.* at 1012.

28 102 F.R.D. 172 (W.D. Mo. 1984).

29 See, e.g., *Confederation Laborista de Puerto Rico v. Cervceria India, Inc.*, 778 F.2d 65, 66 (1st Cir. 1985) (finding union claim that it was not obligated to exhaust grievance procedures under collective bargaining agreement sanctionable under Rule 11 given "the clarity of the precedents of both the Supreme Court and this court on this issue"); *Rodgers v. Lincoln Towing Service*, 771 F.2d 194 (7th Cir. 1985) (imposing Rule 11 sanctions on counsel for arguing the incorrect law as controlling); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1176 (D.C. Cir. 1985) (appellee "could not have reasonably read *Colonial Times*" to justify its position, therefore the appellee had no reasonable basis in existing law to support its position); *In re Oximetrix, Inc.*, 748 F.2d 637, 644 (Fed. Cir. 1984) ("no citation of apt authority or even minimally acceptable supporting argument, and in total disregard of the Supreme Court authority"); *Jorgenson v. County of Volusia*, 625 F. Supp. 1543 (M.D. Fla. 1986) (counsel for owners of Porky's, a topless bar, sought temporary restraining order to prevent enforcement of adult entertainment ordinance but failed to cite controlling authority); *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 108 F.R.D. 686, 690 (S.D.N.Y. 1985) (cases cited as supporting were "patently inapposite"); *Johnson v. Veterans' Admin.*, 107 F.R.D. 626, 628 (N.D. Miss. 1985) (court found "that a competent attorney, after reasonable inquiry, would have determined that judicial review of the Veterans' Administration's

gle Distributing Corp. v. Burroughs, the District Court for the Northern District of California imposed Rule 11 sanctions upon determining that counsel had argued cases as controlling law when, in fact, counsel was really arguing for the extension of existing law.³⁰ In *Golden Eagle*, the court found that the defendant's argument that a court need not apply the law of the original forum if the original forum would have dismissed for forum non conveniens was not supported by precedent. The court noted that Rule 11 sanctions were especially appropriate in this case because counsel had neglected to cite any conflicting precedent.³¹

Courts have cautiously applied Rule 11 to attempts by attorneys to extend current law or to suggest a novel application of existing precedent.³² Courts have refused to impose Rule 11 sanctions when the attorney conduct involved a misunderstanding³³ of the law or a supportable attempt to argue for a different

decision denying veteran benefits was precluded by the relevant statutory and case law"); *Booker v. City of Atlanta*, 586 F. Supp. 340 (N.D. Ga. 1984) (city filed motion to dismiss using argument that had been explicitly rejected by longstanding authority). *See also* Schwarzer, *supra* note 6, at 193 ("A court has the right to expect that counsel will state the controlling law fairly and fully.").

The canons of legal ethics support this position. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1981). In relevant part, DR 7-102(A) provides that:

[A] lawyer shall not:

. . . .

(2) Knowingly advance a claim or defense that is unwarranted under existing law [unless] it can be supported by good faith argument for an extension, modification, or reversal of existing law.

. . . .

(5) Knowingly make a false statement of law or fact.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

30 103 F.R.D. 124 (N.D. Cal. 1984).

31 *Id.* at 127.

32 *See, e.g., Eastway Const. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985). In *Eastway*, the court dismissed the contractor's complaint alleging antitrust and civil rights violations and awarded municipal defendants attorney's fees but stated that:

[W]e do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. . . . Courts must strive to avoid the wisdom of hindsight . . . and any and all doubt must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify, or reverse the law as it stands, Rule 11 has been violated.

Id. at 254. *Zick v. Verson Allsteel Press Co.*, 623 F. Supp. 927 (N.D. Ill. 1985). In *Zick*, the court imposed Rule 11 sanctions on plaintiff in an improper discharge action. The court found that the plaintiff was arguing for an extension of state law which was beyond the power of the federal courts. *Id.* at 930. The court also chastised the plaintiff for not even attempting to distinguish the controlling cases. *Id.* at 932.

33 *See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985) (no sanction appropriate as reasonable misunderstanding of ambiguous court order granting leave to amend); *Robinson v. C.R. Laurence Co.*, 105 F.R.D. 567, 568 (D.D.C. 1985)

interpretation of existing law.³⁴ When faced with a situation where strict application of the reasonable inquiry standard might stifle legal creativity or punish unintentional inartful filings, courts seem to return to pre-amendment standards and retain the requirement of improper motivation before finding a violation. For example, in *Nelson v. Piedmont Aviation, Inc.*,³⁵ the Fourth Circuit refused to reverse a lower court's denial of attorney's fees even though the plaintiff's attorney could cite no supporting authority for his expansive statements of statutory interpretation. The court held that the attorney's reliance "upon anti-discrimination provisions in hiring that were not dissimilar in purpose and scope" to the statute that he was trying to extend did not violate Rule 11.³⁶

The courts have, however, been more willing to find a violation of the reasonable inquiry standard when the filings have exhibited some characteristics of abuse of process. Patent violations of jurisdictional rules inspire harsher Rule 11 sanctions than do most other types of questionable motivation.³⁷ Courts appear equally

(given blur between concepts of conversion and debt, plaintiff's confusion not subject to Rule 11 sanction); *Pudlo v. Commissioner*, 587 F. Supp. 1010 (N.D. Ill. 1984) (filing of untimely motion to quash not subject to Rule 11 sanctions as misreading of Internal Revenue Code not unreasonable); *Taylor v. Belge Cartage Service*, 102 F.R.D. 172 (W.D. Mo. 1984) (Rule 11 does not prohibit assertion of claims where the facts and law are less than clear).

34 *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986) (reversed district court award of Rule 11 sanctions holding that suggestion of political motivation for suit not an appropriate reason to impose sanctions when claim a well-grounded argument for extension of existing law); *Chicago Bd. Options Exch. v. Connecticut Gen. Life Ins.*, 713 F.2d 254 (7th Cir. 1983) (reversed district court ruling that argument for novel interpretation of ERISA violated Rule 11); *EEOC v. County of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985) (no sanctions imposed on county application for protective order against EEOC subpoena but court warned that, as issue now settled, similar action in the future would receive sanctions); *Boorstein v. City of New York*, 107 F.R.D. 31 (S.D.N.Y. 1985) (denied Rule 11 motion holding that the motion to strike a Rule 68 offer of settlement was procedurally permissible and, in the alternative, represented a good faith argument for extending the current law); *Laborers Health and Welfare Trust Fund v. Hess*, 594 F. Supp. 273 (N.D. Cal. 1984) (novel arguments for extension of ERISA not subject to Rule 11 sanction).

35 750 F.2d 1234 (4th Cir. 1984).

36 *Id.* at 1238.

37 *See, e.g., Kearney v. Smith*, 624 F. Supp. 1008 (S.D.N.Y. 1985) (plaintiff filed complaint based on diversity jurisdiction including four defendants with the same state citizenship as the plaintiff); *Heard v. Barnes & Spectrum Emergency Care*, 107 F.R.D. 17, 19 (E.D. Tex. 1985) ("improper purpose was the creation of the appearance of diversity jurisdiction"); *Ilardi v. Bechtel Power Corp.*, 106 F.R.D. 567 (E.D.N.Y. 1985) (manipulation of facts for creation of diversity jurisdiction warrants Rule 11 sanctions); *Weir v. Lehman Newspapers, Inc.*, 105 F.R.D. 574, 575 (D. Colo. 1985) (no basis for subject matter jurisdiction for invasion of plaintiff's "right to freedom of association and right to personal choice in marital life"); *Weisman v. Rivlin*, 598 F. Supp. 724 (D.D.C. 1984) (failure to reasonably inquire into factual basis for diversity jurisdiction); *Hasty v. Paccar, Inc.*, 583 F. Supp. 1577 (E.D. Mo. 1984) (any factual inquiry by the plaintiff would have shown that in personam jurisdiction clearly was not established); *WSB Elec. v. Rank & File Comm. to Stop the 2-Gate Sys.*, 103 F.R.D. 417, 420 (N.D. Cal. 1984) ("attempt to squeeze plaintiff's claim into

unforgiving when the situation involves a questionable characterization of the facts combined with an improper purpose. In *Davis v. Veslan Enterprises*,³⁸ the Fifth Circuit upheld sanctions imposed for defendant's filing of a petition for removal of state court proceedings one day before a scheduled hearing on plaintiff's motion for judgment on the verdict. The appellate court rejected the defendant's questionable characterization of the plaintiff's closing statement to support an abandonment of claims argument which established diversity jurisdiction.³⁹ Instead, the court imposed sanctions for violating Rule 11 by focusing on the fact that the defendant designed its motion to delay judgment, thereby saving a substantial amount of money.⁴⁰

In addition to improper jurisdictional claims, courts have reacted strongly to the filing of nuisance lawsuits which simply rehash an already litigated dispute.⁴¹ Tax protest cases also inspire a large concentration of Rule 11 discussion.⁴² Courts have additionally imposed sanctions in response to the broadshot approach of naming defendants who are only tangentially connected to the actual litigation.⁴³ Moreover, courts have imposed Rule 11 sanctions when the pleadings were filed to obtain discovery, hopefully enabling the plaintiff to uncover some factual basis for an unsubstantiated claim.⁴⁴ Finally, courts have threatened sanctions when they per-

mold of existing law by a wholly reckless and disingenuous presentation of the case" to establish federal jurisdiction).

38 765 F.2d 494 (5th Cir. 1985).

39 *Id.* at 500.

40 *Id.*

41 *Filippini v. Austin*, 106 F.R.D. 425, 432 (C.D. Cal. 1985) ("the number of times this case has been considered by this court and parts of this case by other judges . . . suggests that this action is precisely the kind that the amendments to Rule 11 were designed to prevent").

42 *See, e.g., United States v. Koblinski*, 732 F.2d 1328, 1329 n.1 (7th Cir. 1984) (wages are income); *Parker v. Commissioner*, 724 F.2d 469 (5th Cir. 1984); *Granzow v. Commissioner*, 739 F.2d 265 (7th Cir. 1984); *United States v. Hart*, 701 F.2d 749 (8th Cir. 1983); *McCoy v. Commissioner*, 696 F.2d 1234 (9th Cir. 1983); *Miller v. United States*, 604 F. Supp. 804 (E.D. Mo. 1985); *Johnson v. United States*, 607 F. Supp. 347 (E.D. Pa. 1985); *Snyder v. Commissioner*, 596 F. Supp. 240 (N.D. Ind. 1984); *Aune v. United States*, 582 F. Supp. 1132 (D. Ariz. 1984). *But cf. Blair v. United States Treasury Dept.*, 596 F. Supp. 273 (N.D. Ind. 1984) (a valid tax dispute, although lost, will not result in Rule 11 sanctions); *Davis v. United States*, 104 F.R.D. 509, 512 (N.D. Ill. 1985) ("plaintiffs tax return was frivolous, this lawsuit was not").

43 *Foster v. Michelin Tire Corp.*, 108 F.R.D. 412 (C.D. Ill. 1985) (plaintiff sued three tire companies in a wrongful death action without ascertaining which company had manufactured the allegedly defective tires); *Barrios v. Pelham Marine, Inc.*, 106 F.R.D. 512, 513 (E.D. La. 1985) (employer filed third-party complaint alleging that Texaco had failed to warn him that "grease is slippery").

44 *In re Ronco, Inc.*, 105 F.R.D. 493, 498 (S.D. Fla. 1985) (purpose of going "fishing for an undefined catch" not a defense to Rule 11 motion for sanctions); *City of Yonkers v. Otis Elevator Co.*, 106 F.R.D. 524, 525 (S.D.N.Y. 1985) (pleadings must have factual predicate at the time the claims are asserted and need for further discovery is no defense to a Rule 11

ceive the plaintiff has filed suit to obtain a settlement rather than to redress a legitimate wrong.⁴⁵

Although granted the use of an objective standard, the courts have not exercised this power to the full extent. Courts have instead been extremely conservative in extending the reach of Rule 11 sanctions. This judicial reluctance to apply the full reach of amended Rule 11 indicates that courts recognize the potential for abuse inherent in the Rule as amended, and will continue to refrain from excessive judicial activism in controlling the docket.

B. *Sue Sponte Power to Initiate Rule 11 Sanctions*

Rule 11 expressly allows either party, as well as the court, to initiate a motion to impose Rule 11 sanctions, whereas the original Rule 11 only allowed parties to seek sanctions for Rule 11 violations.⁴⁶ The drafters of Rule 11 designed this explicit granting of sua sponte power to encourage active court involvement in controlling the docket, and to overcome traditional judicial reluctance to impose sanctions absent a motion from a party.⁴⁷ Several commentators have argued that increased judicial willingness to impose Rule 11 sanctions sua sponte would result in increased animosity and decreased cooperation between judges and attorneys.⁴⁸

Although granted the express power to initiate Rule 11 motions, courts are reluctant to exercise the full extent of their power. Many courts have held out Rule 11 sanctions as a warning before actually imposing them.⁴⁹ In *Friedlander v. Nims*,⁵⁰ the District Court for the Northern District of Georgia cited Rule 11 in a cautionary

motion for sanctions); *Viola Sportswear, Inc. v. Mimun*, 574 F. Supp. 619, 621 (E.D.N.Y. 1983) (allegations of worldwide conspiracy based on one pair of counterfeit jeans were baseless and designed to elicit supporting facts upon discovery).

45 *Gieringer v. Silverman*, 731 F.2d 1272 (7th Cir. 1984) (no Rule 11 sanctions granted although considered appropriate for strike suits in the future).

46 See note 8 *supra*.

47 Rule 11 amendments were "intended to recognize judicial management as part of the judicial job description." Miller, *Proceedings of the Second Judicial Conference*, 101 F.R.D. 161, 199 (1983). Rule 11 is "intended to reduce the reluctance of courts to impose sanctions." *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 348.

48 *Hot Locks, Inc. v. Ooh La La, Inc.*, 107 F.R.D. 751 (S.D.N.Y. 1985) (court declines to impose sanctions for improper venue finding that overzealous use of Rule 11 would "destroy the atmosphere of friendly cooperation and professional collegiality" between attorneys, thus jeopardizing future settlement offers); Weiss, *supra* note 20, at 24 (Rule 11 unnecessarily injects "an additional adversarial proceeding that will only exacerbate [the] hostility and reduce the possibilities for settlement" into the judicial process.).

49 *Donaldson v. Clark*, 105 F.R.D. 526, 537 (M.D. Ga. 1985) (imposing sanctions after repeated warnings "that Rule 11 sanctions would be considered if he failed to establish any factual basis for the complaint"); *Etshokin v. Texasgulf, Inc.*, 106 F.R.D. 320 (N.D. Ill. 1984) (court permitted plaintiff to amend complaint following two years of discovery but warned that Rule 11 sanctions would be likely if the complaint could not survive a motion for summary judgment); *Ross v. Ross*, 104 F.R.D. 439 (N.D. Ill. 1984) (dismissing a poodle bite complaint with leave to amend but warning of possible Rule 11 considerations if the

manner when dismissing a complaint with leave to amend under Rule 9(b) for failure to plead fraud with sufficient particularity. In *Friedlander*, the court gave the plaintiffs fifteen days to amend their pleadings. The court, however, cautioned that it would expect "the strictest compliance with Rule 11" in any subsequently filed pleadings.⁵¹ The Second Circuit also cited Rule 11 as a warning when reports of pre-trial conversations indicated that the plaintiff initiated lawsuits to encourage business associates to renew contracts.⁵²

Most courts have narrowly construed the language of Rule 11 to restrict the breadth of its application.⁵³ In *Elliot v. Perez*,⁵⁴ however, the plaintiff filed a civil rights claim against a government official which raised the issue of governmental tort immunity. The court interpreted Rule 11 to require the plaintiff to plead governmental misconduct with particularity. The court further required the plaintiff to demonstrate that the defendant could not maintain a successful defense of tort immunity.⁵⁵ Although the court's extensive discussion of the heightened pleading requirements of Rule 11 appears expansive, considerations of tort immunity are logical in a suit against a government official. The court may also be attempting to heighten the pleading requirement to deter unfounded suits aimed at a perceived governmental deep pocket. In *Elliot*, the court's discussion of Rule 11 was a warning for future filings, as the court vacated the original dismissal and did not impose Rule 11 sanctions.⁵⁶

amended pleading was not sufficiently clear as to what type of poodle, who owned the dog, and who was bit).

50 571 F. Supp. 1188 (N.D. Ga. 1983). In *Friedlander*, the plaintiff alleged various fraudulent schemes including violations of securities laws and RICO but failed to allege any specific wrongdoing on the part of one of the defendants, Timex.

51 *Id.* at 1194-95.

52 In *Burlington Coat Factory Warehouse v. Esprit De Corp, Inc.*, 769 F.2d 919 (2d Cir. 1985), the Second Circuit upheld the lower court's grant of summary judgment for the defendants. After learning that the plaintiff sued any big account who declined to renew its contract with the plaintiff and that the plaintiff was currently involved in fifteen lawsuits, the court warned that as "these remarks and testimony suggest that Burlington has an ongoing policy of bringing litigation without regard to the merits solely to affect business decisions of those with whom it deals," Rule 11 sanctions were possible in future litigation. *Id.* at 927 n.2. Several months later, a lower court did impose sanctions on Burlington for maintaining a suit in the face of overwhelmingly contrary facts. *Burlington Coat Factory Warehouse v. Belk Bros. Co.*, 621 F. Supp. 224 (S.D.N.Y. 1985).

53 *Wenneshiemer v. Foreway Express, Inc.* 624 F. Supp. 502, 506 (E.D. Wis. 1986) (action seeking damages for loss of seniority under collective bargaining agreement not sanctionable because originally filed in state court where legal position was tenable under state law).

54 751 F.2d 1472 (5th Cir. 1985) (to plead cases raising the probable defense of governmental tort immunity, counsel, under Rule 11 standards, is affirming a belief that the defense may fail).

55 *Id.* at 1481.

56 *Id.*

Improper use of Rule 11 sanctions by both the court and litigants can defeat the purpose of the Rule. A party's use of a Rule 11 motion as an offensive litigation tactic may be met by judicial imposition of sanctions. For example, courts have threatened sanctions for using a Rule 11 motion as a substitute for discovery, to delay the proceedings, to harass the opponent, or to generally misuse the Rule.⁵⁷ If the court, however, imposes Rule 11 sanctions excessively, then the court causes the delay in the proceedings. The drafters of the amendments to Rule 11 were cognizant of the perverse possibility of parties attempting to use a rule primarily designed to control improper litigation tactics for a purpose other than that for which it was promulgated. Arthur Miller, Reporter of the Advisory Committee for the Federal Rules, recounted his "recurrent Kafkaesque dream . . . [of a motion] to sanction the sanction motion."⁵⁸

One reason for judicial self control is the concern that Rule 11 sanctions may hamper efficiency by creating satellite litigation. Courts, in attempting to deter frivolous filings, do not want to cause oppressive satellite litigation.⁵⁹ In *Westmoreland v. CBS, Inc.*,⁶⁰ the United States Court of Appeals for the District of Columbia overruled a lower court's denial of Rule 11 sanctions. The court remanded for a determination of appropriate sanctions, urging the court on remand "to be mindful that the costs of sanction litigation can exceed the efficiencies sought by the Federal Rules, and thus to limit the scope of its proceedings accordingly."⁶¹

In another example of judicial awareness of the potential adverse effect of excessive use of Rule 11 sanctions, the district court in *Martinez, Inc. v. Landau & Co.* held that Rule 11 did not apply to particular arguments within the filings, but rather applied to the motion taken as a whole.⁶² Otherwise, the court held, sanctioning

57 See, e.g., *Laborers Health and Welfare Trust Fund v. Hess*, 594 F. Supp. 273 (N.D. Cal. 1984) (defendant's request for Rule 11 sanctions in response to plaintiff's novel argument for extension of the law was frivolous); *Van Dorn Co. v. Howington*, 623 F. Supp. 1548, 1559 (N.D. Ohio 1985) ("motion for sanctions under Rule 11 should not be lightly made by a party or granted by a court"); *Fisher Bros. v. Cambridge-Lee Indus.*, 585 F. Supp. 69, 71 (E.D. Pa. 1983) (the court cautioned against using a Rule 11 motion as substitute for discovery). Judge Schwarzer points out that the potential for the perverse result of actually aiding the party attempting to delay the proceedings or harass the opponent exists if the proceeding to determine the Rule 11 sanction is lengthy. Schwarzer, *supra* note 6, at 184.

58 Miller, *supra* note 47, at 200.

59 "To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record." *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 201.

60 770 F.2d 1168 (D.C. Cir. 1985).

61 *Id.* at 1179.

62 107 F.R.D. 775 (N.D. Ind. 1985). In *Martinez*, the original defendant, Landau, filed a

individual arguments within the filing "would spawn litigation as potentially abusive as that which Rule 11 is designed to prevent."⁶³ The court further cautioned against allowing Rule 11 motions to take on "a life of their own through their use for every motion filed in a case."⁶⁴ Thus, although courts can succumb to the temptation of imposing Rule 11 sanctions for purposes outside those envisioned by the drafters of the 1983 amendments,⁶⁵ the majority of courts have been extremely careful in applying Rule 11.

C. *Mandatory Sanctions for Rule 11 Violations*

The original Rule 11 *allowed* a court to impose sanctions for violations, whereas Rule 11, as amended, *requires* a court to impose sanctions.⁶⁶ The courts, however, still retain substantial discretion in determining when the standard of reasonable inquiry has been violated.⁶⁷ Once the court determines that a Rule 11 violation has occurred, the court must then impose sanctions.⁶⁸ Although Rule 11 explicitly authorizes the imposition of reasonable costs and attorney's fees on the transgressing party, it also grants the court discretion to tailor its choice of an appropriate sanction to the particular facts of the case.⁶⁹

counterclaim alleging RICO violations by the plaintiff, Martinez. In response, Martinez filed a motion to dismiss the counterclaim on four grounds. Two of the grounds were arguably frivolous while the remaining two arguments were subsequently rejected by a contrary Supreme Court decision.

63 *Id.* at 779.

64 *Id.* at 777.

65 *Heuttig & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519 (N.D. Cal. 1984) (Rule 11 sanctions imposed for failure to accept a generous settlement offer); *Wells v. Oppenheimer & Co.*, 101 F.R.D. 358, 359 (S.D.N.Y. 1984) (court deferred decision on amount of Rule 11 sanctions for filing of improper motion to encourage settlement).

66 *See* note 8 *supra*.

67 *See* Note, *supra* note 3, at 760.

68 *See, e.g., Eastway Const. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985); *McLaughlin v. Western Casualty and Surety Co.*, 105 F.R.D. 624 (S.D. Ala. 1985); *Hilgeford v. Peoples Bank*, 607 F. Supp. 536 (N.D. Ind. 1985); *Hearld v. Barnes & Spectrum Emergency Care*, 107 F.R.D. 17 (E.D. Tex. 1985).

69 "The court, however, retains the necessary flexibility to deal appropriately with violations of the rule." *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 200. Various courts have responded to Rule 11 violations with sanctions other than costs and attorney's fees. *See, e.g., Bockman v. Lucky Stores, Inc.*, 108 F.R.D. 299 (E.D. Cal. 1985) (ordering copies of opinion given to every member of the sanctioned attorney's law firm); *Stewart v. City of Chicago*, 622 F. Supp. 35 (N.D. Ill. 1985) (striking pleading for failure to sign but holding that court cannot impose Rule 11 sanction as no signature at all does not violate certification standard); *Hearld v. Barnes & Spectrum Emergency Care*, 107 F.R.D. 17 (E.D. Tex. 1985) (imposing \$5,000 fine payable to the court); *Valient-Bey v. Morris*, 620 F. Supp. 903 (E.D. Mo. 1985) (striking claim signed by unlicensed jailhouse "counselor" on behalf of fellow inmate); *Kendrick v. Zanides*, 609 F. Supp. 1162 (N.D. Cal. 1985) (asking counsel to show cause why he should not be suspended from practice in front of the court for violations of Rule 11); *In re Itel Sec. Litig.*, 596 F. Supp. 226, 235 (N.D. Cal. 1984) (court considers referring name of counsel to state bar association for disciplinary action but also

The court may also, at its discretion, direct appropriate sanctions toward the party, the attorney, or both.⁷⁰ Courts have used this power to directly sanction attorneys when the objectionable aspect of the filing involves a misstatement or misapplication of the law.⁷¹ Courts also direct the sanction toward the attorney when there are indications of improper attorney motivation for the filing. In *Van Berkel v. Fox Farm & Road Machinery*,⁷² the court imposed Rule 11 sanctions directly on the attorney for continuing a personal injury suit even after discovery revealed that the statute of limitations barred the suit. The court found that the plaintiff's attorney did not intend to benefit his client in any fashion, and therefore, the attorney should bear the full brunt of the sanctions. In *Lepucki v. Van Wormer*,⁷³ the Seventh Circuit upheld an Indiana district court's imposition of sanctions against both a tax protest attorney and his client. The court called the attorney's actions "examples of irresponsible advocacy falling below minimum professional standards and deserving of penalty."⁷⁴ Absent an obvious indication of bad faith or misuse of process, the courts impose joint and several liability for violations of Rule 11.⁷⁵

In *Chevron USA, Inc. v. Hand*,⁷⁶ however, the Tenth Circuit upheld the imposition of sanctions on the client where the party agreed to a settlement and subsequently filed a motion to set aside the agreement. The Tenth Circuit upheld the lower court's finding that actions were undertaken to delay the judgment for business reasons and that, as the obvious instigator of the improper filing, the party should bear the full brunt of the sanctions. Absent a clear indication of individual culpability or initiative, however, the courts are reluctant to single out who should pay the sanctions.

This reluctance to point an accusatory finger absent a clear in-

holding that Rule 11 does not authorize punitive damages). See also Schwarzer, *supra* note 6, 104 F.R.D. at 201-05.

70 The court has "the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both." *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 200.

71 See, e.g., *Bockman v. Lucky Stores, Inc.*, 108 F.R.D. 299 (E.D. Cal. 1985) (attorney filed baseless claim to decertify class); *Weir v. Lehman Newspapers, Inc.*, 105 F.R.D. 574 (D. Colo. 1985) (imposed on counsel due to his inappropriate use of the law); *Wrenn v. New York City Health & Hosp. Corp.*, 104 F.R.D. 553, 555 (S.D.N.Y. 1985) (attorney failed to sign pleading even after omission brought to her attention and exhibited "a cavalier, bordering on contemptuous, disregard for the Federal Rules of Civil Procedure and the Rules of this Court").

72 581 F. Supp. 1248 (D. Minn. 1984).

73 765 F.2d 86, 87 (7th Cir. 1985).

74 *Id.* at 87.

75 See, e.g., *City of Yonkers v. Otis Elevator Co.*, 106 F.R.D. 524 (S.D.N.Y. 1985); *WSB v. Rank & File Comm. to Stop 2-Gate Sys.*, 103 F.R.D. 417 (N.D. Cal. 1984) (complaint lacked base in both law and fact).

76 763 F.2d 1184 (10th Cir. 1985).

dication of responsibility reflects the courts' primary goal of deterring future frivolous filings.⁷⁷ Holding the attorney and client jointly and severally liable for Rule 11 violations also assures that the party injured by the frivolous filing is reimbursed for his costs.

D. *Application to Pro Se Litigants*

Rule 11 certification requirements now apply to pro se litigants as well as to litigants represented by counsel, whereas the original Rule 11 only applied to the latter.⁷⁸ Some commentators have argued that extending Rule 11 to pro se litigants, combined with the less subjective standard of reasonable inquiry, would result in an excessive restraint on access to the judicial system for these litigants.⁷⁹ The Advisory Committee, while emphasizing Rule 11's applicability to pro se litigants, stressed that "the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations."⁸⁰ In applying Rule 11, the courts have maintained their conservative stance and have held pro se litigants to a lesser standard of inquiry than attorneys.⁸¹ For example, the District Court for the District of Minnesota, while citing the more stringent standard of reasonable inquiry, expressed a reluctance to impose sanctions on pro se litigants whose claims were "sincere" but unfounded.⁸² Other courts have exhibited a similar reluctance to impose sanctions absent an obvious indication of bad faith or abuse of process.⁸³

The sliding scale of inquiry available in Rule 11 has prevented it from being used to deny pro se litigants access to the court system.⁸⁴ Courts have not imposed Rule 11 sanctions on pro se liti-

77 Focusing on determining the more culpable party would both decrease the efficiency of the sanctioning process and lessen the less guilty party's incentive to closely watch the actions of the other.

78 See note 8 *supra*.

79 "[O]ur society is a great society, in part, because we have access to the courts as we do." Weiss, *supra* note 20, at 24.

80 *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 199.

81 *Davis v. United States*, 104 F.R.D. 509, 510 (N.D. Ill. 1985) (pro se litigant cannot "reasonably be expected to know the existence" of timeliness requirements).

82 *Bigalk v. Federal Land Bank Ass'n of Rochester*, 107 F.R.D. 210 (D. Minn. 1985). In *Bigalk*, farmers appearing pro se challenged a 1977 loan under the Truth in Lending Act. The court found their claims baseless but declined to impose sanctions. The court warned, however, that "parties bringing similar baseless actions in the future" include those appearing pro se. *Id.* at 213.

83 *Cavallary v. Lakewood Sky Diving Center*, 623 F. Supp. 242 (S.D.N.Y. 1985). The court imposed Rule 11 sanctions on a pro se litigant who had signed a valid waiver with the defendant. The court stressed that this action was "the second action Cavallary has filed against Lakewood despite the fact that Judge Doherty ruled he is contractually bound not to sue them." *Id.* at 245. The court expressed reluctance to impose sanctions against a pro se litigant but found his complaint frivolous and "spiteful." *Id.* at 246.

84 A sliding scale has also been suggested for judging attorney violations of Rule 11. *Filippini v. Austin*, 106 F.R.D. 425, 432 (C.D. Cal. 1985) (suggesting that three considera-

gants absent some propensity for being excessively litigious⁸⁵ or for filing improperly motivated motions.⁸⁶ The cases where pro se litigants have received Rule 11 sanctions have involved, with few exceptions, abuse of the litigation process by filing numerous suits⁸⁷ or naming tenuously connected parties as defendants.⁸⁸ The non-litigious pro se litigants who have received Rule 11 sanctions were found to have abused the process through the filing of improperly motivated actions.⁸⁹ Although the courts do not appear willing to hold pro se litigants to the same standard of reasonable inquiry into the law as attorneys, the courts are willing to address problems of abuse of the system by imposing Rule 11 sanctions on pro se litigants.

tions impact on reasonableness of the attorney's inquiry: time available for inquiry, source of the facts relied upon, and plausibility of attorney's view of the law). *See also* Schwarzer, *supra* note 6, at 201 (suggests sliding scale according to level of lawyer's expertise and firm resources); *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 199.

85 *Taylor v. Prudential Bache Sec., Inc.*, 594 F. Supp. 226 (N.D.N.Y. 1984), *appeal dismissed mem.*, 751 F.2d 371 (2d Cir. 1984). The court found that the plaintiff's "beleaguering saga" of seven lawsuits represented the "paragon of harassing and vexatious litigation to which the sanctions of Rule 11 are directed." *Id.* at 227. The court still expressed reluctance to impose sanctions but found that the plaintiff's behavior had "wrought untold injury upon its victims . . . [and drew] away from [the court's] already overburdened docket." *Id.*

86 *Dominquez v. Figel*, 626 F. Supp. 368 (N.D. Ind. 1986). The court imposed sanctions on a pro se litigant who filed a claim alleging violations of his constitutional rights to take a shower and exercise religious freedom during a prison lockdown. The court found that the inmate had actually been allowed to take showers during the lockdown and had been offered a personal in-cell visit by the prison chaplain. The court described the resultant "waste of judicial resources" as "inexcusable" and imposed sanctions. *Id.* at 374.

87 *Tarkowski v. County of Lake*, 775 F.2d 173 (7th Cir. 1983) ("[A]fter losing in state court [defendant] brought eight separate federal court actions which were meritless." Court remanded with suggestion that lower court reconsider denial of Rule 11 sanctions).

88 *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1036 (9th Cir. 1985) (court found that refileing of already dismissed suit with addition of numerous government defendants violated Rule 11).

89 *In Sloan v. United States*, 621 F. Supp. 1072 (N.D. Ind. 1985), the court imposed Rule 11 sanctions on the pro se husband and wife litigants. The Sloans claimed that they were not taxpayers and, therefore, not subject to an IRS investigatory summons. The court rejected their arguments unequivocally, finding that their wages were indeed income and further stating that "suits such as this waste precious judicial resources, and incur needless costs for the respondent. Such irresponsible use of the courts to harass the government and delay the orderly administration of the Internal Revenue laws will not be tolerated." *Id.* at 1075. Despite the court's visible ire with the litigation, the court expressed reluctance to impose sanctions on members of a "network of misguided citizens who believe they can exempt themselves from the Internal Revenue laws despite the clear judicial precedent to the contrary." *Id.* at 1076. *See, e.g.*, *Hilgeford v. Peoples Bank*, 776 F.2d 176, 179 (7th Cir. 1985) (self-drafted land patents claiming title superior to that of lien holder had no purpose for filing claim other than delay, harassment, or obstinacy); *Smith v. Egger*, 108 F.R.D. 44, 45 (E.D. Cal. 1985) (complaint asking for injunction against IRS tax levy was "filed solely for the purpose of harassment and/or to cause delay in the ultimate payment of taxes"); *Pawloske v. Chrysler Corp.*, 623 F. Supp. 569 (N.D. Ill. 1985) (pro se litigant sued employer for money removed from paycheck pursuant to a tax levy ignoring binding precedent that can only proceed against IRS).

The court's reluctance to impose the reasonable inquiry requirement on pro se litigants is consistent with the policy rationale supporting Rule 11's expanded application.⁹⁰ Promoting judicial economy through minimizing frivolous suits can only be achieved if Rule 11 sanctions result in a decreased number of future filings. Because it is doubtful that future pro se litigants will have knowledge of presently imposed sanctions, imposing punishment on pro se litigants does not serve the deterrence purpose of Rule 11. Therefore, the courts should impose sanctions on pro se litigants only when the litigant's behavior is so egregious or the purpose so improper as to justify reimbursing the defendant for the harm caused.⁹¹ Moreover, courts have access to alternative methods beyond Rule 11 to punish litigious individuals⁹² or to control the promulgation of meritless pro se suits through its inherent⁹³ or statutory powers.⁹⁴

E. *Rule 11 Applied to Motions and Other Papers*

Amended Rule 11 applies to pleadings, motions, and other papers, whereas the original Rule 11 only applied to pleadings. Although courts have cautiously applied amended Rule 11's objective standard and its expanded application to pro se litigants, courts have not been as cautious in applying the extended reach of Rule 11 beyond pleadings to motions and other papers. This expansive application of amended Rule 11 by the courts to motions and other

90 See notes 14-17 *supra* and accompanying text.

91 Sanctions, however, do serve to deter litigious individual pro se litigants as well as to reimburse those defendants subjected to particularly egregious abuse of process. In *Taylor v. Prudential Bache Sec., Inc.*, 594 F. Supp. 226 (N.D.N.Y. 1984), *appeal dismissed mem.*, 751 F.2d 371 (2d Cir. 1984), the court awarded defendants \$35,000 in legal fees.

92 The court can use several other provisions within the Federal Rules of Civil Procedure to control litigants who abuse the judicial process: Rule 1 (all claims to proceed expeditiously); Rule 12(f) (strike an insufficient defense); Rule 41(d) (impose costs on plaintiff who refiles a previously dismissed lawsuit); and Rule 56(g) (summary judgment if filed solely for delay). Rule 38 of the Federal Rules of Appellate Procedure allows the awarding of costs and damages for frivolous appeals. See Comment, *Courts Are No Place for Fun and Frivolity: A Warning to Vexatious and Over-Zealous Attorneys*, 20 WILLAMETTE L.J. 441 (1984) (outlining variety of methods courts may use to control the proliferation of suits by prison inmates).

93 *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980) (court must make specific finding of bad faith to exercise inherent power to sanction parties); *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (must have element of bad faith to exercise court's inherent power to award attorney's fees under the original Rule 11).

94 The court can impose fees under 28 U.S.C. § 1297 (1982) on parties who vexatiously multiply proceedings in federal court. *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030 (9th Cir. 1985) (finding that injunction against further filing of further causes of action without leave of the court is appropriate under the All Writs Statute, 28 U.S.C. § 1651 (1982)). The court can impose damages for frivolous appeals under 28 U.S.C. § 1912 (1982). A court may also dismiss civil and criminal cases brought in forma pauperis if frivolous under 28 U.S.C. § 1915 (1982).

filings, however, is consistent with the policy concerns supporting the Rule 11 amendments.

Some commentators expressed concern that the application of Rule 11 to post-pleading filings would punish a party for ignorance of law passed or discovered subsequent to the filing of the initial pleading.⁹⁵ Courts have not applied Rule 11, however, to punish a party's failure to discover applicable law, as long as the party made a reasonable inquiry into the status of the law at the time of the filing.⁹⁶ Furthermore, courts have not imposed Rule 11 sanctions in cases where the law or facts were discovered subsequent to the filing, unless the attorney had notice of the new development and was given adequate opportunity to withdraw voluntarily or amend his pleading.⁹⁷ On the other hand, courts have imposed relatively harsh Rule 11 sanctions on parties who have maintained a complaint or defended a motion in the face of incontrovertible evidence or law contrary to their position.⁹⁸

Courts appear more willing to apply an expansive interpretation of Rule 11 to control the intra-litigation proliferation of motions. Courts have threatened Rule 11 sanctions when discussing motions, especially where counsel has automatically opposed a valid motion or has filed a counter-motion not based in good law.⁹⁹ Courts have not required any indication of bad faith or improper purpose to impose Rule 11 sanctions on a party filing an improper motion. When, however, the courts have found evidence of an im-

95 See Snyder, *supra* note 20, at 55.

96 Hansen v. Prentice-Hall, Inc., 622 F. Supp. 510 (S.D.N.Y. 1985) (no sanction in libel action even though plaintiff did not dismiss after contrary decision as court felt that plaintiff might have been able to distinguish his case); Lunbard v. Maglia, Inc., 621 F. Supp. 1542 (S.D.N.Y. 1985) (claim filed prior to handing down of controlling decision not subject to Rule 11 sanction).

97 Pudlo v. Commissioner, 587 F. Supp. 1010, 1012 n.5 (N.D. Ill. 1984). The court suggested that if plaintiffs had not voluntarily dismissed after being informed of the untimely nature of the petition, Rule 11 sanctions would have been appropriate. The controlling decision had only been issued in advance sheet form when the claim was filed.

98 Skrobacz v. International Harvester, 582 F. Supp. 1192, 1195-96 (N.D. Ill. 1984) (sanctions impossible when plaintiff refused to dismiss suit after being given cite to recently decided Supreme Court case directly contrary to plaintiff's position); Woodfork *ex rel.* Houston v. Gavin, 105 F.R.D. 100 (N.D. Miss. 1985) (plaintiff opposed motion to dismiss despite dearth of supporting facts or law); City of Yonkers v. Otis Elevator Co., 104 F.R.D. 524 (S.D.N.Y. 1985) (plaintiff refused to dismiss fraud claim when presented with the opportunity to do so).

99 Sony Corp. v. S.W.I. Trading, Inc., 104 F.R.D. 541, 542 (S.D.N.Y. 1985) (imposing Rule 11 sanctions for filing a motion to vacate a default emphasizing that "the requirement in Rule 11 that no motion is to be filed without careful consideration as to its basis in law and fact"); Barrios v. Pelham Marine, Inc., 106 F.R.D. 512, 514 (E.D. La. 1985) (defendant filing frivolous third-party complaint resisted motion for summary judgment even though obviously baseless); Wells v. Oppenheimer & Co., 101 F.R.D. 358 (S.D.N.Y. 1984) (defendants moved for summary judgment in the midst of the court's admonition discouraging the filing of such a motion).

proper motive, they have responded by imposing harsh sanctions. For example, in *Davis v. Veslan Enterprises*,¹⁰⁰ the Fifth Circuit awarded both reasonable fees and interest totaling \$38,843.99 for a filing which improperly sought to postpone payment on a state court judgment. This case suggests that the severity of the sanction imposed will depend on the level of improper motivation apparent in the filing.

The courts appear willing to impose a stricter reasonable inquiry standard on motions and other papers filed with the court after initial pleadings. After finding a Rule 11 violation in a subsequent filing, courts have also been willing to impose greater sanctions.¹⁰¹ The increased aggressiveness of the court's application of Rule 11 to post-pleading filings stems, in part, from the docket control concern underlying the amendments.

Enthusiastic judicial application of Rule 11 sanctions to intra-litigation motions, however, may impact negatively on the goal of docket control and judicial efficiency. A number of courts have held that imposition of Rule 11 sanctions on a motion satisfies the requirements for a collateral appeal.¹⁰² Therefore, the potential for satellite litigation is significant in cases where courts impose Rule 11 sanctions at the time of deciding the improper motion. The possibility of satellite litigation, however, is outweighed by the benefits of considering the Rule 11 sanction when discussing the motion rather than at the end of the litigation. Having the Rule 11 motion decided at or near the disposition of the objectionable filing itself ensures that the court will have sufficient facts and the parties adequate notice to satisfy a due process requirement.¹⁰³ In addition,

100 765 F.2d 495, 497 (9th Cir. 1985).

101 Courts have, however, inferred a duty to mitigate from the use of "reasonable expenses" language in Rule 11. See, e.g., *United Food & Commercial Workers v. Armour & Co.*, 106 F.R.D. 345 (N.D. Cal. 1985). The court reduced the fees awarded under Rule 11 from \$22,000 to \$7,500 holding that the "victim of a frivolous lawsuit must use reasonable means to terminate the litigation." *Id.* at 350.

102 See, e.g., *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985) (order imposing Rule 11 sanction on counsel who has withdrawn is appealable as collateral order); *Optyl Eyewear Fashion Int'l Corp. v. Style Co.*, 760 F.2d 1045, 1047 (9th Cir. 1985) (any order imposing Rule 11 sanctions on counsel, a nonparty in the underlying suit, is appealable as a collateral order).

103 *Advisory Comm. Note, supra* note 16, 97 F.R.D. at 200:

The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

See also *In re Intel Sec. Litig.*, 596 F. Supp. 226, 232-33 n.7 (N.D. Cal. 1984) (not recognizing a seventh amendment right to a jury trial during post-judgment Rule 11 sanctions hearing); *Schwarzer, supra* note 6, 104 F.R.D. at 198 (due process satisfied by memorandum and declarations and no need for evidentiary hearing unless facts in dispute).

determining the appropriateness of Rule 11 sanctions at the time of the objectionable filing enables the court to more efficiently settle the issues of what expenses and attorney's fees resulted from the improper filing,¹⁰⁴ as well as to make a record for any subsequent collateral appeal.

Courts have responded to concerns for satellite litigation and efficiency by relaxing the hearing formality required to satisfy due process standards.¹⁰⁵ In addition, appellate courts apply varying standards of review according to the nature of the district court determination being contested.¹⁰⁶

Although judicial willingness to impose Rule 11 sanctions for improper motions can promote inefficiency through satellite suits, the benefit of streamlined litigation and the decrease in improper dilatory litigation tactics comport with the purposes of the amendments. Furthermore, increased standards of appellate review combined with careful and considered imposition of Rule 11 sanctions can minimize the success on appeal.¹⁰⁷

II. Conclusion

Several commentators predicted that the 1983 amendments expanding the scope of Rule 11 would result in an epidemic of judicial activism and, consequently, limit access to the judicial system and discourage attorney creativity in proposing new legal theo-

104 *Weisman v. Rivlin*, 598 F. Supp. 724, 726 (D.D.C. 1984) (Rule 11 "requires that the work expended be causally linked to the improperly filed paper").

105 See note 103 *supra*.

106 The Ninth Circuit in *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986), announced a varying standard for review of Rule 11 sanction cases. Review of factual determinations by the district court will involve a clearly erroneous standard while a challenge to the appropriateness of the sanctions imposed invokes an abuse of discretion standard. *Id.* at 828. Only when the decision of the district court involves a legal conclusion will the Ninth Circuit institute a de novo review. *Id.* Other circuits have announced similar standards of review. See, e.g., *Davis v. Veslan Enter.*, 765 F.2d 495 (5th Cir. 1985); *Eastway Const. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985). In *Indianapolis Colts v. City of Baltimore*, 775 F.2d 177 (7th Cir. 1985), the Seventh Circuit held that the appellate court review of denial of attorney's fees is "narrow and limited" and applied only an abuse of discretion standard. *Id.* at 179. See also *Larouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134, 1140 (4th Cir. 1986) (denial of attorney's fees will only be reversed for abuse of discretion).

107 In *Indianapolis Colts v. City of Baltimore*, the Seventh Circuit awarded costs incurred in defending an appeal of a district court denial of Rule 11 sanctions, finding that the appeal was without merit as the suit below was not frivolous. 775 F.2d at 182. In *Chemical Engineering Corp. v. Marlo, Inc.* 754 F.2d 331 (Fed. Cir. 1984), the appellate court, while declining to award Rule 11 sanctions in the original action due to a possibility that counsel had been misled, awarded costs for the appeal due to the frivolous nature of the contention. In *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir. 1985), the Seventh Circuit upheld the district court's award of attorney's fees and imposed additional sanctions under Federal Rule of Appellate Procedure 38 for filing of a frivolous appeal.

ries.¹⁰⁸ Although given considerably more power under amended Rule 11, the courts have not exercised this new power imprudently or indiscriminately. Instead, the courts have been extremely sensitive to Rule 11's potential chilling effect.¹⁰⁹ The courts have only invoked Rule 11 when the proffering of a unique legal theory was tainted by improper motivation or inadequate legal or factual support.¹¹⁰ The courts have also guaranteed access to the judicial system by infrequently imposing Rule 11 sanctions on pro se litigants.¹¹¹

The courts have been less reticent, however, to use the expanded power of Rule 11 in controlling the proliferation of motions. This aggressive posture comports with the underlying policy of deterring abusive litigation tactics and streamlining the litigation process.¹¹² The potential for abuse in improperly motivated motions is considerable and defending an unfounded motion can be costly for the opposing party. Therefore, to deter excessive motion filing and to increase efficient adjudication of legitimate claims, courts have used Rule 11 more aggressively in assessing the legitimacy of motions.

In the three years since Rule 11's amendment in 1983, almost all federal courts have considered Rule 11 issues. With few exceptions, these courts have exercised caution in utilizing the full extent of Rule 11's expanded power. Although several circuits appear to consider Rule 11 violations more frequently than others,¹¹³ Rule 11 issues are being increasingly considered in all circuits.¹¹⁴ At first glance, the increase appears to contravene the purposes behind the amendments to the Rule. However, the increased judicial willingness to sanction improper litigation tactics will deter future parties from ever filing a frivolous pleading or motion. If, as Arthur Miller suggests, the increased reach of amended Rule 11 will result in a "two- or three-year period of hyperactivity,"¹¹⁵ judicial imposition

108 See notes 19-20 *supra* and accompanying text.

109 See notes 32-36 *supra* and accompanying text.

110 See notes 37-45 *supra* and accompanying text.

111 See notes 81-89 *supra* and accompanying text.

112 See notes 14-17 *supra*.

113 Chrein, *The Actual Operation of Amended Rule 11*, 56 *FORDHAM L. REV.* 13, 17 (1985) (suggests that busier metropolitan districts are more likely to impose Rule 11 sanctions as the courts in those districts are more aware of burgeoning caseloads).

114 From the August 1983 implementation of the amendments to Rule 11 until the end of 1984, approximately 130 cases addressed the applicability of Rule 11 sanctions. Chrein, *supra* note 113, at 16. In 1985, reported decisions discussing Rule 11 sanctions exceeded 170.

115 Miller, *supra* note 47, 101 *F.R.D.* at 200.

of Rule 11 sanctions should eventually decrease the number of frivolous filings in the future.

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