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Insuring Rule 11 Sanctions

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NOTE

Insuring Rule 11 Sanctions

Federal Rule of Civil Procedure 11 requires courts to sanction attorneys who file frivolous papers.¹ Since 1983, when the rule was amended, attorney sanctions have emerged as an increasingly significant aspect of civil litigation in the United States. Estimates of the number of rule 11 decisions appearing in the past six years range from 600 to over 1000,² and the monetary sanctions awarded in these cases have reached amounts as high as \$200,000 to \$300,000.³ As the

1. The text of FED. R. CIV. P. 11 reads as follows:

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

2. Joseph, *The Trouble with Rule 11: Uncertain Standards and Mandatory Sanctions*, 73 A.B.A. J., Aug. 1, 1987, at 87, 88 (over 1000 rule 11 decisions); *Proceedings of the Forty-Eighth Judicial Conference of the District of Columbia Circuit*, 119 F.R.D. 461, 584 (1987) (statement of Howard Willens) (over 1000 decisions interpreting rule 11); Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988) [hereinafter Schwarzer, *Rule 11 Revisited*] (more than 600 decisions enforcing rule 11); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 234 (1988) (688 reported cases on rule 11 from 1983 to 1987; approximately 200 cases annually since 1985); Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988) (over 1000 rule 11 cases). The number of unreported decisions and informal invocations of rule 11 may be many times larger than those reported. See, e.g., THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, RULE 11 IN TRANSITION 59 (1989) [hereinafter RULE 11 IN TRANSITION] (finding survey data in the Third Circuit confirming that reported decisions are only the "tip of the iceberg" with respect to use of rule 11).

3. *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548 (9th Cir. 1986) (affirming sanction of \$294,141.10), *cert. denied*, 108 S. Ct. 83, 85 (1987); *Calloway v. Marvel Entertainment Group*, 111 F.R.D. 637 (S.D.N.Y. 1986) (imposing \$200,000 in sanctions), *modified*, 854 F.2d 1452 (2d Cir. 1988) (affirming \$100,000 sanction against attorneys, but vacating \$100,000 sanction against client), *cert. granted sub nom.*, *Pavelic & Leflore v. Marvel Entertainment Group*, 109 S. Ct. 1116 (1989); cf. *In re Yagman*, 796 F.2d 1165 (9th Cir.) (reversing \$250,000 sanction), *opinion amended*, 803 F.2d 185 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987). Many other cases involve lesser, though still not insubstantial, sanction awards. See, e.g., *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388 (2d Cir. 1989) (affirming sanction of \$10,000); *Truck*

number and size of rule 11 sanctions have grown, so has the interest of the bench and bar. Judicial conferences of federal circuits have conducted symposia and organized task forces on rule 11,⁴ and numerous articles discussing the rule have appeared in law reviews and bar publications.⁵ The burgeoning literature has analyzed nearly every aspect of rule 11, from the standards that the rule establishes to the scope of judicial review that sanction orders merit.

One important but overlooked aspect of rule 11, however, looms on the horizon: Can and should attorneys insure against their potential liability for rule 11 sanctions? Although courts have not yet confronted this question, they may very well need to do so in coming years. The proliferation of sanctions presents attorneys with considerable risk. Judges are sanctioning a broad range of attorney behavior, making it unclear exactly what conduct is sanctionable under the rule.⁶ Faced with the uncertain potential liability for sanctions, attorneys will likely seek insurance protection. Indeed, a few attorneys have already begun to pursue coverage for sanctions under their existing professional liability policies.⁷

Treads, Inc., v. Armstrong Rubber Co., 868 F.2d 1472 (5th Cir. 1989) (affirming sanction of \$12,630.62); *Chapman & Cole v. IteL Container Intl. B.V.*, 865 F.2d 676 (5th Cir. 1989) (affirming sanction of \$20,000); *International Brotherhood of Teamsters v. Association of Flight Attendants*, 864 F.2d 173 (D.C. Cir. 1988) (affirming sanctions of \$23,106.89); *King v. Idaho Funeral Serv. Assn.*, 862 F.2d 744 (9th Cir. 1988) (affirming sanction of \$10,000); *Hays v. Sony Corp. of Am.*, 847 F.2d 412 (7th Cir. 1988) (affirming sanction of \$14,895.46 against a sole practitioner from a small town); *Orange Prod. Credit Assn. v. Frontline Ventures Ltd.*, 792 F.2d 797 (9th Cir. 1986) (affirming sanction of \$54,002.52); *In re Ginther*, 791 F.2d 1151 (5th Cir. 1986) (affirming \$52,000 in sanctions); *Carlton v. Jolly*, 125 F.R.D. 423 (E.D. Va. 1989) (imposing \$12,500 in sanctions); *Gutterman v. Eimicke*, 125 F.R.D. 348 (E.D.N.Y. 1989) (imposing \$12,555 in sanctions); *Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co.*, 112 F.R.D. 355 (S.D.N.Y. 1986) (imposing sanction of \$32,001.98). A recent survey of rule 11 opinions revealed that the average rule 11 sanction is \$44,118 and the median sanction is \$5,153. T. WILLGING, *THE RULE 11 SANCTIONING PROCESS* 30, 80 (1988).

4. See, e.g., *Proceedings of the Forty-Eighth Judicial Conference of the District of Columbia Circuit*, *supra* note 2; *RULE 11 IN TRANSITION*, *supra* note 2; cf. *NEW YORK STATE BAR ASSOCIATION COMMITTEE ON FEDERAL COURTS, SANCTIONS AND ATTORNEYS' FEES* (1987).

5. See, e.g., Carter, *The History and Purposes of Rule 11*, 54 *FORDHAM L. REV.* 4 (1985); Joseph, *Rule 11 is Only the Beginning*, *A.B.A. J.*, May 1, 1988, at 62; Maute, *Sanctions: Are They Changing the Litigation Game Rules?*, *TRIAL*, Oct. 1988, at 67; Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *GEO. L.J.* 1313 (1986); Parness, *More Stringent Sanctions Under Federal Civil Rule 11: A Reply to Professor Nelken*, 75 *GEO. L.J.* 1937 (1987); Pope & Benkoczy, *A Comprehensive Guide to Sanctions Under Rule 11*, 55 *DEF. COUNS. J.* 389 (1988); Schwarzer, *Sanctions Under The New Federal Rule 11 — A Closer Look*, 104 *F.R.D.* 181 (1985) [hereinafter Schwarzer, *Sanctions: A Closer Look*]; Schwarzer, *Rule 11 Revisited*, *supra* note 2; Vairo, *supra* note 2; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 *HARV. L. REV.* 630 (1987) [hereinafter Note, *Plausible Pleadings*]; Note, *Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity*, 76 *KY. L.J.* 891 (1987-88) [hereinafter Note, *Applying Rule 11*]; Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 *N.Y.U. L. REV.* 300 (1986) [hereinafter Note, *The Dynamics of Rule 11*]; Note, *supra* note 2.

6. See *infra* notes 12-13, 25-50 and accompanying text.

7. See *RULE 11 IN TRANSITION*, *supra* note 2, at 127 (Out of 34 attorneys surveyed who had been involved in sanction motions, one attorney is filing a claim for coverage of sanctions im-

Can these and other attorneys find coverage for sanctions under their existing policies? Should they be allowed to obtain coverage for sanctions at all? This Note addresses these questions and attempts to sketch the landscape surrounding the looming issue of insurance coverage for rule 11 sanctions. To determine whether sanctions can and should be insurable, it is necessary first to understand the scope of the risk of rule 11 sanctions. Part I of this Note outlines the unsettled standards, purposes, and practices of rule 11 that make insuring sanctions both attractive and problematic.⁸ As discussed in Part I, judges' views vary widely both as to what conduct is sanctionable and as to what type of sanctions to impose. Many attorneys, therefore, cannot be certain whether their actions will be subject to costly sanctions.

To alleviate this uncertainty, attorneys concerned with the growing risk of rule 11 sanctions are likely to seek insurance coverage. Parts II and III of this Note explore two potential sources of insurance coverage for sanctions. The first place attorneys will look for coverage will be in existing professional liability policies. Part II, therefore, examines whether current attorney professional liability policies cover rule 11 sanctions and concludes that, depending on the doctrine of interpretation used, courts could find that some of these policies cover rule 11 sanctions.⁹ Even if existing policies do not cover such sanctions, however, attorneys may still seek, and insurers may offer, separate policies specifically designed to cover rule 11 sanctions. Part III, therefore, discusses the market requirements of insurability and shows that insurers may willingly offer special rule 11 insurance for attorneys.¹⁰

Given the potential for rule 11 insurance coverage under either existing or new policies, should courts enforce such policies? Part IV considers this question and the public policy issues raised by insurance coverage of rule 11 sanctions.¹¹ This final Part concludes that, at least for now, rule 11 insurance should be allowed and enforced by the courts. The ultimate resolution of the public policy issues presented by rule 11 insurance will depend on the role that the rule is to play in civil litigation; however, at the present time this role is far from clear. Absent a consensus on the purpose and scope of rule 11, any attempt to prohibit rule 11 insurance on public policy grounds will be prema-

posed against him.); telephone interview with Robert Cubbin, Counsel for Michigan Lawyers Mutual Insurance Co. (September 1, 1988) (In the past year, two attorneys have notified company of potential claims for sanctions.). Furthermore, two brief articles on the coverage of sanctions under professional liability policies have appeared in insurance law journals, portending a growing interest by attorneys and insurers in the insurability issue. Hamilton, McKee & Levitt, *Insurability of Monetary Sanctions Under Attorney Errors and Omissions Policies*, 54 DEF. COUNS. J. 520 (1987); Thomsen, *Insurance Coverage for Sanctions Imposed Under Amended Federal Rule 11*, 38 FEDN. INS. & CORP. COUNS. Q. 293 (1988).

8. See *infra* notes 12-84 and accompanying text.

9. See *infra* notes 85-150 and accompanying text.

10. See *infra* notes 151-82 and accompanying text.

11. See *infra* notes 183-250 and accompanying text.

ture. Moreover, insurance coverage for sanctions would make a positive contribution in its own right to the functioning of rule 11. Insurance would advance the compensatory ends of the rule, and it would alleviate any chilling of creative advocacy caused by the rule. The availability of insurance coverage would foster a better balance between the competing public policies of judicial efficiency and vigorous, creative representation in the courts.

I. THE RISK OF RULE 11 SANCTIONS

Practicing law under rule 11 has been variously described as “negotiating a minefield”¹² or playing a game of Russian roulette.¹³ Although these metaphors may sound extreme, they capture the essence of the risk of rule 11 sanctions. Attorneys today face the possibility of being sanctioned without knowing in advance what type of behavior a particular judge will find violates the rule. The standards of conduct under rule 11 lack uniformity and certainty, and the sanctions that can be imposed are discretionary with the court. Moreover, neither courts nor commentators agree on the purpose of rule 11 sanctions, and this lack of consensus has led to uneven, and at times inconsistent, application of the rule.

The growing uncertainty over attorney sanctions stems from the 1983 amendments to rule 11. Before that time, the rule posed little risk because courts rarely invoked it.¹⁴ The former rule 11 required attorneys to sign each pleading filed with the court, thereby certifying that the pleading was well-grounded and “not interposed for delay.”¹⁵ Courts could strike pleadings signed with the “intent” to violate rule 11¹⁶ and could discipline attorneys who willfully violated the rule.¹⁷ Courts seldom used the former rule, however, because it applied only to pleadings; it required a showing of bad faith; and it provided for only two limited sanctions.¹⁸

12. Joseph, *supra* note 2, at 89.

13. Mandelbaum, *Amended Rule 11: Despite Wide Application, Little Consensus Observed*, 3 *INSIDE LITIGATION* (P-H) 1, 18 (July 1989) (quoting Professor George Cochran, University of Mississippi).

14. See 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) (only 23 cases reported from 1938 to 1976 in which sanctions were sought; rule 11 was found to have been violated in only 11 of these cases).

15. *FED. R. CIV. P.* 11 (1980) (amended 1983).

16. *Id.*

17. *Id.* See also Carter, *supra* note 5, at 7-8 (former rule 11 only authorized two types of sanctions: striking pleadings and disciplining attorneys).

18. See Nelken, *supra* note 5, at 1315-16 (former rule 11 rarely invoked because of “‘meaningless sanctions’ and ‘soft standards’”); Oliphant, *Rule 11 Sanctions and Standards*, 12 *WM. MITCHELL L. REV.* 731, 735 (1986) (difficulty of meeting burden of bad faith under former rule); Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 183 (former rule 11 rarely invoked because “striking of a pleading was an ineffective penalty”). See generally Carter, *supra* note 5, at 4-9.

The 1983 amendments, however, expanded the scope of rule 11 and strengthened courts' ability to enforce it.¹⁹ Under the new rule, attorneys must sign, in addition to pleadings, all motions and other papers filed with the court. An attorney's signature now certifies that the attorney has read the paper and that — "to the best of [the attorney's] knowledge, information, and belief formed after reasonable inquiry" — the paper is well-grounded in fact, warranted by existing law or a good faith extension of existing law, and not filed for any improper purpose such as harassment or delay.²⁰ The amended rule generally replaces the subjective standard of the former rule with an objective one of "reasonableness under the circumstances."²¹ It also requires the court, on the motion of a party or on its own initiative,²² to impose "an appropriate sanction" on attorneys who sign papers in violation of the rule.²³

Predicting what a particular court will find "reasonable" or "appropriate," though, is an uncertain undertaking.²⁴ By expanding rule 11's standards and giving courts discretion to craft a variety of sanctions, the drafters of the 1983 amendments created a new risk for attorneys practicing in the federal courts. In addition, by failing to explicate clearly the role that rule 11 sanctions should play in civil litigation, the drafters failed to give courts the guidance needed to apply the rule uniformly and thereby to minimize uncertainty.

A. Broad Standards

The new rule imposes three requirements on attorneys for every paper they sign and file in court. First, attorneys must make a reasonable inquiry into the facts underlying their papers' assertions. Second, they must make a reasonable inquiry into the underlying law to determine that their papers are supported by existing law or a "good faith argument for the extension, modification, or reversal of existing law."

19. See FED. R. CIV. P. 11 advisory committee's note (explaining that a greater range of circumstances would constitute a violation of the new rule and describing the expansion of available sanctions).

20. FED. R. CIV. P. 11.

21. FED. R. CIV. P. 11 advisory committee's note ("The standard is one of reasonableness under the circumstances."). See *infra* notes 25-50 and accompanying text. Despite the objective standard of the amended rule, it is conceivable that, in practice, judges only impose sanctions where an attorney has violated the rule in bad faith. Empirical research on rule 11, however, does not reveal such a practice. See S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 18-23 (1985) (60% of the judges surveyed who perceived a "nonwillful" violation of rule 11 still imposed sanctions of attorneys' fees; 53% of the judges who believed that rule 11 had been violated without "bad faith" still imposed sanctions).

22. See, e.g., *Snipes v. United States*, 711 F. Supp. 827 (W.D.N.C. 1989) (*sua sponte* imposition of sanctions by court).

23. FED. R. CIV. P. 11.

24. See Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1017 ("[T]here is good ground for arguing that the standard a court will apply under rule 11 is unpredictable.").

Third, they must not file papers for any improper purpose.²⁵ As straightforward as these requirements may seem, each has led to broad and uncertain standards for measuring compliance with the rule.²⁶ As this section demonstrates, judges do not agree on what conduct is sanctionable under the rule,²⁷ and attorneys can be sanctioned even when they file an objectively frivolous paper in good faith.²⁸

The first and second requirements impose a broad obligation of reasonable inquiry.²⁹ Attorneys must conduct the type of investigation that a "reasonable attorney" would make under the circumstances to assure that a paper is factually and legally supportable.³⁰ Yet no matter what type of factual inquiry an attorney makes, arguably he can always do more.³¹ Moreover, in a common law system it can be difficult to find any argument that is neither "warranted by existing law [n]or a good faith argument for the extension, modification, or reversal of existing law."³²

25. On the requirements of rule 11 generally, see, e.g., *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 873-74 (5th Cir. 1988) (en banc); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988); Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 184-85.

26. See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986) (The standards for imposing sanctions "have not always been either clear or consistently applied."), *cert. denied*, 480 U.S. 918 (1987); G. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* 31 (1989) (The standards for sanctions are "uncertain."); Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 *HOFSTRA L. REV.* 499, 514 (1986) ("[T]he new criteria for attorney conduct are somewhat amorphous.")

27. See, e.g., S. KASSIN, *supra* note 21, at 45 ("[T]here is a good deal of interjudge disagreement over what actions constitute a violation of the rule."); *RULE 11 IN TRANSITION*, *supra* note 2, at 95 (finding "inconsistent enforcement" of rule 11 in Third Circuit); Maute, *supra* note 5, at 69 (noting "substantial disagreement" among the courts over what conduct is sanctionable); Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1016 (Different courts "have not applied the rule in the same way.")

28. See, e.g., *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985) ("Simply put, subjective good faith no longer provides the safe harbor it once did.")

29. See, e.g., 762 F.2d at 253 ("Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed."); G. JOSEPH, *supra* note 26, at 97-98.

30. See *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987) (test of rule 11 is "whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified"). *But see* A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE* 15 (Federal Judicial Center 1984) (The reasonable inquiry requirement "has got some subjective elements to it, but it is an attempt to become more objective.")

31. See T. WILLGING, *supra* note 3, at 50. Indeed, some courts have suggested that attorneys have a continuing duty to investigate facts. See, e.g., *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335-36 (6th Cir. 1988) ("[T]he reasonable inquiry required under Rule 11 is not a one-time obligation. . . . [A party] is impressed with a continuing responsibility to review and reevaluate his pleadings and where appropriate modify them to conform to Rule 11."). *But see* *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 875 (5th Cir. 1988) ("[T]he review of an attorney's conduct for Rule 11 purposes is isolated to the moment the paper is signed . . ."); *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986) ("Rule 11 applies only to the initial signing of a 'pleading, motion or other paper.'"), *cert. denied*, 480 U.S. 918 (1987).

32. On the difficulty of determining whether a legal argument is frivolous, see Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 *OSGOODE HALL L.J.* 353 (1986). This difficulty is especially acute in areas of the law that are rapidly changing. See, e.g.,

What constitutes a reasonable inquiry will therefore vary from case to case and from judge to judge.³³ As the advisory committee acknowledged, the reasonableness of an inquiry depends on a variety of factors: the amount of time an attorney had available; whether the attorney had to rely on a client for information; whether the paper was based on a "plausible" legal argument; or whether the attorney depended on co-counsel.³⁴ In deciding whether conduct is sanctionable, judges may also be influenced by whether the violation of the rule was malicious or simply careless.³⁵ Given these various factors, it is not surprising that some judges find a particular type of behavior sanctionable while others find it permissible.³⁶ As one federal judge has observed, "what a judge will find to be objectively unreasonable is very much a matter of that judge's subjective determination."³⁷

Like the first two requirements, the standard for the third requirement, that a paper not be interposed for any improper purpose, also introduces uncertainty.³⁸ Rule 11 states that filing a paper "to harass or to cause unnecessary delay or needless increase in the cost of the litigation" constitutes improper purpose.³⁹ Although the rule does not mention bad faith or subjective intent,⁴⁰ determining whether a paper was filed to harass or to cause delay presumably must involve some inquiry into the attorney's intent.⁴¹ This can be difficult to do, however, and subjective inquiries may contravene the objective standard

Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1017. Uncertainty over what courts regard as "warranted" by existing law, that is, what constitutes a plausible argument under existing law, adds to rule 11's risk. See Note, *Plausible Pleadings*, *supra* note 5, at 641 ("When courts use narrow or unclear standards of [legal] plausibility in applying rule 11, they increase the risk to lawyers of practicing simplified pleading.").

33. See Elson & Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 363 (1988) ("[S]uch 'objective' requirements as that there be 'reasonable inquiry' and that the pleading be factually 'well grounded' and legally 'warranted' are hardly precise; each calls for the exercise of individual judgment by the parties and by the court."); cf. *Aminoil, Inc. v. United States*, 646 F. Supp. 294, 298 (C.D. Cal. 1986) (observing in a different context that "[w]hat may be considered reasonable by one court may be found unreasonable by another").

34. FED. R. CIV. P. 11 advisory committee's note. See generally G. JOSEPH, *supra* note 26, at 101-30, 140-57.

35. See Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1016.

36. See *supra* note 27.

37. Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1016; see also G. JOSEPH, *supra* note 26, at 1.

38. See generally Shaffer, *Rule 11: Bright Light, Dim Future*, in *SANCTIONS: RULE 11 AND OTHER POWERS* I, 10-11 (G. Joseph, P. Sandler & C. Shaffer 2d ed. 1988).

39. FED. R. CIV. P. 11.

40. In fact, the advisory committee's note explicitly states that the new rule abandons the element of willfulness found in the former rule in favor of an objective test of "reasonableness under the circumstances." FED. R. CIV. P. 11 advisory committee's note.

41. See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987) (finding that, on remand, "the district court must find out why Szabo-Digby pursued this litigation"), *cert. dismissed*, 108 S. Ct. 1101 (1988); Nelken, *supra* note 5, at 1320 (arguing that "the improper purpose standard requires that the court attempt to fathom the motives of the signer").

intended by the drafters of the amended rule.⁴² A number of courts and commentators have therefore adopted a purely objective approach to the improper purpose prong of rule 11.⁴³ In *Zaldivar v. City of Los Angeles*,⁴⁴ for example, the Ninth Circuit held that regardless of the plaintiff attorney's state of mind, a defendant cannot be "harassed" under rule 11 as long as the complaint "complies with the 'well grounded in fact and warranted by existing law' clause of the Rule."⁴⁵ By this view, if the paper satisfies the first two requirements of reasonableness in fact and law, it then *per se* satisfies the third requirement of proper purpose.⁴⁶ All aspects of rule 11 are then based on the notion of "reasonableness."

Although some courts dispute that rule 11 is completely objective,⁴⁷ most agree that amended rule 11 has at least more of an objective standard than the previous rule.⁴⁸ The amended rule, therefore, "is more stringent than the original good-faith formula and thus . . . a greater range of circumstances will trigger its violation."⁴⁹ Attorneys can be — and are — sanctioned even when they act in good faith.⁵⁰

42. See Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 195-96 (describing the dangers and difficulties with a subjective approach to improper purpose). *But see* Nelken, *supra* note 5, at 1321 n.51 ("The rulemakers, . . . in incorporating and expanding the 'delay' provision of the old rule, have retained its subjective element.").

43. See, e.g., *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) ("[A] complaint that is well-grounded in fact and law cannot be sanctioned regardless of counsel's subjective intent."); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) (rule 11 contains no subjective element), *cert. denied*, 480 U.S. 918 (1987); *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 736 (S.D.N.Y. 1986) ("[E]ven a bad faith motive does not justify Rule 11 sanctions, where . . . the court has concluded that the arguments advanced are not lacking in colorable legal support."); Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 196 ("If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate.").

44. 780 F.2d 823 (9th Cir. 1986).

45. 780 F.2d at 832.

46. Conversely, some courts and commentators infer improper purpose from the failure to satisfy the first two requirements. See, e.g., *Nesmith v. Martin Marietta Aerospace*, 833 F.2d 1489, 1491 (11th Cir. 1987) (Rule 11 "incorporates an objective standard in assessing bad faith."); *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (An attorney's behavior is improper if it is unreasonable.); Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 196 (improper purpose objectively measured by unreasonable behavior).

47. See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987) (Rule 11 retains a "subjective component."), *cert. dismissed*, 108 S. Ct. 1101 (1988); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1130 (5th Cir. 1987) (Papers well-grounded in fact and law may still violate the improper purpose clause of rule 11.); *Terpstra v. Farmers & Merchants Bank*, 634 F. Supp. 47 (N.D. Ind. 1985) (plaintiffs sanctioned for filing suit in bad faith). See generally G. JOSEPH, *supra* note 26, at 184-86 (discussing circuit split on the standard for improper purpose).

48. See, e.g., *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986) ("An empty head but a pure heart is no defense."); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1177 (D.C. Cir. 1985) (rule 11 incorporates an objective standard); *Shaffer*, *supra* note 38, at 2-3 ("[I]t is now settled that subjective good faith is not enough."); Note, *The Dynamics of Rule 11*, *supra* note 5, at 315-16 (courts generally recognize objective standard).

49. FED. R. CIV. P. 11 advisory committee's note.

50. See, e.g., *Thornton*, 787 F.2d at 1154 (7th Cir. 1986) (attorney sanctioned in the absence

Their actions are now judged against those of the proverbial, but nonetheless ambiguous, "reasonable" attorney.

B. *Varied Sanctions*

Whenever a court finds that an attorney has violated rule 11, it must impose an appropriate sanction.⁵¹ Although the rule mandates sanctions, it gives courts considerable discretion in determining when to sanction⁵² and what type and amount of sanction to impose.⁵³ This discretion adds a further element of uncertainty to rule 11 sanctions. In addition to not knowing exactly what conduct is sanctionable, individual attorneys are unable to anticipate the type or amount of sanctions a particular court might impose.⁵⁴

Rule 11 states that an appropriate sanction may include payment of the reasonable expenses and attorneys' fees incurred by the ag-

of "subjective purpose to misstate law"); *Albright v. Upjohn Co.*, 788 F.2d 1217 (6th Cir. 1986) (attorney sanctioned in the absence of a finding of bad faith); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) (same).

51. FED. R. CIV. P. 11 ("If a pleading, motion or other paper is signed in violation of this rule, the court, upon a motion or upon its own initiative, shall impose . . . an appropriate sanction."); see also *Westmoreland*, 770 F.2d at 1174 ("[T]he new provision that the court 'shall impose' sanctions mandates the imposition of sanctions when warranted by groundless or abusive practices."); *Nelken*, *supra* note 5, at 1321 ("[R]ule 11 makes sanctions mandatory."). By mandating sanctions, the rule is "intended to reduce the reluctance of courts to impose sanctions." FED. R. CIV. P. 11 advisory committee's note.

52. Courts have imposed rule 11 sanctions on attorneys, law firms, and clients. See, e.g., *Chu v. Griffith*, 771 F.2d 79 (4th Cir. 1985) (attorney sanctioned); *Calloway v. Marvel Entertainment Group*, 650 F. Supp. 684 (S.D.N.Y. 1986) (attorney and law firm sanctioned); *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) (attorney and client sanctioned); *Chevron, U.S.A. v. Hand*, 763 F.2d 1184 (10th Cir. 1985) (client sanctioned). See generally *Nelken*, *supra* note 5, at 1329 (a 1985 survey of 100 rule 11 cases found that attorneys were sanctioned in 38% of the cases; clients in 29%; and both in 18%). The fact that a court can sanction a client raises the question of whether such sanctions are insurable under the client's liability policies. Although this Note is limited to the question of insuring attorney sanctions, some of the analysis provided here may be applicable to sanctions against clients. Additionally, the analysis contained in this Note would apply to situations where sanctioned clients seek recovery from their attorneys. The questions presented by these latter situations include whether sanctioned clients may recover from their attorneys for malpractice and, if so, whether the attorneys may be indemnified by their professional liability insurers. A number of such indirect claims for coverage of rule 11 sanctions have apparently been made. Telephone interview with James D. Hadfield, Counsel for Lawyers Mutual Insurance Co. (California) (Feb. 9, 1989). These indirect claims raise issues of insurability similar to those addressed in this Note.

53. See, e.g., FED. R. CIV. P. 11 advisory committee's note (The court "has discretion to tailor sanctions to the particular facts of the case."); *Insurance Benefit Adminrs., Inc. v. Martin*, 871 F.2d 1354, 1359 (7th Cir. 1989) (district court may impose wide range of sanctions); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985) ("[D]istrict courts retain broad discretion in fashioning sanctions. . . ."). Rule 11 only requires that sanctions be "appropriate." See, e.g., *In re Yagman*, 796 F.2d 1165, 1184-85, *opinion amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987); *Schwarzer, Sanctions: A Closer Look*, *supra* note 5, at 202-03.

54. Cf. Note, *supra* note 2, at 911-12 ("Judicial use of different methods to calculate monetary sanctions is a . . . source of disparity, injecting an element of arbitrariness into Rule 11 cases.").

grieved party,⁵⁵ but this is by no means the only sanction available. Courts have imposed a variety of nonmonetary sanction actions, including reprimanding attorneys,⁵⁶ striking pleadings or papers,⁵⁷ barring attorneys from appearing in the court,⁵⁸ and referring attorneys to state disciplinary boards.⁵⁹ By far the majority of cases, however, involve monetary sanctions.⁶⁰ Even though most courts assess reasonable expenses and attorneys' fees, the method of calculating these costs for rule 11 purposes is imprecise.⁶¹ Moreover, some courts impose monetary sanctions that bear no relation to the expenses and attorneys' fees of the opposing party.⁶²

55. FED. R. CIV. P. 11; *see also* Miller & Culp, *Litigation Costs, Delay Prompted The New Rules of Civil Procedure*, Natl. L.J., Nov. 28, 1983, at 24, col. 1 ("The new rules are intended to make anyone who improvidently signs a document . . . bear the expenses incurred by the adversary in dealing with it.").

56. *See, e.g., In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986) ("[T]he public admonishment of this opinion is sufficient sanction."); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987) ("[C]ourts may sanction by warning, oral reprimands in open court, or written admonition."); Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 201-02 (reprimand or published order as sanction).

57. The authority to strike pleadings was explicit in the old rule 11, but is theoretically still available under the general language of "appropriate sanction" in the amended rule. *See, e.g., Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (en banc) ("[D]istrict courts may theoretically still dismiss baseless claims or defenses as sanctions . . ."); Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 204. This type of sanction, though, tends to punish the client for the attorney's behavior.

58. *See, e.g., Kendrick v. Zandides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) (Schwarzer, J.) (ordering attorney to show cause why he should not be suspended from practicing in the Northern District of California); *In re Curl*, 803 F.2d at 1007 (dictum) ("The court will not hesitate to sanction future negligence with substantial monetary fines, suspension, or disbarment from practice before our court.").

59. *See, e.g., Lepucki v. Van Wormer*, 765 F.2d 86, 89 (7th Cir.) (referring attorney to state disciplinary body for investigation), *cert. denied*, 474 U.S. 827 (1985).

60. G. JOSEPH, *supra* note 26, at 225; S. KASSIN, *supra* note 21, at 40; NEW YORK STATE BAR ASSOCIATION COMMITTEE ON FEDERAL COURTS, *supra* note 4, at 15, 23; RULE 11 IN TRANSITION, *supra* note 2, at 36-39; Bloomenstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 AKRON L. REV. 289, 291 n.11 (1988); Vairo, *supra* note 2, at 227.

61. *See, e.g., NEW YORK STATE BAR ASSOCIATION COMMITTEE ON FEDERAL COURTS*, *supra* note 4, at 38-40; Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U. L. REV. 587, 598-99 (1987).

62. *See, e.g., National Assn. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 559 (N.D. Cal. 1987) (imposing, in addition to reasonable expenses and fees of \$105,000, a \$15,000 sanction payable to the clerk of the court "for the unnecessary consumption of the court's time and resources"); *Robinson v. Moses*, 644 F. Supp. 975, 982-83 (N.D. Ind. 1986) (imposing a \$3600.00 sanction, payable to the clerk of the court "for the waste of judicial resources"); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987) (where reasonable attorneys' fees amounted to \$50,000, court imposed sanction of only \$10,000); *Doyle v. United States*, 877 F.2d 1235 (5th Cir.) (where reasonable attorneys' fees amounted to \$1,554.88, court imposed sanction of this amount individually on all twenty-five plaintiffs), *cert. denied*, 108 S. Ct. 159 (1987); *Thornton v. Wahl*, 787 F.2d 1151 (7th Cir.) (imposing sanction of reasonable attorneys' fees and double costs), *cert. denied*, 479 U.S. 851 (1986). In addition, some courts have adopted the position that, notwithstanding actual expenses and fees, a sanction should be only as severe as necessary to achieve its purpose. *See, e.g., Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (en banc); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1437 (7th Cir. 1987).

C. Multiple Purposes

Ultimately what makes conduct sanctionable, and then what makes a particular sanction appropriate, depends on the purpose of rule 11.⁶³ Do rule 11 sanctions serve the purpose of punishing or of deterring violators of rule 11? Or should they compensate parties who are forced to respond to frivolous papers? As this section demonstrates, courts and commentators have yet to agree on the proper weight to be given the aims of punishment, deterrence, and compensation in deciding rule 11 cases.

All three of these purposes are rooted in the concerns which led to the amendment of the rule. In the years leading up to the 1983 amendments, the bench and bar had become increasingly concerned with a litigation explosion in general and with abuse of the litigation process in particular.⁶⁴ Professor Arthur Miller, the reporter for the Federal Rules Advisory Committee that drafted the 1983 amendments, described the concerns about litigation abuse as follows:

There is a widespread feeling that there is a lot of frivolous conduct on the part of lawyers out there, a lot of vexatious conduct, a lot of inefficient conduct. . . . Frivolous motions are made and there is frivolous or vexatious discovery. I repeat, we do not know how much of this there really is, because what one person would call frivolous, somebody else would call meaningful or substantive. . . . We really don't know, but the advisory committee — composed of your colleagues on the district courts, a couple of court of appeals judges, and some distinguished trial lawyers from around the country — felt that there had to be some meaningful restraint put on lawyer behavior to cut out some of this type of conduct.⁶⁵

The advisory committee sought restraint on lawyer behavior to make the judicial process more efficient. Former rule 11, however, had “not been effective in deterring abuses”⁶⁶ because it covered only those instances where attorneys intentionally filed frivolous pleadings and included only a limited range of sanctioning mechanisms.⁶⁷

The new rule aims at reducing “the reluctance of courts to impose sanctions,” thereby discouraging “dilatory or abusive tactics” and helping “to streamline the litigation process by lessening frivolous claims or defenses.”⁶⁸ Most courts and commentators agree that

63. See *Thomas*, 836 F.2d at 878; G. JOSEPH, *supra* note 26, at 30-31; T. WILLGING, *supra* note 3, at 25.

64. See, e.g., Address by Chief Justice Warren Burger, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7, 1976), reprinted in 70 F.R.D. 79, 91 (1976) (“Correct or not, there is also a widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense.”).

65. A. MILLER, *supra* note 30, at 11-12.

66. FED. R. CIV. P. 11 advisory committee's note.

67. See *supra* notes 14-18 and accompanying text.

68. FED. R. CIV. P. 11 advisory committee's note.

amended rule 11 is generally designed to deter attorneys from filing frivolous and vexatious papers.⁶⁹ Yet by itself, the goal of deterrence offers little guidance to judges deciding rule 11 cases.⁷⁰ As one commentator has noted:

The undifferentiated desires to “discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses,” . . . are little more than statements of ideals or exhortations to decency and right conduct. They are not disputable. Nor are they terribly helpful to a judge faced with the question whether or how to sanction specific behavior.⁷¹

Deterrence as an underlying policy is not a particularly helpful guide in determining what type of sanction a court should impose because any type of sanction will have some deterrent effect. Indeed, using sanctions to achieve either of the other purposes generally attributed to rule 11, namely compensation or punishment, will invariably have the additional consequence of deterring some frivolous behavior.⁷²

Courts and commentators disagree about whether and to what extent the rule should serve the independent purposes of compensation or punishment.⁷³ Professor Miller, for example, has argued that rule 11 sanctions should serve compensatory goals: “Although denominated a sanction provision, in reality [sanctions are] more appropriately characterized as a cost-shifting technique.”⁷⁴ As one judge has

69. On the views of courts, see, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987) (“Rule 11 is designed to discourage unnecessary complaints and other filings.”), *cert. dismissed*, 108 S. Ct. 1101 (1988); *In re Yagman*, 796 F.2d 1165, 1183 (“[T]he primary purpose of sanctions . . . is to deter subsequent abuses.”), *opinion amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985) (“Rule 11 is specifically designed to deter groundless litigation tactics and stem needless litigation costs to courts and counsel.”); S. KASSIN, *supra* note 21, at 29-32 (59.4% of the 296 federal judges surveyed believed that deterrence is the most important purpose of rule 11 sanctions, compared with 21% and 19.6% who favored rationales of compensation and punishment, respectively); T. WILLGING, *supra* note 3, at 22-23 (Out of 17 judges surveyed, 71% said deterrence was their primary purpose in imposing sanctions; 18% said compensation; and 6% said punishment.); Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1020 (The “vast majority of courts agree that the rule’s purpose is to deter abuse.”). On the views of commentators, see, e.g., T. WILLGING, *supra* note 3, at 20-21 (Commentators assert that “deterrence of abuses” is the primary purpose of sanctions.); Nelken, *supra* note 5, at 1317, 1352 (Rule 11 is aimed at “detering frivolous filings.”); Parness, *supra* note 5, at 1938 (Deterrence is an objective of rule 11.); Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1020 n.31 (Commentators agree that deterrence is the “overriding purpose” of sanctions.)

70. Indeed, even where federal judges agree that deterrence is a primary goal of rule 11, one study showed that “all of the judges had additional purposes in mind.” T. WILLGING, *supra* note 3, at 24.

71. G. JOSEPH, *supra* note 26, at 28 (footnotes omitted).

72. See, e.g., T. WILLGING, *supra* note 3, at 26-31; Nelken, *supra* note 5, at 1325; Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1020 n.31.

73. In a survey of approximately 300 federal judges, for example, 21% of the judges viewed compensation as the primary purpose of rule 11, and 19.6% viewed punishment as the primary purpose. The remainder thought the primary purpose was deterrence. S. KASSIN, *supra* note 21, at 29. On the tension between compensation and punishment in rule 11 doctrine generally, see Nelken, *supra* note 5, at 1323-24.

74. Miller & Culp, *supra* note 55, at 34.

observed, “[r]ule 11 sanctions are not . . . meant solely to deter those who would abuse our federal system of justice; they serve also to compensate the victims of that abuse.”⁷⁵ In one case, rule 11 was flatly described as a “fee-shifting statute.”⁷⁶

Other courts and commentators, however, suggest that rule 11 should serve primarily the purpose of punishment.⁷⁷ Rule 11 sanctions, according to one court, “are not intended to make the moving party ‘whole’ for any and all damages he or she may have sustained by virtue of the malicious prosecution of a meritless claim.”⁷⁸ Sanctions should be “aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party.”⁷⁹

The language of rule 11 and the notes of the advisory committee do not resolve this issue. The amended rule eliminates subjective standards for determining violations of the rule and emphasizes compensatory fee-shifting as an appropriate sanction.⁸⁰ In giving judges broad discretion to determine appropriate sanctions, however, the amendments leave considerable room for punitive goals. Furthermore, the advisory committee notes speak in terms of punishing violators of the rule⁸¹ and instruct courts to consider subjective bad faith in determining the “nature and severity” of sanctions.⁸²

Judging from the language of rule 11, the advisory committee notes, the case law, and the academic commentary, a useful, guiding purpose of rule 11 sanctions is far from evident. As this section of the Note has discussed, rule 11 sanctions serve the multiple purposes of punishment, deterrence, and compensation.⁸³ Judges and lawyers are

75. *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 125 (2d Cir. 1987) (Pratt, J., dissenting); *see also In re TCI Ltd.*, 769 F.2d 441, 446 (7th Cir. 1985) (best way to deter frivolous pleading “is to ensure that those who create costs also bear them”); *Perkinson v. Houlihan's/D.C., Inc.*, 108 F.R.D. 667, 676 (D.D.C. 1985) (“The Federal Rules require that sanctions be designed so as to compensate the wronged party for the extra effort it was forced to expend because of the wrongdoer’s obstructive behavior.”).

76. *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 419 (7th Cir. 1988).

77. *See, e.g., Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986) (noting that the primary purpose of sanctions is “to punish deviations from proper standards of conduct”), *cert. denied*, 480 U.S. 918 (1987); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1180 (D.C. Cir. 1985) (noting that rule 11 sanctions serve a “dual purpose” of punishment and deterrence).

78. *Chris & Todd, Inc. v. Arkansas Dept. of Finance & Admin.*, 125 F.R.D. 491, 493-94 (E.D. Ark. 1989); *see also Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987) (Sanctions “should not be viewed as a general fee-shifting device.”); *RULE 11 IN TRANSITION*, *supra* note 2, at 37, 40 (arguing against the compensatory purpose of rule 11); *Vairo*, *supra* note 2, at 232-33 (same).

79. Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 185.

80. *See supra* notes 21, 55 and accompanying text.

81. FED. R. CIV. P. 11 advisory committee’s note (“The detection and *punishment* of a violation of the signing requirement, encouraged by the amended rule, is part of the court’s responsibility for securing the system’s effective operation.”) (emphasis added).

82. FED. R. CIV. P. 11 advisory committee’s note.

83. *See, e.g., Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 877 (5th Cir. 1988) (en banc); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482-83 (3d Cir. 1987); *Lieb v. Topstone Indus., Inc.*, 788

unsure which of these three purposes is the overriding purpose of rule 11, and this confusion has only exacerbated the uncertainty created by the rule's broad standards and varied sanctions.⁸⁴

II. ATTORNEY PROFESSIONAL LIABILITY INSURANCE AND RULE 11 SANCTIONS

The confusion over rule 11 leaves attorneys facing a considerable risk. If attorneys, like most people, are risk averse,⁸⁵ they will seek insurance to protect themselves from the risk of rule 11 sanctions. Attorneys will likely look first for coverage under their existing professional liability policies.⁸⁶ Attorney professional liability insurance covers the risk of loss arising in the course of rendering legal services.⁸⁷ Does it also cover the risk of rule 11 sanctions? In addressing this question, this Part applies various doctrines of insurance interpretation to the language found in most attorney professional liability policies. The analysis in this section is based on the Insurance Services Office lawyers' professional liability policy form, as well as on a review of policies obtained from twenty attorney professional liability insurers nationwide.⁸⁸ Although not all attorney professional liability policies

F.2d 151, 158 (3d Cir. 1986); Parness, *supra* note 5, at 1938; Note, *supra* note 2, at 907-09. Having multiple purposes is not unusual for a legal doctrine. Much of tort law, for example, has hybrid purposes. Compensation of the victim is a main purpose of tort liability, but such liability also accomplishes purposes of deterrence and punishment. See, e.g., Litan, Swire & Winston, *The U.S. Liability System: Background and Trends*, in *LIABILITY: PERSPECTIVES AND POLICY* 3-5 (1988).

84. See, e.g., G. JOSEPH, *supra* note 26, at 31 ("Lack of clarity over goals . . . enhance[s] the confusion generated by uncertain standards and uneven enforcement."); Vairo, *supra* note 2, at 203 ("Confusion over which one of these purposes is the primary purpose [of rule 11 sanctions] has led to inconsistent results in the cases.").

85. See, e.g., W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 56-57 (1987) (most people are risk averse); A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 51 (1983) (same); F. STEPHEN, *THE ECONOMICS OF THE LAW* 144 (1988) (same).

86. In fact, there is some evidence indicating that attorneys have already begun to look for coverage from their professional liability insurers. See *supra* note 7.

87. See 7A J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 4504.01, at 309-10 (1979). For other types of losses, attorneys must look to other forms of insurance, e.g., property insurance for loss or damage to records, papers, or other property, or director's and officer's insurance for lawyers who serve in such corporate positions. R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* § 725 (2d ed. 1981). The discussion in this Note is limited to professional liability insurance since attorneys incur rule 11 sanctions while rendering professional legal services.

88. Policies were solicited from forty-one insurance companies offering attorney professional liability insurance. The policies reviewed for this Part were those received in response to that solicitation from the following companies: American Home Assurance Co.; Association of Trial Lawyers Assurance; The Bar Plan (Missouri); Continental Casualty Co. (CNA) (offering policies through local underwriters in Arkansas, Illinois, Indiana, Michigan, and Tennessee); Evanston Insurance Co.; The Home Insurance Co.; Insurance Co., Ltd.; International Surplus Lines Insurance Co.; Lawyers' Mutual Insurance Co. (California); Lawyers Mutual Insurance Co. of Kentucky; Lawyers Mutual Liability Insurance Co. of North Carolina; Michigan Lawyers Mutual Insurance Co.; New England Insurance Co. (Massachusetts and Rhode Island); Ohio Bar Liability Insurance Co.; Oregon State Bar Professional Liability Fund; Rumger Insurance Co.; St. Paul Fire & Marine Insurance Co.; Texas Lawyers' Insurance Exchange; The Virginia Insurance Reciprocal; and Wisconsin Lawyers Mutual Insurance Co. A total of twenty-five policies were

are identical,⁸⁹ most follow the same general form.⁹⁰ Much of the language is similar enough to discuss the policies as a group, although variations are noted below where relevant.

Under most attorney professional liability policies, insurers agree to indemnify policyholders for all sums which they become legally obligated to pay as "damages" for acts, errors, or omissions arising out of the performance of professional legal services.⁹¹ Insurers also agree to defend any claims instituted against insured attorneys which may result in awards for such damages, even if the claims are groundless, fraudulent, or false.⁹² Most policies, however, exclude coverage for losses that are outside the scope of the insured's capacities as an attorney⁹³ or that are difficult or against public policy to insure.⁹⁴

In interpreting attorney professional liability policies, courts use the same doctrines of construction used to interpret other types of insurance policies.⁹⁵ Most courts interpret insurance policies according to the plain meaning of the policy wording.⁹⁶ When ambiguities arise, however, courts generally construe the language against the insurer

examined; the larger number of policies is due to the fact that some companies offered more than one policy. Copies of these policies are on file with the *Michigan Law Review*. For examples of language found in these policies, see *infra* notes 109, 111, 120, 129, 134, 136-139, 142, 145-46, and text accompanying note 131.

89. In fact, there are two different types of attorney professional liability policies — "occurrence" and "claims made" — but the distinction between these two types of policies is not relevant here. The basic difference between the two policies lies in when and how coverage is triggered. Coverage under the occurrence policy is triggered by an act or omission occurring during the policy period which ultimately gives rise to a claim against the attorney. Coverage under the claims made policy is triggered by the filing of a claim within the policy period, regardless of when the act or omission giving rise to the claim occurred. See generally J. FELIX, A LAWYER'S GUIDE TO LEGAL MALPRACTICE INSURANCE, 13-16 (1982); R. MALLIN & V. LEVIT, *supra* note 87, §§ 709-10. The difference in when coverage is triggered does not affect the issue of whether rule 11 sanctions are covered by attorney professional liability policies. Resolution of this broader issue hinges on matters discussed in this Part, such as the definition of damages and the scope of exclusions. See *infra* notes 109-44 and accompanying text. This Note, therefore, does not distinguish between occurrence and claims made policies.

90. The Insurance Services Office, for example, prepares standard liability policy forms which many insurance companies follow. See generally E. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 83 (3d ed. 1982).

91. See generally J. FELIX, *supra* note 89, at 17; R. MALLIN & V. LEVIT, *supra* note 87, § 705. For examples of typical policy language, see *infra* note 109.

92. See generally R. MALLIN & V. LEVIT, *supra* note 87, § 716. For examples of typical policy language, see *infra* note 145.

93. For example, exclusions often remove coverage for property damage or for liability arising out of an attorney's service as a corporate director or officer. See generally R. MALLIN & V. LEVIT, *supra* note 87, § 717.

94. For example, most policies exclude coverage for intentional criminal acts. See generally J. FELIX, *supra* note 89, at 21; R. MALLIN & V. LEVIT, *supra* note 87, § 718. Policy exclusions are discussed *infra* at notes 119-44 and accompanying text.

95. See R. MALLIN & V. LEVIT, *supra* note 87, § 701.

96. See, e.g., *Goucher v. John Hancock Mut. Life Ins. Co.*, 113 R.I. 672, 679, 324 A.2d 657, 661 (1974) (language in insurance policy "must be given its plain, ordinary, and usual meaning"); *Insurance Co. of N. Am. v. Adkisson*, 121 Ill. App. 3d 224, 229, 459 N.E.2d 310, 314 (App. Ct. 1984) (insurance policies should be interpreted like any other contract); *Standard Venetian Blind*

and in favor of the insured.⁹⁷ Courts interpret words of inclusion broadly, and words of exclusion narrowly.⁹⁸ This doctrine, sometimes called *contra proferentem*,⁹⁹ is justified on the grounds that insurers generally draft standard insurance policies and that policyholders have little choice but to accept the language as it was drafted.¹⁰⁰

Some courts take a somewhat different approach, interpreting policy language according to the reasonable expectations of the insured.¹⁰¹ If the ordinary policyholder could reasonably expect coverage under the policy, courts in many states will find coverage regardless of the actual language in the policy.¹⁰² The reasonable expectations doctrine has led some courts to find coverage even though the policy language unambiguously excluded it.¹⁰³ Other courts have used reasonable expectations in a more limited way to resolve ambiguities in policy wording.¹⁰⁴ Although courts generally invoke the expectations doctrine only in cases where the policyholders are ordinary

Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563 (1983) (same); R. MALLEN & V. LEVIT, *supra* note 87, § 701.

97. See, e.g., *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U.S. 132, 135-36 (1901) (“[A] policy [which] is so framed as to leave room for two constructions . . . should be interpreted most strongly against the insurer.”); *Sincoff v. Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 390, 183 N.E.2d 899, 901-02, 230 N.Y.S.2d 13, 16 (1962) (ambiguous language should be strictly construed against the insurer); 7 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 900 (3d ed. 1957) (“Ambiguous language in a policy of insurance is to be construed liberally in favor of the insured and strictly against the insurer.”).

98. R. MALLEN & V. LEVIT, *supra* note 87, § 701.

99. *Contra proferentem* literally means “[a]gainst the party who proffers or puts forward a thing.” BLACK’S LAW DICTIONARY 296 (5th ed. 1979).

100. See, e.g., *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir.) (Hand, J.) (“[I]nsurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion.”), *cert. denied*, 331 U.S. 849 (1947); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 326, 495 A.2d 406, 407 (1985) (Courts resolve ambiguities against insurers because insurance “contracts are highly technical, extremely difficult to understand, and not subject to bargaining over the terms.”); *Mathews v. American Cent. Ins. Co.*, 154 N.Y. 449, 456-57, 48 N.E. 751, 752 (1897) (Since insurers draft policies with their own interests in mind, “when the meaning is doubtful, [a policy] should be construed most favorable to the insured, who had nothing to do with the preparation thereof.”). The doctrine of construing ambiguous language against the insurer applies in attorney professional liability cases, even though attorneys might be thought to be more knowledgeable about insurance than ordinary consumers.

101. K. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 235 n.6 (1986) (finding over a hundred cases involving the reasonable expectations doctrine); R. KEETON & A. WIDISS, *INSURANCE LAW* § 6.3, at 633 (1988) (courts protecting the reasonable expectations of the insured).

102. K. ABRAHAM, *supra* note 101, at 102.

103. See, e.g., *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962) (reasonable expectations dictated coverage for death on a chartered flight despite air travel insurance policy’s provision of coverage only for transportation on a “Scheduled Air Carrier” or a land carrier provided by the scheduled air carrier in the event of an interruption of service); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (reasonable expectations dictated coverage for a burglary despite policy language requiring that the exterior of the premises show signs of forced entry).

104. See, e.g., *Evenchik v. State Farm Ins. Co.*, 139 Ariz. 453, 679 P.2d 99 (Ariz. Ct. App. 1984).

consumers,¹⁰⁵ the doctrine has also been used by courts to find coverage in cases where the policyholders were attorneys.¹⁰⁶

Both the doctrines of *contra proferentem* and reasonable expectations provide courts with flexibility in determining whether existing attorney professional liability policies cover rule 11 sanctions. As one commentator observes, however, “[s]ometimes the courts . . . seem to search for ambiguities in an insurance policy where none exist The consequence is that judicial techniques of interpretation frequently create insurance coverage when policies do not provide for it.”¹⁰⁷ Although many courts do not actively seek to create ambiguities or redraft policies,¹⁰⁸ some may well use the doctrines of interpretation to find coverage for rule 11 sanctions.

In evaluating whether existing policies provide coverage for sanctions, courts need to consider first whether sanctions are “damages” as covered by the policies, and second, whether sanctions fall within any of the policies’ exclusions. In addition, courts need to determine whether insurers must defend their insured attorneys against rule 11 motions. The following sections apply the doctrines outlined above to language commonly found in attorney professional liability insurance policies. As discussed below, courts may find that existing policies are ambiguous with respect to rule 11 and may use the doctrines of *contra proferentem* or reasonable expectations to find coverage for rule 11 sanctions.

A. Are Sanctions “Damages”?

For attorney professional liability policies to cover rule 11 sanctions, these sanctions must be considered “damages” that arise out of an act or omission of a lawyer which occurs in the course of rendering professional services as an attorney.¹⁰⁹ Rule 11 sanctions plainly arise

105. See, e.g., *Spaid v. Cal-Western States Life Ins. Co.*, 130 Cal. App. 3d 803, 182 Cal. Rptr. 3 (1982); *Commercial Union Assurance v. Gollan*, 118 N.H. 744, 394 A.2d 839 (1978); *Kievit v. Loyal Protection Life Ins. Co.*, 34 N.J. 475, 170 A.2d 22 (1961); K. ABRAHAM, *supra* note 101, at 103.

106. See, e.g., *Gyler v. Mission Ins. Co.*, 10 Cal. 3d 216, 514 P.2d 1219, 110 Cal. Rptr. 139 (1973) (finding coverage under a claims made attorney professional liability policy for a claim filed after the expiration of the policy); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 495 A.2d 406 (1985) (same).

107. K. ABRAHAM, *supra* note 101, at 101; see also *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 355, 694 P.2d 181, 185 (1984) (disapprovingly noting that courts “find, or fail to find, ambiguity in order to justify an almost predetermined result”).

108. See, e.g., *First Natl. Bank v. Fidelity & Casualty Co.*, 428 F.2d 499 (7th Cir. 1970) (Reasonable expectations should not control express terms of a policy.), *cert. denied*, 401 U.S. 912 (1971); *Jenkins v. State Security Ins. Co.*, 56 Ill. App. 3d 737, 742, 371 N.E.2d 1203, 1206 (1978) (“[T]he rule that ambiguous provisions are to be strictly construed against the insurer does not permit perversion of plain language to create ambiguity where none exists.”).

109. The typical attorney professional liability policy indemnifies only sums that an attorney is obligated to pay “as damages.” The relevant section of the Insurance Services Office form, for example, reads as follows:

out of acts or omissions that occur while an attorney is rendering legal services: the attorney acts by signing a paper and filing it with the court in violation of the rule; or she omits to act by failing to make a reasonable inquiry into the facts and law underlying the paper's assertions.¹¹⁰ The more difficult question is whether rule 11 sanctions constitute "damages" as covered by the policies.

Because many policies do not define the word "damages,"¹¹¹ resolving this question may hinge on the plain meaning of the term.¹¹² In one sense of the word, damages could mean compensation for loss or harm incurred by an injured third party.¹¹³ The imposition of rule 11 sanctions, however, does not depend on injury to another party, but rather on a violation of the rule.¹¹⁴ Although in theory courts need not calculate sanctions on the basis of injury to the other party, practically speaking most courts do base the amount of rule 11 sanctions on the other party's costs and attorneys' fees.¹¹⁵ Therefore, most rule 11 sanctions are clearly "damages" under a compensatory meaning of the term.¹¹⁶

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any act or omission of the insured, or of any other person for whose act or omission the insured is legally responsible which occurs during the policy period, and arises out of the performance of professional services for others in the insured's profession as a lawyer.

INSURANCE SERVICES OFFICE, No. GL-00-23, LAWYERS PROFESSIONAL LIABILITY FORM (Mar. 1981) (current form). For a somewhat broader wording, see CNA, No. G-42072-D, LAWYERS PROFESSIONAL LIABILITY COVERAGE art. 1, § A. (Sept. 1985) ("We will pay all amounts, up to our limit of liability, which you become legally obligated to pay as a result of a wrongful act by you or by any entity for whom you are legally liable.").

110. *Cf.* *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 418 (7th Cir. 1988) ("Rule 11 defines a new form of legal malpractice.").

111. The industry model form for attorney professional liability insurance, for example, contains definitions for "claims expenses," "suit," and "bodily injury," but no definition for "damages." See INSURANCE SERVICES OFFICE, No. GL-00-23, LAWYERS PROFESSIONAL LIABILITY FORM (Mar. 1981). Those policies that do contain a definition of "damages" define the term as "an award or settlement for money." See, e.g., THE BAR PLAN, No. TBP-2, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY 13 (Jan. 1989). Some insurers attempt to define the term by saying what are not considered "damages." These latter instances are treated as exclusions for the purpose of this Note and are discussed in the next section.

112. See *supra* note 96 and accompanying text.

113. See, e.g., *Miller v. Weller*, 288 F.2d 438, 439 (3d Cir. 1961) (Damages means "something paid in recompense for an infringement of a plaintiff's legal right by the defendant's liability-creating conduct."); *Frankel v. United States*, 321 F. Supp. 1331, 1347 (E.D. Pa. 1970) ("Damages means compensation for a legal injury sustained."); *York v. Oregon State Corrections Inst.*, 59 Or. App. 708, 711, 651 P.2d 1376, 1378 (1982) ("Damage is pecuniary compensation recoverable for injury or loss suffered through the unlawful act, omission, or negligence of another."); *Fuller v. Director of Finance*, 694 P.2d 1045, 1048 (Utah 1985) ("The ordinary meaning of damages includes compensation."); *cf.* *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984) (compensatory definition of damages unsuccessfully advanced by attorney professional liability insurer); *Nationwide Mutual Insurance Co. v. Knight*, 34 N.C. App. 96, 100, 237 S.E.2d 341, 345 (1977) ("The commonly accepted definition of the term 'damages' does not include punitive damages.").

114. See *supra* note 51 and accompanying text.

115. *Vairo*, *supra* note 2, at 227.

116. See *Hamilton, McKee, & Levitt*, *supra* note 7, at 525 ("The compensatory purpose of

The term "damages" in attorney professional liability policies, though, does not always mean compensatory damages. In *Perl v. St. Paul Fire & Marine Insurance Co.*,¹¹⁷ for example, the Minnesota Supreme Court interpreted "damages" much more broadly in determining whether a fee forfeiture for an attorney's breach of fiduciary duty was covered under an attorney professional liability policy. Although the court limited coverage on other grounds, it nonetheless held that a fee forfeiture was "damages" within the meaning of the attorney's policy. The court found that damages "refers to all money damages whether or not awarded to compensate for actual harm."¹¹⁸ Under this definition of damages, monetary rule 11 sanctions would be considered damages covered by insurance policies regardless of the purpose behind their imposition.

Since attorney professional liability policies do not adequately define the term "damages," courts may well find the term ambiguous and, like the *Perl* court, interpret it broadly. If insurers had wanted the term "damages" to take on a particular meaning that would either not include rule 11 sanctions, or not include rule 11 sanctions that are not compensatory, they could have so defined the term in the policy.

B. *Are Sanctions Excluded?*

Although rule 11 sanctions may fall within the meaning of the term "damages," they still could fall outside the policy coverage because of exclusion provisions.¹¹⁹ Three common exclusions may eliminate coverage for rule 11 sanctions. These are the exclusions for "fines or penalties," "punitive or exemplary damages," and "dishonest, fraudulent, criminal or malicious acts or omissions" of the insured. This section discusses the applicability of these exclusions to rule 11 insurance and concludes that, under the terms of some policies, these exclusions may not prevent a court from allowing coverage for rule 11 sanctions.

Attorney professional liability policies usually exclude coverage for "fines or penalties,"¹²⁰ but the policies do not expressly state what constitutes a fine or a penalty. Thus, deciding whether rule 11 sanctions are fines or penalties may depend partly on one's view of the purpose of sanctions. If sanctions are viewed as punishment and not as compensation, then they seem more like fines or penalties than they

fee awards . . . renders them more in the nature of the type of 'damages' normally covered under professional liability policies.").

117. 345 N.W.2d 209 (Minn. 1984).

118. 345 N.W.2d at 212.

119. See *supra* notes 93-94 and accompanying text.

120. See, e.g., HOME INSURANCE COMPANY, No. H35175-F, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY § B.I.(b,3) (Sept. 1983) (policy coverage "does not include fines or statutory penalties . . . whether imposed by law or otherwise").

do when viewed as compensation.¹²¹

In the rule 11 context, some courts and commentators have distinguished between compensatory sanctions and fines or penalties. One judge, for example, cautioned that “courts need to be wary about imposing fines under the rule” and urged that “[t]he safer course . . . is to limit sanctions to consequential expenses and attorney’s fees.”¹²² Another judge referred to a sanction “unrelated to any such objective figure as expenses or an attorney’s fee” as “a penalty in the nature of a fine.”¹²³ In addition, the Ninth Circuit Court of Appeals, in reversing a \$250,000 sanction, noted that “a monetary sanction [may] assume the criminal character of a fine . . . if the amount of the sanction imposed is grossly disproportionate to the attorney’s misconduct or otherwise falls outside the bounds of the authority for the sanction.”¹²⁴

Statements such as these suggest that compensatory sanctions are distinct from fines and penalties. Although occasionally a court may expressly impose a fine or penalty under rule 11,¹²⁵ in most instances the amount of a rule 11 sanction is based on the costs incurred by the opposing party.¹²⁶ Particularly in these latter cases, a court could find that such compensatory sanctions do not constitute fines or penalties as excluded by professional liability policies. Even if the fines imposed are not clearly compensatory, however, courts could find that the “fines and penalties” exclusion is ambiguous and interpret it narrowly. The same rule 11 sanction, for example, may sometimes serve more than one purpose,¹²⁷ and in these cases a court may justifiably doubt whether sanctions really should be considered fines or penalties. The doctrines of interpreting ambiguous policy language in favor of coverage could allow courts to conclude that such rule 11 sanctions are covered under existing attorney professional liability policies.¹²⁸

A number of insurance companies, though, have attempted to ex-

121. See Hamilton, McKee, & Levitt, *supra* note 7, at 525 (“The traditional meaning of a ‘fine’ would seem to encompass most citations, at least those sanctions levied as punishment.”).

122. Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 202-03.

123. *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 125 (2d Cir.) (Pratt, J., dissenting) (disapproving of sanction not based on actual attorneys’ fees), *cert. denied*, 108 S. Ct. 269 (1987).

124. *In re Yagman*, 796 F.2d 1165, 1180-81, *opinion amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987).

125. See, e.g., *Dore v. Schultz*, 582 F. Supp. 154, 158 (S.D.N.Y. 1984) (“[T]he attorney for plaintiffs is sanctioned in the amount of two hundred dollars payable as a fine into the Registry of this court . . .”).

126. See *supra* note 60 and accompanying text.

127. NEW YORK STATE BAR ASSOCIATION COMMITTEE ON FEDERAL COURTS, *supra* note 4, at 23 (77% of judges responding to survey “indicated that their awards of sanctions were intended to be both compensatory and punitive/exemplary.”).

128. See Thomsen, *supra* note 7, at 300 (“[T]he insurance company, as drafter of the contract, could have protected itself by specifically excluding ‘sanctions’ along with ‘fines, penalties, and/or punitive or exemplary damages.’”).

pressly exclude sanctions from coverage. Out of twenty-five policies examined for this Note, fifteen have some form of an exclusion for "sanctions."¹²⁹ Of these, seven simply contain the word "sanctions" within the exclusion for fines and penalties.¹³⁰ The Home Insurance Company, for example, has excluded coverage in one of its policies for "fines or statutory penalties, or *sanctions* whether imposed by law or otherwise."¹³¹ With the word "sanctions" added to the exclusion, the policy may well be viewed as less ambiguous and a court might more easily justify excluding coverage for rule 11 sanctions. A court might arguably find, though, that even with the term "sanctions" the exclusion is ambiguous and does not necessarily encompass rule 11 sanctions.¹³² Courts have held that exclusionary language must be unequivocally clear and conspicuous;¹³³ perhaps the word "sanctions" by itself still will not be clear enough to exclude rule 11 sanctions.¹³⁴

129. For citations to these 15 policies, see *infra* notes 130 & 136-38. A sixteenth policy contains language that could plausibly be construed to exclude coverage for rule 11 sanctions, even though the word "sanctions" is not used. See OHIO BAR LIABILITY INSURANCE CO., No. LPLP-1b, INSURING AGREEMENT 5 (Nov. 1987) (excluding coverage for "restitution, fines, penalties or an award of attorneys' fees imposed against any person or entity under any federal or state law or statute, or any local rule(s) of court").

130. EVANSTON INSURANCE CO., No. 1507, LAWYERS PROFESSIONAL LIABILITY INSURANCE 1 (Feb. 1989); HOME INSURANCE COMPANY, No. H36581F, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY § B.I.(b) (May 1986); INTERNATIONAL SURPLUS LINES INSURANCE CO., No. 200.0.54, LAWYERS PROFESSIONAL LIABILITY INSURANCE 2 (May 1988); LAWYERS' MUTUAL INSURANCE COMPANY, No. 1, LAWYERS' PROFESSIONAL LIABILITY POLICY 1 (June 1987); LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA, PROFESSIONAL LIABILITY CLAIMS-MADE POLICY (June 1987); ST. PAUL FIRE & MARINE INSURANCE CO., No. 43997, LAWYERS PROFESSIONAL LIABILITY PROTECTION 1 (April 1988); TEXAS LAWYERS' INSURANCE EXCHANGE, No. P-7, ATTORNEYS' CLAIMS MADE PROFESSIONAL LIABILITY INSURANCE POLICY art. 1 § 1.5(a) (July 1988).

131. HOME INSURANCE COMPANY, No. H36581F, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY § B.I.(b) (May 1986) (emphasis added). This policy is used by the Home Insurance Company in most, but not all, states. In some states, the policy referred to in note 120 (which does not include the word "sanctions") is used. Telephone Interview with Stan Oetken, Assistant Vice President for Professional Liability Underwriting Managers, Inc. (Oct. 10, 1988).

132. The word "sanction" has many meanings. In the context of administrative law, for example, "sanction" can mean the following: "prohibition, requirement, limitation, or other condition affecting the freedom of a person"; "withholding of relief"; "imposition of a penalty or fine"; "destruction, taking, seizure, or withholding of property"; "assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees"; "requirement, revocation, or suspension of license"; or "taking other compulsory or restrictive action." Administrative Procedure Act, 5 U.S.C. § 551(10) (1982). In an attorney professional liability policy, does the term "sanction" mean any or all of these things? In whose favor should the meaning be determined?

133. See, e.g., *Emcasco Ins. Co. v. L & M Dev., Inc.*, 372 N.W.2d 908, 911 (N.D. 1985) ("Limitations or exclusions from broad coverage must be clear and explicit."); *Ponder v. Blue Cross of S. Cal.*, 145 Cal. App. 3d 709, 719, 193 Cal. Rptr. 632, 637 (1983) (language of exclusions must be clear and plain); *Moss v. Mid-America Fire & Marine Ins. Co.*, 103 Idaho 298, 300, 647 P.2d 754, 756 (1982) (exclusions must be clear and precise).

134. For example, claims under specific statutes are typically excluded through explicit mention of the statutes in the policy. See, e.g., INSURANCE SERVICES OFFICE, No. GL-00-23, LAWYERS PROFESSIONAL LIABILITY FORM (Mar. 1981) (stating that the policy does not apply to claims arising under "the Securities Act of 1933, The Securities Exchange Act of 1934, The

Despite this possibility, the addition of the word “sanctions” does make the case for excluding coverage for rule 11 sanctions much stronger.¹³⁵ So too does the language found in other policies, ranging from exclusions for reimbursement of attorneys’ fees¹³⁶ to exclusions for sanctions imposed under federal or state rules of procedure.¹³⁷ Only one of the twenty-five policies examined, however, specifically mentions Federal Rule of Civil Procedure 11 in its exclusionary provisions.¹³⁸ For those policies that do not contain clear and explicit exclusions for rule 11 sanctions, courts must look to other policy provisions to see if sanctions should be excluded.

The exclusion for “punitive or exemplary damages,” for example, is similar in form to the exclusion for “fines and penalties.”¹³⁹ Whether rule 11 sanctions can be considered as punitive or exemplary damages depends again partly on one’s view of the purpose of rule 11

Public Utility Holding Company Act of 1935, The Trust Indenture Act of 1939, The Investment Company Act of 1940 or The Investment Advisors Act of 1940”). A court might require this level of specificity for the exclusion of rule 11 sanctions.

135. An explicit exclusion, however, is not always decisive in insurance contracts. The pollution exclusion clauses in comprehensive general liability policies, for example, have been read by some courts not to exclude coverage for pollution damage. *See, e.g.*, *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988); *Kipin Indus. v. American Universal Ins. Co.*, 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987).

136. AMERICAN HOME ASSURANCE CO., No. 41650, LAWYERS PROFESSIONAL LIABILITY POLICY 3 (Jan. 1985) (excluding “fines, sanctions or penalties, or the return of or reimbursement for legal fees, costs or expenses”); NEW ENGLAND INSURANCE CO., No. C-168, LAWYERS PROFESSIONAL LIABILITY POLICY (Dec. 1988) (stating that the policy does not apply to “fines, sanctions or penalties; to the return of or reimbursement for legal fees, costs or expenses”).

137. THE BAR PLAN, No. TBP-2, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY 8 (Jan. 1989) (excluding “fines, penalties, sanctions, costs and fees imposed by a court under state or federal statutes or rules of procedure”); LAWYERS MUTUAL INSURANCE CO. OF KENTUCKY, No. POL, LAWYERS PROFESSIONAL LIABILITY INSURANCE PROVISIONS art. 5, § A.15 (Nov. 1987) (excluding “fines, penalties, sanctions, costs or fees imposed by a court for the violation of the rules of procedure, state or federal”); OREGON STATE BAR PROFESSIONAL LIABILITY FUND, CLAIMS MADE PLAN § I.3.d(2) (1989) (excluding “any attorneys fees, costs, fines, penalties, sanctions or other amounts imposed under any federal or state statute, administrative rule, court rule or case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses”); THE VIRGINIA INSURANCE RECIPROCAL, No. LPL 160, LAWYERS PROFESSIONAL LIABILITY POLICY art. 3, § A.8.c (Sept. 1987) (excluding coverage for “fines, sanctions, or penalties imposed upon an attorney or his client pursuant to statute, court rules, or otherwise”); WISCONSIN LAWYERS MUTUAL INSURANCE CO., No. WLMPOL-003, LAWYERS PROFESSIONAL LIABILITY INSURANCE PROVISIONS art. 5, § A.14 (July 1989) (coverage not applying “to any Claim for costs imposed upon an Insured pursuant to . . . any Rule under the Federal Rules of Civil Procedure . . . nor to the Insured’s liability to a third person for costs imposed upon such person pursuant to . . . any Rule under the Federal Rules of Civil Procedure”).

138. INSURANCE CO., LTD., LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY § C.3(a) (undated) (excluding coverage for “Civil or Criminal fines, sanctions or penalties, whether pursuant to law or statute, including but not limited to awards under California Code of Civil Procedure § 128.5, 28 U.S.C. § 1927, or Federal Rule(s) of Civil Procedure, Rule 11”).

139. For a sample wording of the exclusion for punitive or exemplary damages, see, e.g., CNA, No. G-42072-D, LAWYERS PROFESSIONAL LIABILITY COVERAGE art. II, § H (Sept. 1985) (“We will not defend or pay, under this Coverage Part for . . . any punitive or exemplary amounts.”). In some states, even where punitive or exemplary damages are not excluded in the policy, coverage for them is prohibited by public policy. See sources cited *infra* at note 201.

sanctions.¹⁴⁰ If the purpose is compensation, sanctions can hardly be considered punitive. Moreover, even the same sanction can serve more than one purpose, prompting one commentator to note that "the mixed nature of monetary sanctions, which may compensate as well as punish, makes the characterization of sanctions as punitive damages fraught with logical pitfalls."¹⁴¹ For this reason, a court interpreting an attorney professional liability policy could easily find that rule 11 sanctions do not fall within the exclusion for punitive or exemplary damages.

Insurance policies also exclude coverage for losses arising out of acts or omissions of the insured attorney that are dishonest, fraudulent, deliberately wrongful, criminal, or malicious.¹⁴² Courts impose rule 11 sanctions, however, even when attorneys have acted honestly and in good faith.¹⁴³ By itself, then, a sanction under rule 11 does not necessarily fall within the exclusion for dishonest and fraudulent acts. To fall within this exclusion, a sanction probably needs to be accompanied by a specific finding that the attorney acted in bad faith or with malice. However, since courts need not make such a finding in order to impose rule 11 sanctions, it is doubtful that subsequent courts would ever know whether an attorney violated the rule in bad faith. In cases other than those dealing with rule 11 sanctions, when it has been unclear if an insured attorney's conduct was dishonest or fraudulent, courts have held that coverage exists under professional liability policies.¹⁴⁴ Likewise, in rule 11 cases, courts may well find that coverage for sanctions under some policies has not been excluded.

C. *Is There a Duty to Defend Against Sanctions?*

In addition to indemnifying attorneys for direct losses, most professional liability insurance policies obligate insurers to defend and appeal any claim against the insured seeking damages which may be

140. See *supra* note 121 and accompanying text.

141. Thomsen, *supra* note 7, at 304.

142. See, e.g., HOME INSURANCE COMPANY, No. H36581F, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY § C.I(a) (May 1986) (excluding "dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions"); INSURANCE SERVICES OFFICE, No. GL-00-23, LAWYERS PROFESSIONAL LIABILITY FORM (Mar. 1981) (excluding "dishonest, fraudulent, criminal or malicious acts or omissions").

143. See sources cited *supra* note 50; cf. Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) ("Rule 11 does not prohibit merely intentional misconduct. Inexperience, incompetence, willfulness or deliberate choice may all contribute to a violation.").

144. See, e.g., National Sur. Corp. v. Musgrove, 310 F.2d 256 (5th Cir. 1962) (exclusion in insurance broker's professional liability policy did not encompass constructive fraud), *cert. denied*, 375 U.S. 974 (1964); St. Paul Fire & Marine Ins. Co. v. Icard, Merrill, Cullis & Timm, 196 So.2d 219 (Fla. Ct. App.) (coverage not excluded where complaint against the insured attorney was "grossly insufficient" to justify belief that attorney's actions were dishonest or fraudulent), *cert. denied*, 201 So. 2d 897 (Fla. 1967); Cadwallar v. New Amsterdam Casualty Co., 396 Pa. 582, 152 A.2d 484 (1959) (coverage not excluded despite allegations of fraud and conspiracy because attorney's conduct potentially was not fraudulent).

covered by the policy.¹⁴⁵ Most policies define claims simply as demands for money;¹⁴⁶ thus a motion for monetary rule 11 sanctions would fall within the meaning of the term “claim” as found in a policy’s defense provision.

Although the typical policy only states that the insurer will defend claims seeking damages covered by the policy, courts have consistently held that a liability insurer’s duty to defend is broader than its duty to indemnify.¹⁴⁷ An insurer may be required to provide a defense even when it would not be required to pay the final damage award.¹⁴⁸ As long as a claim seeks damages that are potentially covered by the policy, the insurer must pay for a defense.¹⁴⁹

For this reason, some professional liability insurers may need to defend attorneys against rule 11 motions even if the insurer would not ultimately be required to indemnify the insured. In cases where coverage would be excluded only if an attorney acted maliciously, for example, such malice would not be established when a rule 11 motion is filed. Moreover, because a court can sanction an attorney without expressly finding bad faith, there will presumably always be a possibility of coverage, and therefore a duty to defend, in such cases.

As with the term “damages” and the various exclusions,¹⁵⁰ courts

145. *See, e.g.*, HOME INSURANCE COMPANY, No. H36581F, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY § B.II (May 1986) (“[T]he Company shall defend any claim against the Insured including the appeal thereof seeking damages to which this insurance applies even if any of the allegations of the suit are groundless, false, or fraudulent.”); INSURANCE SERVICES OFFICE, No. GL-00-23, LAWYERS PROFESSIONAL LIABILITY FORM 2 (Mar. 1981) (“The company shall have the right and duty to defend any suit against the insured seeking damages for claims to which this insurance applies even if any of the allegations of the suit are groundless, false or fraudulent.”); LAWYERS’ MUTUAL INSURANCE COMPANY (CALIFORNIA), LAWYERS’ PROFESSIONAL LIABILITY POLICY art. 2, § 2.2 (June 1987) (“For any Claim seeking Damages with respect to such insurance as is afforded by the policy, the Company shall have the right to appoint counsel and shall have the duty to defend such Claim even if any or all of the allegations of the Claim are groundless, false or fraudulent.”).

146. *See, e.g.*, HOME INSURANCE COMPANY, No. H36581F, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY § B.I.b (May 1986) (“Claim, whenever used in this policy, means a demand received by the Insured for money”); LAWYERS’ MUTUAL INSURANCE COMPANY (CALIFORNIA), LAWYERS’ PROFESSIONAL LIABILITY POLICY art. 1, § 1 (June 1987) (“Claim means: a demand . . . for money against an Insured.”). *But see* INSURANCE SERVICES OFFICE, No. GL-00-23, LAWYERS PROFESSIONAL LIABILITY FORM 2 (Mar. 1981) (using term “suit” rather than “claim”).

147. *See, e.g.*, *Conway v. Country Casualty Ins. Co.*, 92 Ill.2d 388, 442 N.E.2d 245 (1982); *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 476 N.E.2d 272, 486 N.Y.S.2d 873 (1984).

148. *See Pennsylvania Mfrs.’ Assn. Ins. Co. v. Lumbermens Mut. Casualty Co.*, 648 F.2d 914, 918 (3d Cir. 1981) (“The two duties are not coterminous and a carrier may be obligated to defend its insured in circumstances where the damage award itself may be payable by another insurance company, other party, or the insured himself.”).

149. *See, e.g.*, *National Indem. Co. v. Flesher*, 469 P.2d 360 (Alaska 1970) (finding that insurer must provide a defense if the known or reasonably ascertainable facts are within, or potentially within, the coverage of the policy); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (en banc) (finding insurer obligated to defend insured against suit for assault because the loss was potentially within the coverage of the policy).

150. *See supra* sections II.A and II.B.

may construe the duty to defend provisions of attorney professional liability policies in favor of coverage. Absent an explicit exclusion for sanctions imposed under rule 11, the language in existing attorney professional liability policies gives courts room to find that the policies cover sanctions. Rule 11 sanctions serve multiple purposes and are imposed on attorneys who act honestly and in good faith. They do not fit neatly into traditional policy provisions and courts may well find that some of the existing policies cover the risk of rule 11 sanctions.

III. THE POTENTIAL MARKET FOR RULE 11 INSURANCE

Even if courts do not find coverage for rule 11 sanctions under the terms of existing policies, insurance companies could write new policies specifically covering rule 11 sanctions. Given the risk of sanctions that attorneys face, one might expect a market to develop for such insurance. This Part briefly analyzes the actuarial criteria of insurability and suggests that special rule 11 insurance may well be offered by the market in the near future.

Insurance operates by shifting the risk and burden of loss from individuals to groups of similarly situated individuals.¹⁵¹ Even though risks to individuals are by nature uncertain, if a group is sufficiently large, risks can be measured with accuracy. Insurers rely on statistical analysis and probability theory to determine the total expected loss for the group and, on that basis, to establish equitable premiums for all individual policyholders.¹⁵² Although in the abstract it is possible to insure (*i.e.*, to shift or spread) any type of risk, in practice insurers only cover those risks which can be adequately analyzed in statistical terms and those for which coverage would be economically feasible.¹⁵³

151. K. ABRAHAM, *supra* note 101, at 64; F. STEPHEN, *supra* note 85, at 146; E. VAUGHAN, *supra* note 90, at 21.

152. E. VAUGHAN, *supra* note 90, at 22-27.

153. The issue discussed in this Part of the Note is whether rule 11 sanctions meet the statistical or actuarial criteria for insurability, not the principles of economic feasibility. Risks that meet the actuarial criteria are ones that can be measured and predicted with some degree of accuracy. Even measurable and predictable risks, though, must be economically feasible, meaning simply that an insurer must be able to make money by insuring them. Economic feasibility is not discussed in depth in this Part because the risk of rule 11 sanctions would almost certainly meet all of the following four principles of economic feasibility discussed in the insurance literature. First, to be economically feasible, insurance should not cover catastrophic losses such as wars or floods. Rule 11 sanctions can hardly be considered catastrophic in this sense. Second, the potential loss to individuals should be nontrivial so insurers can charge premiums large enough to recoup administrative costs and profits. As noted *supra* at note 3, the size of rule 11 sanctions and the costs of defending rule 11 motions are not insubstantial. Third, the probability of loss should not exceed 40-50%, or the necessary premiums will be excessive. Although the frequency of rule 11 sanctions has increased significantly in the past six years, the probability of sanctions being imposed on a particular attorney is not close to 40-50%. Finally, insurance premiums should not be too high, which they probably would not be for rule 11 coverage, given that the other principles of economic feasibility are satisfied. *See generally* D. BICKELHAUPT, *GENERAL INSURANCE* 14 (11th ed. 1983); M. GREENE, *RISK AND INSURANCE* 58-59 (3d ed. 1973); G. LUCAS & R. WHERRY, *INSURANCE: PRINCIPLES AND COVERAGES* 19 (1954); R. MEHR, *FUNDAMENTALS OF INSURANCE* 43 (2d ed. 1986); R. RIEGEL, J. MILLER & C. WIL-

To insure a risk of loss, insurers must be able to estimate the frequency and magnitude with which the loss will occur among a given population.¹⁵⁴ Insurers will generally be able to determine this if three actuarial criteria are reasonably satisfied: (1) A large number of similarly situated individuals are exposed to the risk; (2) the loss is definite; and (3) the loss is accidental and unintentional from the standpoint of the insured.¹⁵⁵ This Part applies these criteria in the context of rule 11, and concludes that insuring against sanctions will be feasible.

A. *Large Number of Similarly Situated Individuals Exposed to Risk of Loss*

Insurance, it is commonly said, is based on the law of large numbers.¹⁵⁶ A large number of individuals exposed to a similar risk makes it possible for insurers to predict more accurately the future chances of loss to the group. This also enables insurers to spread risk equitably across a group of individuals.¹⁵⁷ A large quantity of data collected over a period of time makes it more reasonable to think that the frequency of loss in the past will continue in the future.¹⁵⁸

The individuals principally exposed to the risk of rule 11 sanctions are, of course, attorneys,¹⁵⁹ and the United States has over 650,000 attorneys, 460,000 of whom are in private practice.¹⁶⁰ In addition, the fact that insurers already provide insurance specifically for attorneys suggests that the number of attorneys is sufficiently large to make reasonably accurate predictions about liability losses. Not every attorney,

LIAMS, INSURANCE PRINCIPLES AND PRACTICES: PROPERTY AND LIABILITY 16-17 (6th ed. 1976) [hereinafter R. RIEGEL].

154. See D. BICKELHAUPT, *supra* note 153, at 13 (An insurable risk "must permit a reasonable statistical estimate of chance of loss and possible variations from the estimate.").

155. These actuarial criteria are not absolute prerequisites for insurance coverage, but rather are guides used by insurers when deciding what risks to insure. See, e.g., D. BICKELHAUPT, *supra* note 153, at 14 (The "requirements for an insurable risk are not absolute."); M. GREENE, *supra* note 153, at 55 ("These requirements should not be considered absolute, as iron rules, but rather as guides."); R. MEHR, *supra* note 153, at 44 ("The criteria of insurability are not always followed rigidly."); E. VAUGHAN, *supra* note 90, at 28-29. As one commentator has explained, "[t]hese criteria must be viewed as the optimum to achieve rather than characteristics to be met in every instance." R. MEHR, *supra* note 153, at 44; see also M. GREENE, *supra* note 153, at 55 (These criteria "should be viewed as ideal standards, and not necessarily as standards actually attained in practice."). In fact, according to another commentator, "[m]any common kinds of insurance do not meet each of the requirements perfectly." D. BICKELHAUPT, *supra* note 153, at 14; see also R. RIEGEL *supra* note 153, at 17 ("[I]nsurers often write risks that do not satisfy these . . . requirements.").

156. See, e.g., R. MEHR, *supra* note 153, at 44-48; R. RIEGEL, *supra* note 153, at 18-21; E. VAUGHAN, *supra* note 90, at 22.

157. See E. VAUGHAN, *supra* note 90, at 29.

158. See M. GREENE, *supra* note 153, at 55.

159. The rule does, though, also expose clients to the risk of sanctions. See *supra* note 52 and accompanying text.

160. See B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 3-4 (1986).

however, faces the risk of rule 11 sanctions. For example, those attorneys not involved with litigation and those who never appear in federal court are not exposed to the risk of rule 11 sanctions. Insurers may be able to add to the pool of data, though, attorneys practicing in the number of state courts that have rules of civil procedure that follow rule 11.¹⁶¹ In any case, more than enough attorneys do practice before the federal courts to satisfy the criterion of large numbers.

What may not satisfy this criterion, however, are the data on the frequency of rule 11 sanctions. Such data, where they have been collected at all, have only been available for the six years since the rule was amended. Insurers are generally reluctant to insure against a new-found peril when they have not had the "opportunity to collect statistics over a sufficient length of time on losses resulting from this peril."¹⁶² Moreover, with rule 11 doctrine and practice in flux, it may be harder for insurers to predict future sanction rates based on past ones.¹⁶³ In the coming years, the rate of sanctioning may increase dramatically if lawyers become more accustomed to seeking sanctions and if judges become more interested in imposing them.

A large pool of data spanning a long time period, however, is not essential for insurers. When dealing with new risks, insurance companies make calculations based "upon what is sometimes called 'underwriting judgment,' and in some instances this is nothing more than an approximation or guess to be adjusted with the accumulation of experience."¹⁶⁴ Thus, although frequency data on rule 11 sanctions are not as extensive as those on, for example, mortality, insurers probably still have or can acquire enough information to make a reasonable approximation which can, if necessary, be adjusted each year.

B. *Definiteness of Loss*

In order for insurers to estimate the frequency and magnitude of loss, the loss itself must be definite and capable of being measured.¹⁶⁵ "In other words," one commentator explains, "we must be able to tell when a loss has taken place, and we must be able to set some value on

161. See, e.g., ILL. CIV. PROC. CODE ch. 110, § 2-611 (West Supp. 1989); N.C. GEN. STAT. ch. 1-A, art. 3, rule 11 (1983); OKLA. STAT. tit. 12, ch. 39, 2011 (Supp. 1988); R.I. STAT. ANN. § 9-29-21 (Supp. 1988); VA. CODE ANN. 8.01-271.1 (Supp. 1989); WYO. STAT. 1-14-128 (1988); see also Oliphant, *supra* note 18, at 739 (citing state court rules similar to rule 11 in Arizona, Kentucky, Michigan, Wisconsin, and Minnesota); cf. CAL. CIV. PROC. CODE § 447 (West Supp. 1989) (rule following language of rule 11 implemented in two counties); MASS. GEN. LAWS ANN. ch. 231, 6F (West 1985) (recovery of fees and costs for claims that are "wholly insubstantial, frivolous, and not advanced in good faith"); N.Y. CIV. PRAC. L. & R. § 8303-a (McKinney Supp. 1989) (recovery of costs for frivolous personal injury, wrongful death, and medical malpractice claims).

162. M. GREENE, *supra* note 153, at 55.

163. See *supra* notes 24, 26-27, 84 and accompanying text.

164. D. BICKELHAUPT, *supra* note 153, at 14.

165. See *id.* at 13-14; R. MEHR, *supra* note 153, at 41-42; E. VAUGHAN, *supra* note 90, at 29.

the extent of it.”¹⁶⁶ Rule 11 sanctions obviously satisfy this criterion when a court order states a specific amount of monetary sanctions. When a court imposes nonmonetary sanctions, however, the loss will not be definite and insurance will be inappropriate. The difficulty of insuring nonmonetary sanctions, though, need not prevent insurers from offering coverage for the monetary sanctions that are imposed in most rule 11 cases.

C. *Loss that is Accidental or Unintentional from the Standpoint of the Insured*

Insurers can most accurately make the statistical analysis and prediction upon which insurance relies when losses are accidental or unintentional.¹⁶⁷ Insurance operates best where it is reasonable to expect that the past rate and magnitude of loss will continue in the future. Losses intentionally caused by the insured, however, are harder to predict.¹⁶⁸ If persons already intentionally cause losses without insurance, they will have less incentive to prevent such losses in the future if they are insured.¹⁶⁹ The resulting increased probability of loss is termed moral hazard.¹⁷⁰ This section discusses the applicability of moral hazard to rule 11 sanctions, and concludes that moral hazard is no more of a problem with respect to rule 11 than it is in other, commonly insured areas.

To some degree, moral hazard is a problem with any type of loss, intentional or unintentional. Insurance coverage may, for example, diminish the economic incentives for an insured to be careful and avoid accidental loss. Moral hazard is most serious, though, with intentional losses because insurance may enhance existing reasons for an insured to cause loss intentionally.¹⁷¹

Rule 11 sanctions, however, are not necessarily intentional losses. The objective standard of the amended rule enables courts to sanction attorneys who unintentionally, but negligently, violate the rule. Sanctions in these instances could be insured just as losses arising from any malpractice judgment based on negligence can be insured.¹⁷²

166. E. VAUGHAN, *supra* note 90, at 29.

167. *See id.*; *see also* M. GREENE, *supra* note 153, at 56; G. LUCAS & R. WERRY, *supra* note 153, at 19; R. MEHR, *supra* note 153, at 42.

168. *See* D. BICKELHAUPT, *supra* note 153, at 13 (“Intentional losses caused by the insured are usually uninsurable because they cannot be reasonably predicted . . .”).

169. *Cf.* K. ABRAHAM, *supra* note 101, at 35 (“[B]ecause insureds can control their own behavior, they have it within their power to act inconsistently with insurers’ interests by taking less care than they would were they not insured.”).

170. *See, e.g.*, K. ABRAHAM, *supra* note 101, at 14-15; E. VAUGHAN, *supra* note 90, at 6; Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531, 535 (1968); Shavell, *On Moral Hazard and Insurance*, 93 Q.J. ECON. 541 (1979).

171. *See* B. BERLINER, *LIMITS OF INSURABILITY OF RISKS* 76 (1982).

172. Indeed, professional liability policies are written to cover negligent errors and omissions of attorneys. *See supra* note 91 and accompanying text.

However, attorneys can still intentionally violate rule 11.¹⁷³ Some attorneys may actually perceive incentives for violating it. If these attorneys think that violating the rule would help them win a case or otherwise advance a client's cause, they may willingly accept the risk of sanctions, even without insurance. The risk for these attorneys becomes speculative. Like gambling or investing in the stock market, speculative risks involve the possibility of both losses and gains.¹⁷⁴ For example, an attorney who files a frivolous complaint risks sanctions, but he may also gain a favorable, or at least a "nuisance-value," settlement from the defendant. Similarly, an attorney who files burdensome discovery documents may risk sanctions if the papers are filed merely to harass or delay, but he may also gain from the harassment or delay.¹⁷⁵ Insurers tend to avoid insuring these types of speculative risks because doing so eliminates, or reduces greatly, the possibility of loss otherwise found in such risks.¹⁷⁶ If the possibility of loss were covered by insurance, speculative risks would no longer really be risks at all,¹⁷⁷ and individuals would undoubtedly engage more frequently in speculative behavior.

Notwithstanding the problems of insuring intentional losses, the criterion of accidental and unintentional loss is not an absolutely necessary condition. While "[i]t is preferable that the risk be such that the insured cannot himself produce the event insured against or increase the probability of its happening[,] . . . [i]f this condition . . . were strictly adhered to, many forms of insurance would be prevented from adequately exercising their legitimate functions."¹⁷⁸ Through the use of deductibles, coinsurance, risk classification, and pricing, insurers can control the moral hazard problem. Deductibles are fixed amounts of loss below which the insured is liable and above which the insurer is liable.¹⁷⁹ Coinsurance schemes allocate loss on a percentage basis between the insured and the insurer.¹⁸⁰ Risk classification and

173. See *In re Ronco, Inc.*, 105 F.R.D. 493, 495 (N.D. Ill. 1985) (subjective "improper purpose" aspect of rule 11). But see *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986) (rule 11 standard is entirely objective).

174. E. VAUGHAN, *supra* note 90, at 8. In contrast to speculative risks, pure risks involve only the possibility of loss. Examples of pure risks include property damage and illness. See generally *id.* at 7-8.

175. Such an attorney, however, would also face possible sanctions under FED. R. CIV. P. 26(g) which covers discovery requests.

176. See B. BERLINER, *supra* note 171, at 80; E. VAUGHAN, *supra* note 90, at 8.

177. This analysis assumes that the insurance premium would be less than the potential gains. If it is not, then the speculative risk, when insured, would be one of loss only, or a pure risk. See *supra* note 174.

178. R. RIEGEL, *supra* note 153, at 16; see also R. MEHR, *supra* note 153, at 44 ("Insurers . . . write insurance for which no adequate statistics are available for scientific rate making . . . [and] they write coverage where the loss is not accidental . . .").

179. See K. ABRAHAM, *supra* note 101, at 2.

180. For example, under a policy in which an insurer agrees to indemnify only 70% of the losses, the insured would bear 30%. See *id.*

pricing often go hand in hand: classified by individual characteristics or past experience, the riskier insureds' conduct, the higher are their premiums.¹⁸¹ These devices assure that insured persons retain financial risk and are deterred from creating intentional losses. With the aid of these tools, insurers offer policies covering damages caused by such intentional torts as defamation and malicious prosecution.¹⁸²

Intentional violations of rule 11 can probably be feasibly covered by insurance too; but if not, at least accidental and negligent violations of the rule can be. The risk of rule 11 sanctions reasonably satisfies the three criteria of insurability. A large number of attorneys are exposed to a definite risk of loss which they did not intentionally bring upon themselves. It is foreseeable, therefore, that the insurance industry will respond to this risk by offering insurance specifically covering rule 11 sanctions.

IV. PUBLIC POLICY AND THE INSURABILITY OF RULE 11 SANCTIONS

The likely emergence of insurance coverage for rule 11 sanctions under either existing or new policies raises an important public policy question: Should rule 11 sanctions be insurable? Courts will face this question in deciding whether to enforce policies that cover rule 11 sanctions,¹⁸³ as well as in continuing to develop rule 11 doctrine.¹⁸⁴ In

181. *See id.* at 15.

182. *See* R. RIEGEL, *supra* note 153, at 447 (coverage available for libel); Note, *Lawyers' Professional Liability Insurance: Coverage for Malicious Prosecution, Abuse of Process, Libel, and Slander*, 33 S.C. L. REV. 355, 356 (1981) (listing insurance policies that cover malicious prosecution and defamation); *see also, e.g.*, HOME INSURANCE COMPANY, No. H35175F, LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY (Sept. 1983) (malicious prosecution covered); CNA, No. G-42072-D, LAWYERS PROFESSIONAL LIABILITY COVERAGE art. IV (Sept. 1985) (defamation and malicious prosecution covered).

183. In deciding whether to enforce insurance policies covering rule 11 sanctions, courts may also face a related jurisdictional question. Insurance policies are governed by state law, but rule 11 is a federal rule. The jurisdictional question, thus, is whether state insurance law is preempted by the federal public policies underlying rule 11. The Federal Rules Enabling Act, under which rule 11 was promulgated, expressly states that the federal rules of civil procedure "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072 (1982). Moreover, general conflict-of-laws principles suggest that federal rules that are merely procedural have no binding effect on state courts. *See* WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1417 (1971). State courts (and even federal courts applying state law) might therefore not be obligated to consider the public policies underlying rule 11 in deciding whether to enforce an insurance policy that covers sanctions. Nevertheless, since the concerns raised by rule 11 are widely shared, courts faced with the question of insurability may still be persuaded by, and voluntarily recognize, the federal policies presented by rule 11.

184. The insurability question may affect rule 11 decisions at two levels. First, federal district judges who oppose rule 11 insurance will likely change their sanctioning practices in an effort to keep sanctions from being insured. Although conceivably some of these judges will order that their monetary sanctions be uninsurable, it is more likely that they will begin to impose nonmonetary sanctions more frequently. Second, federal appellate courts, particularly the United States Supreme Court, may take insurance into account in future attempts to clarify the role of rule 11 in civil litigation. As discussed in the text *infra*, the multiple purposes of rule 11 sanctions make it difficult to prohibit insurance coverage on public policy grounds. If the

determining whether rule 11 sanctions should be insurable, this Part looks again to the purposes of the rule, as well as to the public policy concerns underlying it. Rule 11 presents courts with two "competing concerns" which are relevant to the question of insurability: "the desire to avoid abusive use of the judicial process and [the desire] to avoid chilling zealous advocacy."¹⁸⁵ As this Part demonstrates, insurance offers a way of balancing the competing concerns of judicial efficiency and creative advocacy, as well as of accommodating the multiple purposes of the rule. Insurance would not significantly hamper the punitive or deterrent purposes of rule 11, and the availability of insurance would actually enhance the rule's compensatory purpose. At the same time, insurance coverage for sanctions would give attorneys a way of limiting the risk of rule 11 sanctions without stifling creative, good faith advocacy. Before turning to the reasons for allowing coverage of sanctions, though, it is fruitful to consider the case that could be made against rule 11 insurance.

At first glance, for instance, it might actually seem that rule 11 insurance should be prohibited. The federal courts, after all, are seriously overburdened.¹⁸⁶ Over the past decade, the number of civil filings in the federal district courts has increased approximately fifty-five percent.¹⁸⁷ Last year, approximately 240,000 civil cases were filed in

Supreme Court becomes troubled by the availability of rule 11 insurance, it may seek to declare punishment as the main purpose of the rule, thereby strengthening the case against insurance. Given the compensatory language found in the rule, however, such a declaration would likely require a formal amendment of the rule. The Supreme Court is authorized to promulgate such amendments under 28 U.S.C. § 2072 (1982) and could amend the rule to make punishment its guiding purpose. For the jurisdictional reasons mentioned *supra* at note 183, however, it is questionable whether the Court has the authority to go further and amend the rule so as to prohibit outright the use of insurance coverage for sanctions.

185. *Hudson v. Moore Business Forms, Inc.*, 827 F.2d 450, 453 (9th Cir. 1987); *see also, e.g., In re Ruben*, 825 F.2d 977, 991 (6th Cir. 1987); *Carlton v. Jolly*, 125 F.R.D. 423, 427-28 (E.D. Va. 1989); *Oliphant, supra* note 18, at 765.

186. Arguments in favor of rule 11 often make reference to the litigiousness of Americans and to the overburdening of the courts. *See, e.g., Dreis & Krump Mfg. Co. v. International Assn. of Machinists*, 802 F.2d 247, 255 (7th Cir. 1986) ("Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts."). Although these problems merit concern, rule 11 "was not designed as a cure-all for the ills of the adversary system." *Nelken, supra* note 5, at 1352. Rule 11 simply cannot, and probably should not, be used to bring federal lawsuits down to a more manageable number. *Cf. Levin & Sobel, supra* note 61, at 597-98; *Note, The Abuse of Rule 11 and Forum Non Conveniens*, 7 *REV. LITIGATION* 311, 317 (1988). The causes of contemporary litigation's costs, complexities, and delays are related to more fundamental aspects of our system of justice rather than to the existence of frivolous claims and motions. *See, e.g., A. MILLER, supra* note 30, at 2-9 (on the incentives for litigation); *Friedman, Litigation and Its Discontents*, 40 *MERCER L. REV.* 973, 977-83 (1989) (on the competitive and tactical incentives for litigation). Moreover, to the extent that rule 11 breeds additional litigation over sanction awards, the rule may actually contribute to the mounting burden in the courts. *See generally Schwarzer, Rule 11 Revisited, supra* note 2, at 1017-18 (discussing the problem of so-called "satellite litigation" over rule 11).

187. *DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS*, 1988 *ANNUAL REPORT* 114 (1988) (table S-8). *But cf. Galanter, The Day After the Litigation Explo-*

the district courts.¹⁸⁸ Based on a Rand Corporation estimate of the average cost of a civil filing, the total governmental expenditure on civil cases last year alone reached over \$360 million.¹⁸⁹ At least some commentators attribute a portion of this burden to frivolous filings: “[T]here is considerable opinion, supported by at least anecdotal evidence, that misuse and abuse of the litigation process have contributed to the problem [of overcrowded federal dockets].”¹⁹⁰ In an already overburdened system, frivolous filings and motions make an already lengthy process lengthier. They take time and energy away from judges whose time and energy are already taxed. By unnecessarily tying up the litigation process, those who behave frivolously or abusively restrict other parties’ right to an effective process of justice.¹⁹¹

Litigation today, to paraphrase Professor Lawrence Friedman, involves vindictiveness as well as vindication.¹⁹² Among litigators, notes the chief judge of the D.C. Circuit Court of Appeals, the civility of old is lost and the accepted strategy is to “win at all costs.”¹⁹³ One federal district court judge describes today’s litigation process as “a constant flow of poorly prepared, ill-considered, and often misleading, if not downright deceptive, papers filed by attorneys.”¹⁹⁴

Rule 11 offers some hope for dealing with this litigation abuse. For the rule to work effectively, though, its sanctions must have an impact on attorneys who burden the court with groundless or abusive papers. Insurance coverage would lessen the immediate financial impact of rule 11 sanctions.¹⁹⁵ If rule 11 sanctions were insurable, an attorney could then shift the direct costs of a sanction to his insurer instead of having to internalize these costs himself. In this way, it would appear that insurance coverage for sanctions would diminish courts’ ability to punish attorneys for conduct that violates rule 11.

In analogous circumstances, courts have invalidated insurance

sion, 46 MD. L. REV. 3 (1986) (questioning popular assumptions about the so-called “litigation explosion”).

188. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 187, at 114.

189. In 1982, the average cost to the government of a civil case in federal court was \$1500. J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM xix (1983). The figure given in the text is obtained by multiplying \$1500 by the number of cases filed in 1988, and it assumes that the total cost would be even higher when adjusted for inflation.

190. Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 182.

191. See, e.g., G. JOSEPH, *supra* note 26, at 257; Wald, *Three Challenges to the Legal Profession*, 36 FED. B. NEWS & J. 227, 231 (1989).

192. Friedman, *supra* note 186, at 985.

193. Wald, *supra* note 191, at 231.

194. Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1014.

195. See K. ABRAHAM, *supra* note 101, at 46 (Insurance may allow some firms to evade liability for the costs of their activity.); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 559 (1948) (“No doubt the protection given by insurance makes some individuals callous and every now and then a man will admit as much in his own case.”).

coverage out of concern for a diminution in financial punishment. The Minnesota Supreme Court in *Perl v. St. Paul Fire & Marine Insurance Co.*,¹⁹⁶ for example, invalidated as against public policy an insurance policy that covered a fee forfeiture imposed on an attorney, Perl, who had failed to reveal a conflict of interest to his client.¹⁹⁷ Although the client suffered no actual damages from Perl's breach of his fiduciary duty, Perl was ordered to forfeit to his former client the \$20,000 in attorneys' fees she had paid. The court found that the fee forfeiture constituted "damages" under the terms of Perl's malpractice policy, but nevertheless held that such coverage was against public policy and therefore void. In deciding whether the fee forfeiture was insurable, the court acknowledged that the public policy question depended on the purpose of the attorney fee forfeiture,¹⁹⁸ which in this case was "primarily to penalize the offending attorney" for violating his client's trust.¹⁹⁹ Such a violation, the court noted, is "a particularly grave matter of public concern" since it undermines the trust underlying the attorney-client relationship.²⁰⁰ To permit insurance coverage when an attorney violates a client's trust would therefore defeat the important punitive purpose of the forfeiture.²⁰¹ Had the attorney merely been required to pay "actual, compensatory damages," rather than a punitive forfeiture, "[c]overage in such a case would lie."²⁰²

Much of the reasoning in *Perl* could be applied to the issue of in-

196. 345 N.W.2d 209 (Minn. 1984).

197. Interestingly, the Minnesota Supreme Court enforced the insurance policy with respect to coverage for Perl's law firm, which was also named in the order imposing the fee forfeiture. The court observed that "the policy considerations which deny coverage to the individual offending lawyer do not apply with equal force to the law firm." *Perl*, 345 N.W.2d at 216. For this reason, insurance coverage for law firms sanctioned under rule 11 should raise fewer objections than insurance for sanctioned attorneys.

198. 345 N.W.2d at 215.

199. 345 N.W.2d at 216.

200. 345 N.W.2d at 216.

201. The *Perl* court's concern that insurance coverage would dilute punishment is echoed in opinions disallowing insurance coverage of punitive damages in tort cases. *See, e.g.*, *American Sur. Co. v. Gold*, 375 F.2d 523 (10th Cir. 1966); *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966). In *Northwestern Natl. Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962), for instance, the U.S. Court of Appeals for the Fifth Circuit, applying Florida and Virginia law, invalidated insurance coverage for a \$20,000 punitive damages award against an intoxicated driver. The court held, *inter alia*, that insurance coverage would contravene the "especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of punishment in punitive damages when they are guilty of reckless slaughter or maiming on the highway." 307 F.2d at 441. Notwithstanding concerns such as these, courts in many other states have nevertheless permitted insurance coverage for punitive damages. *See, e.g.*, *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986); *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 567 P.2d 1013 (1977); *Ostrager, Insurance Coverage for Punitive Damages Assessed Against Insured*, in *PROFESSIONAL LIABILITY INSURANCE FOR ATTORNEYS, ACCOUNTANTS, AND INSURANCE BROKERS* 1986 549-63 (1986) (finding that 24 states and the District of Columbia have allowed coverage for punitive damages, while only 15 states have invalidated it).

202. *Perl*, 345 N.W.2d at 215.

insuring rule 11 sanctions. To the extent that the purpose of the rule is to punish attorneys who burden the courts with frivolous papers, this punishment will be dampened if sanctions are insurable. Likewise, to the extent that rule 11 is designed to deter attorneys from filing frivolous papers, either by punishing them or by requiring them to compensate aggrieved parties,²⁰³ insurance coverage would also dilute the deterrent effect of the rule. Insurance would make the direct economic consequences of violating rule 11 less severe, thereby diminishing the incentives for being careful and honest in pleading.²⁰⁴

For this reason, insurance coverage would present a problem of moral hazard.²⁰⁵ If attorneys are insured against rule 11 sanctions, the number of violations of the rule could potentially increase.²⁰⁶ Such an increase would confound rule 11's purpose of reducing frivolous behavior in the courts. Furthermore, for those attorneys who perceive a gain to be reaped from filing frivolous papers (even absent insurance), the addition of insurance coverage could further dilute the deterrent impact of rule 11 by removing much of the speculative risk.²⁰⁷

Despite these concerns, the basis for prohibiting insurance coverage of rule 11 sanctions is inadequate at the present time. Prohibiting insurance coverage on the basis of public policy should come only when a distinct public policy can be identified, and when it is clear that this policy would be undermined by insurance. Yet rule 11 is at present based on multiple purposes and draws into play competing policies. The reasons for wanting to prohibit rule 11 insurance ultimately give way under closer examination.

For instance, even with insurance, rule 11 will retain sufficient force to deter the filing of frivolous papers. An insured attorney who is sanctioned for violating rule 11 will not necessarily escape all

203. Any means of increasing the costs of noncompliance with rule 11 can deter violations of the rule. According to economic theory, individuals seek to maximize their utility and therefore choose behavior that minimizes expected loss. This theory appears to be descriptively accurate. See, e.g., Bruce, *The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature*, 6 *LAW & POLY.* 67, 91 (1984) (research indicates that the threat of fines and penalties deters drivers from unsafe behavior).

204. K. ABRAHAM, *supra* note 101, at 14 (“[O]ther things being equal, insurance against loss will reduce your incentive to prevent the insured event from occurring . . .”).

205. See *supra* notes 170-71 and accompanying text.

206. It can never be known, however, if insurance coverage would lead to more frivolous papers, largely because it is impossible to define and measure frivolousness objectively. Moreover, even if the number of sanctions increased after insurance became available, this would not necessarily imply a corresponding increase in the amount of frivolous papers. The availability of insurance itself might encourage judges to impose (and lawyers to seek) more sanctions, even in the absence of an increase in the amount of frivolous paper. Cf. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 591 (5th ed. 1984) [hereinafter *PROSSER & KEETON*] (The availability of insurance tends to increase the number and size of recoveries in some types of tort cases.).

207. Cf. Nelken, *supra* note 5, at 1325 (Sanctions need to “outweigh the benefits derived, for example, from delay” in order to be effective deterrents.).

harm.²⁰⁸ Such an attorney will likely face higher insurance premiums for coverage of both sanctions and malpractice claims,²⁰⁹ and may have difficulty in the future finding any professional liability insurance at all.²¹⁰ In addition, the attorney's reputation will likely be damaged. The fact that attorneys spend large amounts of money fighting small monetary sanctions suggests that the reputational effects of rule 11 may serve an important, if not critical, punitive and deterrent role.²¹¹ Furthermore, rule 11 gives courts flexibility to punish egregious violators of the rule in uninsurable ways. In particularly serious cases, "an appropriate sanction" could consist of severe nonmonetary sanctions, such as dismissing a pleading that violates the rule, reprimanding the attorney in a published opinion, referring the attorney to a disciplinary body, or barring the attorney from appearing in court. These non-monetary sanctions would have a substantial punitive effect even on insured attorneys who violate the rule.

Moreover, the insurance mechanism itself can be designed to deter attorneys from violating rule 11. Insurers resolve the problem of moral hazard through deductibles, coinsurance, risk classification, and pricing.²¹² The application of these tools to rule 11 coverage would minimize the adverse effects of insurance on deterrence. With deductibles and coinsurance, attorneys would still be financially responsible for a portion of sanctions and defense costs. With accurate pricing and risk classification, attorneys would be encouraged to avoid sanctions in order to maintain lower premiums.²¹³

The argument that insurance would undermine rule 11's deterrence is simply a new version of an old, generally discredited line of thought. "Throughout its history," notes one commentator, "the insurance device has been alternately hailed as a promoter of communal

208. See Schwarzer, *Rule 11 Revisited*, *supra* note 2, at 1017 (describing the "penal consequences" of rule 11 sanctions, "including injury to a lawyer's reputation, investigation by state bar associations, and adverse effects on malpractice insurance coverage").

209. *Cf.* Bruce, *supra* note 203, at 85 (noting that with automobile insurance "it is beyond dispute that the rating systems used by most liability insurers provide substantial penalties to those drivers who are convicted of accident-causing behaviour").

210. See RULE 11 IN TRANSITION, *supra* note 2, at 91 (postulating that rule 11 sanctions "might well be considered a material fact to be considered in continued coverage" of an attorney by an insurance company).

211. *Cf.* Golden Eagle Distributing, Inc. v. Burroughs, Inc., 801 F.2d 1531 (9th Cir. 1986) (large law firm appealing \$3,155.50 sanction).

212. See *supra* notes 179-81 and accompanying text.

213. See K. ABRAHAM, *supra* note 101, at 15 (By setting higher premiums for insureds with more losses, "the insurer can create loss prevention incentives and thereby mitigate moral hazard."), & at 44 (pricing and risk classification can effectively deter losses); James, *supra* note 195, at 560 ("Insurance companies can and do adjust their rates and select their risks so as to furnish an incentive towards safety."). *But see* Harrington, *Prices and Profits in the Liability Insurance Market*, in R. LITAN & C. WINSTON, *LIABILITY: PERSPECTIVES AND POLICY* 46-47 (1988) (The lack of statistical data and information on insureds "leads to too little prevention and too many losses.").

welfare and damned as a generator of evil."²¹⁴ Fire insurance, for example, was originally thought to provide an incentive for arson.²¹⁵ General liability insurance, which developed late in the nineteenth century, was at the time thought to eliminate the "financial deterrent against negligent and criminal acts."²¹⁶ Yet by 1986 insurance companies were writing over \$175 billion in net premiums annually for property and liability insurance,²¹⁷ and courts have recognized this insurance not only as commonplace, but also as valuable to society.²¹⁸ The extension of insurance coverage to rule 11 sanctions should lead to no more frivolous conduct in the courts than accident insurance has led to accidents in society at large.²¹⁹

Furthermore, even assuming that insurance would diminish the punitive or deterrent aims of rule 11 to some degree, prohibiting insurance on this basis would overlook the multiple purposes attributed to the rule. Rule 11 sanctions do more than punish or deter violators of the rule. Sanctions under rule 11 also compensate parties who are forced to respond to frivolous papers. At the present time, courts disagree about the proper weight to be given each of the three purposes ascribed to rule 11. In such a climate of uncertainty, opponents of rule 11 insurance cannot claim that a marginal diminution in punishment or deterrence would sound the death knell of rule 11.

Insurance would actually contribute to the compensatory purpose of rule 11. This contribution can be demonstrated by analogy to the tort liability system, which is designed "to afford compensation for injuries sustained by one person as the result of the conduct of another."²²⁰ Damage awards in tort cases are structured "to return the plaintiff as closely as possible to his condition before the accident."²²¹ By covering these damage awards in tort cases, insurance furthers the goal of compensation.²²² Liability insurance helps guarantee that in-

214. McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941).

215. *Id.*

216. *Id.*

217. Harrington, *supra* note 213, at 44 (based on estimates given in table 3-1 therein).

218. *See infra* notes 224-26 and accompanying text.

219. *Cf.* R. JERRY, UNDERSTANDING INSURANCE LAW 351 (1987) ("[T]here is no evidence that the existence of insurance has caused more negligence. There is equally little likelihood that the existence of insurance for reckless or wanton acts would cause more reckless or wanton behavior.").

220. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238 (1944); *see also* Litan, Swire & Winston, *supra* note 83, at 3-4; Seavey, Book Review, 45 HARV. L. REV. 209, 211 (1931) ("Tort liability . . . exists chiefly to compensate an individual, as nearly as may be, for loss caused by the defendant's conduct.").

221. M. FRANKLIN & R. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 597 (4th ed. 1987); *see also* *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985) ("The primary objective of awarding damages in civil actions has always been to compensate the injured plaintiff, rather than to punish the defendant.").

222. *Cf.* James, *supra* note 195, at 550 ("The best and most efficient way [to deal with human

jured parties will be compensated for damages suffered.²²³ Such insurance is “regarded more and more as a device for providing funds to meet the needs of injured persons and less and less as a device for the protection of the insured.”²²⁴ For this reason,²²⁵ a number of states require automobile owners to carry tort liability insurance.²²⁶ In the law of torts, liability insurance advances the aim of compensation.

Insurance coverage for rule 11 sanctions would similarly enhance the compensatory purpose of the rule. The presence of insurance coverage for sanctions would provide compensation to the “injured” party regardless of an attorney’s financial condition.²²⁷ Admittedly, insurance for rule 11 sanctions may seem less necessary for compensation purposes than does insurance for, say, automobile accidents.²²⁸ Even so, courts do consider attorneys’ ability to pay in establishing sanction awards and on this basis have awarded less than full compensation in some cases.²²⁹ If insurance were available, courts could abandon the extra consideration of ability to pay and could award amounts that are fully compensatory. On the basis of compensation, therefore, insurance coverage for rule 11 sanctions should be permitted, if not encouraged.

Since rule 11 presently has multiple purposes — one of which would actually be furthered by the availability of insurance — a complete prohibition on rule 11 insurance is not justifiable at this time. Nevertheless, a partial prohibition could still be advanced. Recognizing that insurance would contribute to compensation, but assuming that it would diminish punishment to some degree, it might make sense to allow rule 11 insurance for compensatory sanctions, but not for punitive ones.²³⁰ Theoretically, this limited insurability approach could best accommodate rule 11’s multiple purposes. Since insurance coverage will advance the compensatory purpose of rule 11, then com-

losses] is to assure accident victims of compensation, and to distribute the losses involved over society.”).

223. See R. MEHR, *supra* note 153, at 155.

224. McNeely, *supra* note 214, at 60.

225. See PROSSER & KEETON, *supra* note 206, at 600.

226. *Id.* at 602-03.

227. *Cf.* G. JOSEPH, *supra* note 26, at 79 (noting that insurance could be one potential way to ensure that rule 11 victims are compensated).

228. See James, *supra* note 195, at 563 (arguing that accident liability insurance has “increased the chances of compensation to the victim in cases where someone is legally liable to him for damages”).

229. See, e.g., *Johnson v. New York City Transit Auth.*, 823 F.2d 31, 33 (2d Cir. 1987) (courts may take ability to pay into consideration); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986) (noting in dictum that courts can consider an attorney’s ability to pay), *cert. denied*, 480 U.S. 918 (1987); *Doe v. Keane*, 117 F.R.D. 103, 107 (W.D. Mich. 1987) (awarding only half the requested fees to avoid “financial ruin” of offending attorney).

230. *Cf.* K. ARROW, *Insurance, Risk, and Resource Allocation*, in *ESSAYS IN THE THEORY OF RISK-BEARING* 143 (1971) (discussing reasons for partial risk-shifting).

pensatory sanctions should definitely be insurable.²³¹ Indeed, covering compensatory damages is what insurance does all the time. When it is necessary, though, to punish lawyers for egregious conduct, insurance might be prohibited.²³² In such cases, attorneys — rather than insurers — would bear the brunt of the sanctions.

This limited insurability approach would give attorneys the benefit of insurance coverage for the costs of defending rule 11 motions,²³³ which in many cases may well exceed the amount of the sanctions themselves. When a policy covers defense costs, the insurer has a duty to defend any claim that potentially falls within the coverage of the policy. Under a limited insurability approach, any rule 11 motion could potentially fall within the coverage of a policy, since it could not be known until after a judge issues an order if the sanctions would be compensatory or punitive.

Despite these advantages, however, a limited insurability approach would probably be unworkable at the present time. Given the multiple purposes rule 11 serves, it will not always be clear whether a particular sanction is compensatory or punitive. The same sanction, for example, often serves more than one purpose.²³⁴ For a limited insurability approach to work, judges would need to make findings that set out one primary purpose for the sanctions they impose.²³⁵ In order to make such findings, trial judges would need further guidance on the role of rule 11. Judges would need to know how punitive sanctions differ from compensatory ones, and when each type is justified. One possibility would be to allow the imposition of uninsurable punitive sanctions only when an attorney acts in bad faith.²³⁶ Absent another amendment to rule 11, though, such a distinction could conflict with the discretion the rule grants judges in crafting an “appropriate” remedy.²³⁷ In practice, implementing a limited insurability approach would prove cumbersome at this time.

Unless courts can develop clear standards for imposing punitive

231. *Cf.* *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 215 (Minn. 1984) (dicta) (actual, compensatory damages flowing from attorney's breach of his fiduciary duty would be insurable).

232. *Cf. Perl*, 345 N.W.2d at 215-16 (holding uninsurable a punitive fee forfeiture imposed on attorney for breach of fiduciary duty).

233. *See supra* notes 145-50 and accompanying text.

234. *See supra* note 127.

235. In some circuits, district court judges are already required to detail the reasons for imposing sanctions, even if not the precise purpose the sanction is intended to further. *See, e.g., Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1438 (7th Cir. 1987); *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 158 (3d Cir. 1986).

236. Such a basis for punitive sanctions would comport with the basis for awarding punitive damages in tort cases, where something more than mere negligence is required. *See generally PROSSER & KEETON, supra* note 206, at 9-10. Punitive damages, though, are insurable in approximately two thirds of the states that have considered the question. *See Ostrager, supra* note 201, at 549-63.

237. *See supra* notes 52-53 and accompanying text.

versus compensatory sanctions, or until it can be shown that the over-riding purpose of rule 11 will be substantially undermined by insurance, the basis for any prohibition of rule 11 insurance will remain inadequate. Because any prohibition of rule 11 insurance is presently premature, it is important now to consider an independent justification for allowing insurance coverage of rule 11 sanctions. Allowing coverage for sanctions would lead to a better balance between the competing concerns of creative advocacy and efficient judicial process.²³⁸ With insurance coverage, the filing of frivolous papers would still be sufficiently discouraged, but the chilled advocacy currently associated with the rule would be alleviated.

Although designed to deter frivolousness, rule 11 was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."²³⁹ Many courts and commentators believe, however, that the rule as it currently operates threatens enthusiastic and creative advocacy.²⁴⁰ As rule 11 sanctions grow larger and more prevalent, and as the standards for imposing them remain uncertain, the risk that an attorney will be sanctioned increases. To reduce this risk, attorneys may avoid filing claims or making arguments based on creative, but still potentially legitimate, factual or legal theories.²⁴¹ In

238. In more formal terms, this means that insurance coverage of sanctions would lead to a more optimal level of deterrence. An optimal deterrence level is one at which socially undesirable activity, such as the filing of frivolous papers, is minimized, but socially desirable activity, such as vigorous and creative advocacy, is maximized.

239. FED. R. CIV. P. 11 advisory committee's note.

240. See, e.g., *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 885 (5th Cir. 1988) (en banc) ("If abused, Rule 11 may chill attorneys' enthusiasm and stifle the creativity of litigants in pursuing novel factual or legal theories."); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987) ("Rule 11 creates difficulties by simultaneously requiring courts to penalize frivolous suits and protecting complaints that, although not supported by existing law, are bona fide efforts to change the law."); *cert. dismissed*, 108 S. Ct. 1101 (1988); *In re Yagman*, 796 F.2d 1165, 1183 (invalidating a \$250,000 sanction because, *inter alia*, its size "pose[d] a direct threat to the balance between sanctioning improper behavior and chilling vigorous advocacy."); *opinion amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987); Levin & Sobel, *supra* note 61, at 593; Nelken, *supra* note 5, at 1338-43 (chilling effect of sanctions); Schwarzer, *Sanctions: A Closer Look*, *supra* note 5, at 184 ("[I]mposing sanctions on lawyers for their conduct of litigation raises the spectre of chilling advocacy."); Note, *Plausible Pleadings*, *supra* note 5, at 641-42 (chilling effect of sanctions); Note, *Reasonable Inquiry Under Rule 11 — Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751 (1985) (same); Note, *Applying Rule 11*, *supra* note 5, at 911-22 (same); Rothstein & Wolfe, *Innovative Attorneys Starting to Feel Chill From New Rule 11*, *Legal Times*, Feb. 23, 1987, at 18 (same). As a matter of empirical analysis, however, it may be next to impossible to assess the full extent of the chilling effect, if any, created by the rule. See, e.g., Elson & Rothschild, *supra* note 33, at 365; Nelken, *supra* note 5, at 1339-40; Note, *Applying Rule 11*, *supra* note 5, at 922.

241. See, e.g., Levin & Sobel, *supra* note 61, at 593 ("[T]he more severe the sanctions imposed, the greater the risk of a chilling effect."); Rothstein & Wolfe, *supra* note 240, at 18-19 ("Attorneys unsure of the boundaries of Rule 11's sweep may begin refusing to take novel or risky, but arguably meritorious, cases for fear of being personally sanctioned."); Note, *Plausible Pleadings*, *supra* note 5, at 639 ("Conflicting notions of plausibility, as much as overly narrow ones, have a chilling effect on litigation, leading prudent lawyers to steer wide of even potential implausibility by avoiding filing nonstandard claims.").

an adversary system, a substantial social cost develops when attorneys begin to argue less vigorously and creatively.²⁴²

Some commentators have suggested that rule 11 restricts the filing of suits in practice areas that frequently involve novel factual or legal arguments.²⁴³ Rule 11 sanctions potentially inhibit the filing of civil rights suits, for example, because attorneys in these cases appear to have been sanctioned more frequently than those in other areas of the law.²⁴⁴ The uncertain threat of sanctions may also keep attorneys from making vigorous or creative arguments in the suits they do file.

The effectiveness of our procedural system depends on vigorous representation of clients by attorneys.²⁴⁵ A rule so harsh that it stifles advocacy contravenes the broader policies underlying an adversarial system of justice. Furthermore, a rule that discourages, even unintentionally, the making of novel arguments strikes at the essence of a common law system.²⁴⁶ The effectiveness and fairness of the law depends on innovation: "Our society is changing, and law, if it is to fit society, must also change."²⁴⁷ Common law courts not only can make law where none existed before, but can "modify[] or replac[e] what had previously been thought to be the governing rule when applying that rule would generate a malignant result in the case at hand."²⁴⁸ Under such a system, the law is inherently in flux and an objective assessment of what constitutes a frivolous legal argument seldom

242. See, e.g., *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 885 (5th Cir. 1988) (en banc); Levin & Sobel, *supra* note 61, at 593; Weiss, *A Practitioner's Comment on the Actual Use of Amended Rule 11*, 54 *FORDHAM L. REV.* 23 (1985).

243. See LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 *VAL. U. L. REV.* 331, 333-34 (1988); Note, *Rule 11: Has the Objective Standard Transgressed the Adversary System?*, 38 *CASE W. RES. L. REV.* 279, 283-84 (1987).

244. See, e.g., *Woodrum v. Woodward Cty.*, 866 F.2d 1121, 1127 (4th Cir. 1989); Nelken, *supra* note 5, at 1340; Vairo, *supra* note 2, at 200-01. Civil rights cases accounted for only 7.6% of the civil filings from 1983 to 1985, but accounted for 22.3% of the rule 11 cases during the same period; in contrast, contract claims accounted for 35.7% of all cases, but only 11.2% of the rule 11 cases. Nelken, *supra* note 5, at 1327. On the difficulty of extrapolating from these data, however, see T. WILLGING, *supra* note 3, at 160-63.

245. *In re Yagman*, 796 F.2d 1165, 1182 ("[W]e embrace the fact that zealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process."), *opinion amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987); S. LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 44-47 (1984); Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 34, 35-36 (H. Berman 2d ed. 1971).

246. See, e.g., *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) ("Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself."); Weiss, *supra* note 242, at 23 (Creative advocacy "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.").

247. K. LLEWELLYN, *BRAMBLE BUSH* 66 (1960).

248. Schauer, *Is the Common Law Law?* (Book Review), 77 *CALIF. L. REV.* 455 (1989).

comes easily.²⁴⁹ As one commentator noted, “[t]oday’s frivolity may be tomorrow’s law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then accepted as theoretically tenable (though not the law), and then accepted as the law.”²⁵⁰ In such a legal system, attempts to identify frivolous conduct, and then to punish those who engage in it, will necessarily create a risk for those who argue for legal change.

Rather than have attorneys avoid making innovative claims in order to reduce the risk of rule 11 sanctions, it would be better to allow them to obtain rule 11 insurance. Insurance coverage offers a way of balancing the policy of judicial efficiency with the competing policy of vigorous, innovative advocacy. The deterrence of rule 11 will still exist, but its harshness will be controlled. Without insurance, the risk of sanctions may prevent attorneys from presenting innovative, but still good faith, solutions to legal and social problems. With insurance, attorneys will more likely offer such solutions. Whereas rule 11 presently works to enhance judicial efficiency at the expense of advocacy, the availability of insurance would preserve vigorous advocacy while still allowing rule 11 to help streamline the litigation process.

CONCLUSION

Attorneys face a growing risk of rule 11 sanctions. The rule’s broad standards have led to uncertainty about what type of behavior a judge will find sanctionable. Furthermore, the absence of any meaningful consensus over the primary purpose of rule 11 has exacerbated the uncertainty surrounding the rule. As the number and size of rule 11 sanctions continue to grow, attorneys will likely look for insurance as a way of shifting the risk of sanctions.

Attorneys may well find insurance for rule 11 sanctions under their existing professional liability policies. Some of the existing policies can be viewed as ambiguous when applied to rule 11, and courts might therefore interpret these policies to include coverage for rule 11 sanctions. Professional liability policies cover “damages” arising out of acts or omissions of the insured attorney, and compensatory sanctions might well be thought of as such damages. This compensatory element of rule 11 could also take sanctions out of the scope of traditional exclusions for “fines or penalties” and “punitive or exemplary damages.” Furthermore, as judges can and do sanction attorneys for simple negligence, it is unclear whether coverage for sanctions should be denied by exclusions for “dishonest or fraudulent acts.” Given the doctrines that dictate interpreting ambiguous insurance policy lan-

249. Cf. Levinson, *supra* note 32, at 369-77 (discussing the difficulties of assessing frivolity in legal argumentation).

250. Risinger, *supra* note 14, at 62.

guage in favor of coverage, courts may well find that some professional liability policies cover rule 11 sanctions.

Even if courts do not find that existing professional liability policies cover sanctions, insurance companies may offer new policies specifically covering rule 11 sanctions. Rule 11 sanctions generally satisfy the three actuarial criteria for insurable losses. A large number of attorneys are exposed to the risk of sanctions. The losses from rule 11 sanctions are definite and are not necessarily intentional from the standpoint of the insured. The randomness of rule 11 sanctions exposes attorneys to an uncertain potential liability on which insurance companies may likely decide to capitalize by offering rule 11 coverage.

The likelihood that existing or new insurance policies will cover rule 11 sanctions raises the question of whether such insurance should be allowed. At the present time, courts should permit attorneys to obtain and rely upon rule 11 insurance. Although at first glance it might seem that insurance would sharply diminish the rule's punitive or deterrent effect, rule 11 will retain substantial force with the availability of insurance. In any case, even assuming insurance would lead to some decrease in punishment or deterrence, it is not clear that this should outweigh the positive contribution insurance would make to rule 11's compensatory purpose. Until courts agree on a specific, overriding purpose of rule 11, prohibiting insurance coverage on public policy grounds will be premature.

Allowing insurance for sanctions makes sense not only because of the uncertainty surrounding rule 11's main purpose, but also because insurance would alleviate the chilling problem currently associated with the rule. Chilled advocacy threatens fundamental values of our adversarial and common law system of justice. The availability of insurance for rule 11 sanctions would alleviate this threat, while still allowing the rule to regulate litigation abuse effectively.

— *Cary Coglianese*