10-1996

The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11

Charles M. Yablon
Benjamin N. Cardozo School of Law, yablon@yu.edu

THE GOOD, THE BAD, AND THE FRIVOLOUS CASE: AN ESSAY ON PROBABILITY AND RULE 11

Charles M. Yablon*

Frivolity is frowned upon in the world of civil litigation. Although the term "frivolous" never appears in the text of Rule 11 of the Federal Rules of Civil Procedure,[1] the determination that a claim is frivolous, and an *objective* determination at that, has been a primary criterion for imposing liability under Rule 11 for the last thirteen years.[2] This raises the obvious

---

* Professor of Law, Benjamin N. Cardozo School of Law. I wish to thank my colleagues A. Leo Levin, Philip Shuchman, Alex Stein, and Stewart Sterk for their advice and helpful comments in connection with this Essay.

1. Its awkward negation made a limited appearance in the 1993 amendments. Rule 11(b)(2) now requires that an "argument for the extension, modification or reversal of existing law or the establishment of new law" be "nonfrivolous."

Rule 38 of the Federal Rules of Appellate Procedure, in contrast, has always (since adoption of the Rules in 1967) provided for the award of "just damages" in the event of a "frivolous" appeal.

2. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) ("It is true that the District Court could have employed Rule 11 to sanction Chambers for filing 'false and frivolous pleadings . . . .'" (citation omitted)); Maerki v. Wilson, 1995 U.S. App. LEXIS 9750, *5 (6th Cir. Apr. 25, 1995) ("Rule 11 prohibits assertions of frivolous claims or defenses . . . ."); Jones v. International Riding Helmets, Ltd., 49 F.3d 692, 695 (11th Cir. 1995) ("In this circuit, a court confronted with a motion for Rule 11 sanctions first determines whether the party's claims are objectively frivolous—in view of the facts or law—and then, if they are, whether the person who signed the pleadings should have been aware that they were frivolous . . . ."); Townsend v.

question—exactly what makes a claim frivolous? It can't just be that the claim is a loser, because on that absurd criterion every losing claim would be frivolous. Rule 11 would thereby permit imposition of attorneys' fees on virtually every unsuccessful litigant, a concept found only in benighted legal systems like that of Great Britain.[3]

The usual, if slightly circular explanation, is that frivolous claims are those that are so lacking in merit they should never have been brought in the first place.[4] This definition enables judges to divide the world of legal claims into three relatively coherent categories: (1) successful claims (which presumably should have been brought in the first place); (2) frivolous claims (which should not have been brought); and (3) a curious category of claims which have enough merit to be brought but not enough to actually succeed. Not surprisingly, courts have had a fair amount of trouble developing standards for distinguishing frivolous cases from ordinary losers.[5]

This brings us to a second unanswered question—why do lawyers bring frivolous cases? The standard explanations are the stupidity and/or greed of lawyers, but these perennial candidates for blame seem particularly unsatisfactory in this context. The stupidity being posited of lawyers who bring frivolous cases is that rarest of all forms—stupidity about one's own short term best interests. By the standard definition, a frivolous case is one that any lawyer who did a reasonable amount of investigation would realize had no merit. It is hard to believe that lawyers do not have a sufficient interest in distinguishing winning cases from losers that they will systematically fail to investigate the facts or fully research the law that will enable them to make such distinctions. Surely most attorneys would conclude that the

---

Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc) ("Our cases have established that sanctions must be imposed on the signer of a paper if . . . the paper is 'frivolous.' The word 'frivolous' does not appear anywhere in the text of the Rule; rather, it is a shorthand that this court has used to denote a filing that is both baseless and made without a reasonable and competent inquiry." (citation omitted)); Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990), *cert. denied*, 498 U.S. 1050 (1991) ("Status as a *pro se* litigant may be taken into account, but sanctions can be imposed for any suit that is frivolous.").

3. *See* John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 634 (1984); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1061 n.253 (1989); Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 333 (1987).

4. "The essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit." Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 546 (1991).

5. *See* William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015–17 (1988) (describing the unpredictability of Rule 11's application).

time and energy spent on such preliminary investigation is less than that wasted litigating a losing case.

However, one might argue time spent litigating a losing case is not necessarily wasted. Lawyers are often paid for their time by the hour, win or lose. But unless we can explain why clients would be willing to pay lawyers to bring cases that have no merit, we have simply pushed the stupidity hypothesis back one level. Moreover, many of the complaints sanctioned as frivolous under Rule 11 involve contingency fee cases in which counsel will not be paid unless the suit succeeds. It seems we are back to stupidity as the only explanation for such bizarre litigation behavior.

This Essay offers a different view of the frivolous case—that it doesn't exist, at least rarely in the version envisioned in the case law and literature of Rule 11. Rather than involving claims that had no chance of success and should never have been brought, I believe most of the cases that have been challenged and sanctioned in recent years under Rule 11 were brought by lawyers who reasonably believed that their claims had a low (but not zero) probability of success. This provides a more plausible explanation for why lawyers persist in bringing such cases because, as every probability theorist and horseplayer knows, sometimes it pays to bet on the long shots.[6]

If frivolous cases are indeed long shots that didn't pan out, rather than baseless claims that should never have been brought, this assertion raises fundamental questions about the nature and desirability of Rule 11. It implies that there is no special qualitative characteristic of the "frivolous" case that distinguishes it from ordinary losers. The claims lawyers choose to file in federal court will simply have differing probabilities of success, ranging from the very high to the very low. Rule 11, therefore, represents nothing more than a policy decision to impose additional costs on people who bring some arbitrarily determined class of low-probability claims. This does not necessarily mean that Rule 11 is a bad idea, but it does mean that it is an even more controversial measure than has generally been recognized.[7] After all, nobody is going to stand up and defend a lawyer's right to

6. Throughout this Essay, I use the term "low-probability case" and "long shot" interchangeably to refer to cases in which the lawyer bringing the case believes, based on information presently available to her, that the likelihood of success, i.e., the likelihood of convincing a factfinder of the allegations by a preponderance of the evidence, is low. This should not be confused with the evidentiary claim that the allegations, while they might be true, cannot be established by a preponderance of the evidence.

7. The post-1983 amendment to Rule 11 is already considered "the most controversial amendment to the Federal Rules since their adoption a half-century ago." Carl Tobias, *Some Realism About Empiricism*, 26 CONN. L. REV. 1093, 1093 (1994).

file frivolous claims, but there are probably at least a few folks who have a good word to say about long shots. I happen to be one of them.

Low-probability cases can still be attacked, of course, particularly by those who believe the courts are overburdened and the price of justice is too high. If one seeks to deter litigation, imposing added costs on the cases with the lowest probabilities of success seems like a reasonable way to do it. An honest defense of Rule 11, however, would have to acknowledge that a predictable number of babies are inevitably going to get thrown out along with all that bath water. This Essay shows that the Holy Grail of policymakers in this area, a rule that will deter frivolous litigation without inhibiting meritorious cases, is simply not attainable. Deterring low-probability claims, by definition, means the loss of some meritorious claims.[8]

Section I of this Essay sets forth the concept of low-probability litigation with positive expected value and shows that it provides a plausible account of why lawyers are motivated to bring cases, most of which they are going to lose. It also explains why many such cases might be viewed as baseless from the hindsight perspective of the trial judge. Section II examines recent empirical studies of Rule 11 that support the view that most cases now being sanctioned under the Rule are indeed long shots rather than baseless actions that had no possibility of success when filed. Section III examines the policy implications of sanctioning low-probability litigation. It shows that any rule that sanctions low-probability claims will inevitably deter some potential winners along with the losers. The problem is inherent in the uncertainty and probabilistic nature of litigation judgments

---

Many have questioned whether the presumed benefits of deterring frivolous cases is outweighed by the collateral harms associated with the Rule, including wasteful satellite litigation on Rule 11 motions, fostering accusations of unprofessionalism among counsel, and chilling effects on meritorious claims. *See, e.g.*, Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990). This Essay, however, challenges the premise that deterring frivolous cases is a "benefit" to the legal system and to society at all.

8. There were a number of significant changes made to Rule 11 in 1993. Although some of the changes arguably made the Rule tougher, there is general consensus that the overall deterrent effect of Rule 11 was probably reduced. Although it is too early to assess the effects of the 1993 changes, we have a fair amount of data on the Rule's impact between 1983 and 1993.

This Essay will focus on that data in an attempt to understand how Rule 11 has been functioning and to discuss the desirability of sanctioning frivolous litigation. As will be clear in this Essay, I think that the watering down of Rule 11 is a good thing, and would like to see it further diluted. Others, including Justice Scalia in his famous dissent from the transmission of the 1993 Rules Amendments to Congress, take a rather different view. Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting).

In short, this paper addresses what has been and remains the central issue in the debate over Rule 11—whether it is appropriate and beneficial to seek to punish lawyers and clients for filing claims that the courts later determine are "frivolous."

and cannot be fixed by tinkering with the Rule. Finally, I examine the arguments for and against the sanctioning of low-probability litigation. I conclude with a stirring call for truth, justice, and a return to the subjective standard of pre-1983 Rule 11.

I. WHY IT MIGHT PAY TO BRING FRIVOLOUS CASES

This Essay focuses on plaintiffs' and plaintiffs' counsels' decision to bring frivolous actions. Although the penalties of Rule 11 are also applicable to defendants and their counsel, and may be used to sanction other misconduct besides the filing of frivolous claims, it is well-established that plaintiffs and plaintiffs' counsel incur the wrath of Rule 11 far more frequently than their defending counterparts.[9] They are most frequently sanctioned for filing frivolous claims.[10] Filing frivolous claims, as noted, is also the most inexplicable of litigation behaviors. Sheer stubbornness, as well as the time value of money and theories of efficient breach, all explain why defendants might pay by the hour to have their counsel mount even the weakest defenses. *Starting* a frivolous lawsuit, however, seems like a waste of time for everyone involved.

Law and economics theorists, with their unshakable faith in economic rationality, have come up with at least a few instances in which it pays for lawyers to bring cases they know they are going to lose.[11] One scenario is where it will cost defendant more to defeat the claim than it will cost plaintiff to prosecute it. Plaintiff can then extort a settlement based purely on defendant's potential savings in litigation costs. Settlements can also be

---

9. *See* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 953–54 (1992) [hereinafter *AJS Study*] (plaintiffs' side was the target in 57.6% of sanctions motions and in 70.3% of cases in which sanctions were imposed); *see also* FEDERAL JUDICIAL CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14–15 (1991) [hereinafter *FJC Study*] (in five judicial districts studied, plaintiffs' side was the target in 52% to 72% of sanctions motions and in 61% to 81% of cases in which sanctions were imposed).

10. *AJS Study*, *supra* note 9, at 953–54. Filing of allegedly frivolous suits or claims was the reason most often given by respondents for the imposition of sanctions (21.3%). Many of the other reasons cited, such as "[f]iling frivolous pleading/motion/response" (16.5%), "[f]ailure to adequately investigate facts" (6.8%), and "failure to adequately investigate law" (4.0%) may also implicate the decision by counsel for plaintiff to bring a lawsuit later determined to be frivolous. *Id.*

11. *See* Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought Solely for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (criticizing certain aspects of these models).

extorted for frivolous claims when information asymmetries make it more costly for defendants to distinguish potentially valid claims from likely losers than to simply pay everybody off. I think it doubtful, however, that the assumptions of these models are reflected in much actual litigation.[12]

Also excluded from consideration here are the irrational "nut" cases, frequently brought pro se, alleging conspiracies and harms inflicted by everyone from the President of the United States, to Satan, to space aliens. (All of whom, it may be noted, are hard to subject to jurisdiction in the federal courts.) What we are left with then are the "run of the mill" frivolous cases, what defendants might call "nuisance suits." They are brought by counsel and are often lost on a motion to dismiss or for summary judg-

12. It seems unlikely that plaintiffs can impose consistently higher litigation costs on defendants than they incur themselves. Many of the cases found to be frivolous are resolved quite early in the litigation process, on motions to dismiss or for summary judgment. The cost of litigation up to the time of such motions seems to fall relatively equally on both sides. The model seems to assume that no dispositive threshold motion will be made and plaintiff will be able to threaten a one-sided and abusive discovery process, with plaintiff doing all the asking and defendant doing the much more expensive document shuffling, producing, and answering.

In real litigation, however, defendants' counsel are generally quite adept at placing time-consuming and expensive motions and other obstacles in the path of plaintiffs' counsel (particularly in a case they know they are going to win), such that it seems unlikely a plaintiff can create a sufficient threat, based on disparity in litigation costs alone, to coerce a settlement. This is particularly true if, as is often the case, the defendants are likely to be repeat players (insurance companies or corporations) and want to discourage such litigation in the future.

The information asymmetry argument also seems dubious in light of the relatively equal availability of information concerning the likelihood of success on the law (i.e., both sides can read the relevant statutes and cases), the relatively cheap access to the plaintiff's version of the facts provided by liberal discovery (you can always take the plaintiff's deposition), and the added informational benefits many defendants, like insurance companies, get by being repeat players.

What seems more likely is that litigation costs and information asymmetries are added factors in promoting settlements in cases in which defendants perceive there to be a low, but not zero, chance of a large recovery. If a plaintiff's and a defendant's assessments of the expected value of the claim are reasonably close, they can save litigation costs and reduce uncertainty by settling. This gives a plaintiff's lawyers even more incentive to bring low-probability claims with positive expected returns.

A slightly different information asymmetry argument is based on the "threat" that a plaintiff might actually win the lawsuit even though he does not, in fact, meet the criteria for liability. In such studies, courts or juries are seen as making "errors," and those errors are socially costly. In real litigation, of course, the true facts of the matter are never known, and a case won by the plaintiff is by definition a meritorious case. For purposes of this Essay, I am utilizing the famous assumption of legal realists and practicing litigators that determinations of legal merit involve "[t]he prophecies of what the courts will do in fact." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

ment, accompanied by a Rule 11 motion. Judging by the frequency with which Rule 11 motions are made, the courts seem to be full of such cases.[13] Why?

A. A Portfolio of Potential Losers

Consider the law practice of Sandra J. (Sandy) Flywheel, a recent graduate of a moderately prestigious law school. After getting some trial experience with a medium-sized firm, she is now trying to make it on her own as a sole practitioner. Sandy doesn't have any rich corporate clients. She represents mostly individual plaintiffs and is willing to take their cases on a contingency fee basis.

She doesn't mind representing the little guy, but Sandy hasn't taken any vows of poverty, either. She keeps her eye out for the big case, the potential million dollar recovery. She knows that if she can manage to win such a case, it can make her fortune and her reputation at the same time.

Unfortunately, contingency fee litigation, like everything else in law, turns out to be a rather crowded field. All the really good cases, the ones with big damages and strong liability, seem to be snapped up by the same small group of well-known, well-funded trial lawyers.

Out of necessity, then, Sandy has begun to specialize in a different type of litigation. The best cases available to her are those in which potential damages are large but liability is weak, or, as she would put it, uncertain. Although her cases run the gamut from civil rights to securities to medical malpractice and products liability, recovery in every one of them involves overcoming what she has come to think of as "problems."

That is, she recognizes that to win any of these cases, she will need not just good lawyering skills but some luck as well. For example, she knows that the facts underlying the allegations of fraud in her securities complaint are thin, and hopes that when defendants make the inevitable motion to dismiss, she will be lucky enough to have drawn a judge who takes a liberal

---

13. *See, e.g.*, *AJS Study*, *supra* note 9, at 952 (Seven and six-tenths percent (7.6%) of the respondents reported that they had been involved in a case in which Rule 11 sanctions actually had been imposed during the past 12 months, and 24.3% of the respondents reported having been involved in a case with a Rule 11 motion or show cause order that did not ultimately lead to sanctions during the past 12-month period.).

view of the pleading requirements.[14] Similarly, although the plaintiff in her employment discrimination action is certain she was passed over for promotions because she is female, Sandy knows that defendants have developed a job performance record on her client showing her as insubordinate. Sandy will have to get lucky in discovery to find some evidence that casts doubt on defendants' story. Although the plaintiff in Sandra's suit against the power company is undeniably ill and has lived fifteen years near high voltage lines, Sandra knows she will need luck to find an expert that will put forth a theory of causation sufficiently credible to withstand a directed verdict motion and convince a jury to award damages to her client.[15]

Sandy is a realist. She knows that every one of these cases looks like a loser. Based on her present knowledge of the facts and the law, she estimates that she has only about a 10% chance of winning any one of them. However, Sandy also knows a little bit about probability theory and recognizes that if she brings ten such cases, each with a 10% chance of success, her odds of winning at least one of those cases is almost two-to-one in her favor. Accordingly, she has filed them all and is hoping for the best.

Is Sandy engaging in frivolous litigation? Should she be subject to sanctions under Rule 11? Those are the questions I hope to get you to consider in Section III of this Essay, but first I must convince you that it is cases like Sandy's that make up the bulk of the "frivolous" cases sanctioned under Rule 11.

Let's first consider why it is that, unlike the standard notion of the frivolous case, it makes sense for Sandy to bring this litigation. The preceding hypothetical assumes that lawyers make probabilistic judgments about cases under conditions of uncertainty. When a lawyer decides to take a case, she knows some things about it (her client's version of the events, the relevant law, her evaluation of the client's veracity and credibility as a witness), and knows that there is other relevant information she cannot possibly know (who the judge will be, what that judge's attitude will be toward the relevant procedural and substantive issues, what documents will be found in defendant's files) or can only know with additional expendi-

14. *Compare, e.g.*, Morgan v. Kobrin Secs. Inc., 649 F. Supp. 1023, 1028 (N.D. Ill. 1986) (plaintiff need only set forth the "bare bones of the fraudulent scheme") *with In re* Gupta Corp. Secs. Litig., 900 F. Supp. 1217, 1229 (N.D. Cal. 1994) ("[C]ourts have required that the facts pled support a strong inference of fraudulent intent.").

15. There has apparently been one case litigated on the theory that electrical magnetic fields from high voltage lines caused cancer. The case went to a jury and an expert was permitted to testify on plaintiff's theory of causation, but the jury ruled in favor of defendant. *See Legal News Briefs*, NAT'L L.J., Mar. 11, 1993, at 6, 6; Victoria Slind-Flor, *Fertile Fields of Litigation: Did Power Line Radiation Cause Cancer?*, NAT'L L.J., Apr. 26, 1993, at 1, 1.

tures of time and/or money. On the basis of what she knows and does not know, the lawyer forms some probabilistic judgment about the case's likelihood of success.[16]

We make such judgments all the time. Will my train be late? Will my Corporations professor call on me today? Will Clinton be reelected? We assume that we are competent to make such judgments and plan our lives in accordance with them.[17]

In the previous hypothetical, Sandy Flywheel's judgment is that each of her cases has a low probability of success. Does that mean she should abandon them in favor of more meritorious ones? Not necessarily. According to standard portfolio theory, the value of a claim is measured by the amount that will be realized upon the occurrence of an event times the probability of that event.[18] In a litigation context, one must also subtract from the expected value of the claim the costs of litigating it.[19]

On this basis, consider whether it is better for Sandy to take (on a 33.3% contingency fee) a $50,000 claim with a 75% chance of success or a

---

16. For an exposition of the idea that probability judgments represent personal degrees of belief about uncertain future events, see DETLOF VON WINTERFELDT & WARD EDWARDS, DECISION ANALYSIS AND BEHAVIORAL RESEARCH 90-136 (1986).

17. These judgments are made using the language of probability, yet they are describing something rather different from the phenomena studied under classical probability theory. Classical probability developed out of the study of games of chance, and can be thought of as describing the frequency with which certain results will be obtained from certain repeatable events (i.e., the roll of dice or spin of a roulette wheel). This concept of probability is sometimes referred to as "frequentist."

The probabilities involved in predicting the outcome of litigation, however, involve estimating the likelihood of the occurrence of single, nonrepeat events. Probability statements made in these contexts are understood by most decision theorists as describing the speaker's degree of certainty that the event in question will occur. Because there is no objective way to determine the accuracy of such judgments beyond certain minimal rationality constraints, such probability judgments are sometimes referred to as "subjectivist." Alex Stein has pointed out that, to the extent I am assuming that these judgments satisfy not merely minimal rationality requirements but are also based on the lawyer's prior experience and knowledge, they are more appropriately described as "epistemic probability." *See* ROY WEATHERFORD, PHILOSOPHICAL FOUNDATIONS OF PROBABILITY THEORY (1982).

Whatever it is called, most probability theorists assume that if people are able to make accurate probability judgments about non-repeat events (and that is a big and somewhat controversial question), they will produce aggregate results similar to those predicted by classical probability theory. Accordingly, half of the cases assigned a 50% chance of success will be winners, but only 10% of the cases assigned a 10% probability of success will succeed.

18. E.g., the value of a coin flip by which you will get $20 if it comes up heads is $10 (0.5 x $20). *See* WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 227-29 (6th ed. 1996).

19. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5 (4th ed. 1992) (analyzing the disposition of civil cases based on probability of success and costs of litigation and settlement).

$500,000 claim with a 10% chance. (Assume that the amount of time and other litigation costs involved in prosecuting both cases is comparable.) In the former case, the expected value of the claim is $37,500 (0.75 x $50,000) for a fee with an expected value of $12,500. In the low-probability case, however, the expected value of the claim is $50,000 (0.10 x $500,000) and her fee would be worth $16,650. Obviously, the low-probability case is a better investment of Sandy's time and energy.

Not so fast! This expected value analysis may sound good, but think about what really is going to happen to Sandy under the two scenarios. In the first case, she has a good, but not certain, chance of winning her $50,000 claim and getting a fee of $16,500. In the second case, she has a small chance of winning a bonanza, a $500,000 recovery that will pay her $166,500, and a much stronger likelihood that she will not be able to pay her electric bills. If, after considering these options, you decide that you would rather spend your time on the first case than the second, you, like most people, are risk averse.[20]

But risk can be reduced through diversification. Sandy has developed a portfolio of cases whose risks are independent of each other, i.e., the result in case A neither increases nor decreases the probability of success in cases B, C, D, etc.[21] Litigating ten such cases is very much like rolling a die ten times. The probability of rolling a six on any given try is only one in six, but the likelihood of rolling at least one six in ten tries is approximately 84%.

Similarly, if you litigate ten cases, each with a 10% likelihood of success, your chances of winning at least one (and thus actually getting some money for your efforts) has gone up to 65%.[22] Accordingly, if you have ten such cases with an average potential recovery of $500,000, each taken on a 33.3% contingency fee basis, you have a two-thirds probability of

---

20. *See* KLEIN & COFFEE, *supra* note 18, at 233–34.

21. Under standard portfolio theory, the best way to diversify is to find risks that are negatively correlated with one another. If Company A will earn $100 per share in boom times and nothing in times of recession, and Company B will earn $100 per share in a recession and nothing in boom times (and if there is a fifty-fifty chance of either recession or boom), you can eliminate this economic risk entirely by purchasing an equal number of shares of Companies A and B. Such a portfolio will earn $50 a share under any economic condition. *See* VICTOR BRUDNEY & WILLIAM W. BRATTON, CORPORATE FINANCE 88–91 (4th ed. 1993).

It is unlikely that lawyers can find many cases that correlate negatively in the manner of Company A and Company B (indeed, it is far from clear that investors can locate such companies). What they can do, however, is locate cases with risks that are independent of one another.

22. It is computed by calculating the probability of losing all 10 cases, and then taking the reciprocal of that number ($1 - 0.9^{10}$). Note that your probability of success does not increase through such diversification of your caseload. Your chance of success for each case remains at 10%, and your likelihood of success with respect to the portfolio as a whole remains 10%.

winning at least one case and earning $166,500 from your portfolio, which gives it an expected value of $108,225.[23] If the cost to you of litigating these cases is less than $108,225, then this portfolio of litigation has a positive expected value.

The possibility of settlement changes this analysis, but actually makes bringing low-probability cases more attractive for plaintiff's counsel. Under standard economic models of settlement behavior, Sandy should be able to settle each of her ten cases for an average settlement of $50,000 and an average fee of $16,650, assuming that each defendant's litigation costs exceed that defendant's settlement costs, and each defendant roughly agrees with Sandy as to the probability the claim will succeed.[24] On this basis, Sandy still makes $166,500 from these ten low-probability cases and she doesn't even have to do much litigating.

Of course, the real world is likely to be somewhat messier than this. Defendants may not agree with plaintiff's estimate of likelihood of success. Defendants are also operating under uncertainty, but the information available to them is different from that available to plaintiff. They may also have institutional or strategic reasons for refusing to settle low-probability cases.[25] In negotiating settlements, Sandy will have to watch out for an adverse selection effect in which the defendants most eager to accept her $50,000 settlement offer are those against whom her claims are most likely to be successful. But Sandy knows that as these cases proceed, both her and defendant counsel's assessment of plaintiff's probability of success will change. Part of the art of litigating this kind of case, as Sandy has dis-

---

23. Expected value is determined by: 0.65 x $166,500. Actually, the expected value is higher because it is the sum of the two-thirds probability of winning one case plus the lesser probabilities of winning 2, 3, or all 10 cases.

24. *See* POSNER, *supra* note 19; William Baxter, *The Political Economy of Antitrust*, in THE POLITICAL ECONOMY OF ANTITRUST: PRINCIPAL PAPER BY WILLIAM BAXTER 3 (Robert D. Tollison ed., 1980); I.P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539 (1983); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Donald Wittman, *Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988).

Under these models, a plaintiff's minimum settlement demand would be the plaintiff's estimate of the plaintiff's likelihood of success times the likely recovery minus the plaintiff's costs of litigation plus settlement costs ($P_pJ - C_p + S_p$). Settlement should occur when the defendant's maximum offer is higher than the plaintiff's minimum demand. The circumstances under which settlement will occur can be formalized as follows: $P_p - P_d < (C - S)/J$. In this formula, C equals the plaintiff's litigation costs plus the defendant's litigation costs. S equals the plaintiff's settlement costs plus the defendant's settlement costs.

25. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 343 (1991).

covered, is to settle at the moment when her case appears to pose the maximum level of risk to defendant. Basically, however, the possibility of settlement does not change her strategy for picking cases and actually somewhat increases her chances of realizing value from low-probability cases.

B. Why Losing Claims Seem Worse to Judges than to the Lawyers Who Bring Them

Do such low-probability claims with positive expected returns constitute the bulk of the claims actually being sanctioned under Rule 11? There are good reasons to believe they do. Viewing these claims as low-probability rather than baseless provides a coherent explanation for why lawyers bring them, and one that comports with basic concepts of probability theory. But this is not what judges *say* they are doing in their sanction decisions. They describe the claims they are clobbering as "baseless" ones that should never have been brought, and that a reasonable inquiry would have shown lacked any possibility of success.[26] Judges also *say* they are evaluating these claims from the same perspective as the lawyers who bring them, looking at the information available to plaintiffs' counsel at the time the action was brought.[27]

Am I calling these judges liars? Certainly not. But I do believe that judges are very likely to have different and lower estimates of the probability of success of weak claims than the lawyers who bring them. This is in part because predictions of the probability of single future events are inherently subjective, and in part because judges, in seeking to make ex post reconstructions of what a reasonable plaintiff's lawyer's ex ante pre-filing investigation would have revealed, are likely to systematically neglect cer-

---

26. *See, e.g.*, Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 553 (1991) (noting that the purpose of the Rule is to "deter baseless filings"); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987) (holding that when even a "minimal investigation" would have revealed that plaintiff's claim had "absolutely no chance of success," the claim violated Rule 11) (quoting Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985)); *Eastway*, 762 F.2d at 254 (noting that sanctions are appropriate "where it is patently clear that a claim has absolutely no chance of success"); Carr v. Times Picayune Publishing Corp., 619 F. Supp. 94, 98 (E.D. La. 1985) (finding that a claim that has "no support in any possible theory of law or any possible interpretation of the facts" violates Rule 11).

27. *Business Guides*, 498 U.S. at 551 (duty to conduct a reasonable inquiry into the facts and law before filing); CTC Imports & Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 578 (3d Cir. 1991) (court "is expected to avoid the wisdom of hindsight and should test the signer's conduct by what was reasonable to believe at the time the pleading, motion, or other paper was submitted" (citing Notes of Advisory Committee on Rules, 1983 Amendment, Fed. R. Civ. P. 11, *reprinted in* 97 F.R.D. 165, 199)).

tain factors and overemphasize others. In short, judges are not lying when they conclude that these claims are baseless; they are just wrong.

What judges and lawyers describe when they speak about the potential merits of a claim is the probability of the occurrence of a single future event (i.e., whether a judgment will be given for plaintiff). It is a well-established principle of probability theory that probability judgments about single, nonrepeat events are impossible either to verify or refute on any objective or empirical basis.[28] Although it feels to many of us (judges included), that we are describing some discernible characteristic of a claim when we say it has "a lot of merit," "a little merit," or "no basis in law or fact," exactly what are these different terms describing?[29] Most probability theorists would say that they are not describing presently existing facts about the claims, but rather are reporting the speaker's subjective beliefs as to how certain or uncertain the speaker is that a future event (in this case, a judgment for plaintiff) will occur. If you say that a claim has no basis in law or fact (i.e., 0% probability of success), and I say that it is a long shot that could pan out if I get the right judge and get lucky in discovery (i.e., 10% probability of success), is there any objective fact, present or future, that could resolve our dispute? If the claim is ultimately lost, that would certainly not refute my belief that it was a long shot. A win, concededly, would show I was right and you were wrong, but winning cases are rarely the subject of Rule 11 motions. The issue in most such motions is distinguishing (1) claims that had no possibility of success from (2) those that had a small possibility of success but lost anyway. If you state your belief that the claim fell in category (1), and I disagree and place it in category (2), there is no way, either in theory or in practice, to determine which one of these probability judgments is more accurate. Indeed, it is not even clear what "accuracy" might mean with respect to such judgments.

Accordingly, although the standard for determining frivolousness under Rule 11 since 1983 has generally been described as "objective," it is

---

28. De Finetti, one of the founders of the subjectivist concept of probability, declared that "probability does not exist." BRUNO DE FINETTI, THEORY OF PROBABILITY at x (Antonio Machi & Adrian Smith trans., Wiley Classics Library Edition, 1990). His followers are quick to point out that what he meant was that no objectively demonstrable concept of probability exists, at least for nonrepeat events. DECISION, PROBABILITY AND UTILITY 97 (Peter Gardenfors & Nils-Eric Sahlin eds., 1988).

29. This notion that probabilistic statements describe some inherent characteristic or propensity of the thing being described is sometimes called the "propensity" theory of probability. L. JONATHAN COHEN, AN INTRODUCTION TO THE PHILOSOPHY OF INDUCTION AND PROBABILITY 56 (1989). As Cohen notes, however, "a propensity analysis . . . does not intrinsically carry with it any distinctive type of guidance in regard to the actual evaluation of probabilities." *Id.*

objective only in a very strange and limited sense. The pre-1983 Rule 11 authorized sanctions only where the judge believed that the lawyer who brought the case was doing so for improper motives. The post-1983 Rule 11 authorizes the judge to substitute her own subjective judgment as to the probability of success (as noted above, all such judgments are inherently subjective) for the subjective judgment of the attorney who brought the case.[30] The judge is supposed to examine the facts and law reasonably available to the lawyer at the time the case was filed, and make her own determination whether there was a reasonable basis for bringing the case. Although the judge's ex post probability determination is not objectively truer or more accurate than that of the losing attorney, it is, for Rule 11 purposes, the one that counts.

Mere disagreement between judges and plaintiffs' lawyers as to a claim's probability of success is enough to explain many Rule 11 sanctions.[31] If judges are systematically more pessimistic than plaintiffs' lawyers in evaluating the probability of success of various claims, then many cases that lawyers reasonably believed were worth bringing will be held to be baseless by trial judges. There are a number of reasons to believe that this is precisely what is occurring.

First and foremost is the difference in time perspective. A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive. Like a reader who already knows how the mystery turns out, she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling.

This hindsight can affect a judge's view of what constitutes "reasonable inquiry," the duty imposed on counsel by Rule 11 to investigate the facts and law before a claim may be filed. Again, one can ask why such a

30. "Although the standard that governs attorneys' conduct is objective reasonableness, what a judge will find to be objectively unreasonable is very much a matter of that judge's subjective determination." Schwarzer, *supra* note 5, at 1016.

31. Imagine a case with a potential $2,000,000 recovery and litigation costs of $100,000. If the plaintiff's lawyer gives the case a 10% likelihood of success, it will be worth bringing (assuming the lawyer is not risk averse) as it has a positive expected value of $100,000. A judge, however, who took a more pessimistic view and thought the case had only a 2% chance of success, would assign it a value of negative $60,000 and conclude it should never have been brought.

duty needs to be imposed, since it is presumably in the lawyer's interest to determine whether a claim has merit before she files it. But if information is not costless (and it isn't), it only makes sense to pay for additional information (in time or money) if you reasonably believe that the value of that additional information exceeds the cost of obtaining it. To make this determination, you must ascertain (or guess at) the likely value to you of information you have not yet obtained. This is a little bit like figuring out which parts of the casebook to study the night before the final exam, and is equally subject to regret with hindsight.[32]

Imagine that Sandy is considering bringing a case, and she has the names of ten people who might confirm or refute parts of her client's story. She makes a judgment as to which are most likely to have useful information, and then speaks to the three who rank highest on her mental list. They provide some weak support for parts of her client's claims. Believing that the other witnesses are unlikely to be much different, Sandy decides it is not worth the time and expense of interviewing the others and simply goes ahead and files the lawsuit. Fast forward to discovery, during which one of the seven potential witnesses Sandy never interviewed gives devastating deposition testimony against her client. The case is dismissed on summary judgment, and Sandy now faces a Rule 11 motion. The trial judge, knowing that the witness's testimony was crucial to the case and knowing that Sandy could have discovered it prior to filing, might well find Sandy's failure to interview that witness unreasonable.

Because she now knows that the interview would have provided useful information, the judge is likely to think Sandy was wrong in concluding it had a low probability of providing such information. Yet, none of the facts stated show that Sandy's initial probability determination regarding that interview was in any way wrong. Similarly, the fact that the dice roll a twelve on a particular throw does not mean I was wrong in my ex ante judgment that the odds of that happening were only one in thirty-six. In effect, Sandy and the judge simply disagree about the prior probabilities that an interview with the witness would have provided useful information.

---

32. Under the 1993 amendments to Rule 11, there must be support for each legal and factual contention in the complaint. Earlier case law had been divided as to whether the Rule 11 standard could be applied to the complaint as a whole. *E.g.*, *compare* Burull v. First Nat'l Bank of Minneapolis, 831 F.2d 788, 789 (8th Cir. 1987) (holding that where the complaint as a whole was sufficiently substantial to reach a jury, a court is not required to impose sanctions) *with* Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363 (9th Cir. 1990) (holding that frivolous claims joined with other nonfrivolous claims may be sanctionable). However, a plaintiff can now allege that factual contentions without support are "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

The judge is likely to overestimate the ex ante likelihood of an event's occurrence when she knows the event actually took place. As a matter of probability, however, the occurrence of a single event does not show that Sandy's prior evaluation of its probability was incorrect or unreasonable.[33]

By the same token, the judge's overall evaluation of Sandy's likelihood of success on uncertain legal issues will likely be significantly lower than Sandy's evaluation of that probability. Sandy began the case uncertain as to who the judge would be and whether she would get favorable or unfavorable rulings on various questions of law and mixed law and fact issues. It is unlikely that the judge, in evaluating Sandy's likelihood of success when she brought the claim, will consider the possibility that a judge other than herself might have been assigned to the case, and that that other judge might have had a somewhat different view of the relevant law.[34]

It is also doubtful that the judge will consider the potential value of a successful outcome as well as the probability of success in determining whether the claim is frivolous. Remember that for Sandy, the value of a claim is determined by the probability of success times the expected value of the outcome minus litigation costs. This means she will bring some very weak claims if the potential damages are big enough. The judge, however, focusing in hindsight only on the likelihood of success of the losing claim, is more likely to find Sandy's decision to file such a claim unreasonable.

Finally, it should be remembered that Sandy's litigation strategy was based on bringing a diversified portfolio of cases, only a few of which she expected to win. The court, however, is only evaluating the merits of the case that has come before it. It is no defense for Sandy to say that this case was part of a portfolio of relatively risky cases, a few of which turned out well for her. What might seem like a reasonable risk as part of a diversified portfolio may seem like an unreasonable risk in isolation.

You may be saying that some of these omissions or distortions in the judge's hindsight attempts to determine the reasonableness of the plaintiff

---

33. This is an extreme version of the fallacy that Kahneman and Tversky call "belief in the law of small numbers," which creates an "exaggerated confidence in the validity of conclusions based on small samples." Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23, 25 (Daniel Kahneman et al. eds., 1982).

34. *See* Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 635 (1987) ("There seems to be an ineluctable pressure on judges to reinforce the propriety of their initial legal determinations by extending them a step further, thus concluding that their legal analysis is so correct and perhaps even self-evident that anybody but a fool, an incompetent lawyer, or one misusing the courts should have reached the same conclusion.").

lawyer's ex ante probability assessments are appropriate—that we don't want judges providing a more lenient standard for cases involving big damages than small ones, and that every claim should be evaluated individually, not as part of a diversified portfolio. If so, you have accepted the central point of this section: Even though the judge in an ex post sanctions decision says a case was baseless and should never have been brought, the case likely had positive expected returns to the lawyer who brought it.[35]

II. ARE THE CLAIMS BEING SANCTIONED BASELESS OR JUST BAD?

In Part I we considered two mutually exclusive descriptions of the kinds of claims generally being sanctioned as "frivolous" under Rule 11. Under the standard view, frivolous claims are baseless claims that no reasonable lawyer would ever have brought. Under our slightly heretical theory, they are simply long shots (i.e., cases with small but not negligible chances of success) that lawyers might well find worth bringing in the appropriate circumstances.

The advantages of the "long shot" theory are that it explains why lawyers persist in bringing frivolous cases, comports with standard models of probability and economic analysis, and even shows how these low-probability losers, viewed from a hindsight perspective, might be misconstrued as baseless by judges rendering sanctions decisions. The advantage of the "baselessness" theory is that's what the law says a frivolous case is. So, on one side we have coherence, scientific validity, and explanatory power. On the other we have legal authority. I guess the issue is still a toss-up.

This section seeks to buttress the long shot theory by showing that it is consistent with, and helps explain many of the findings revealed by, empirical studies of Rule 11. The same studies further provide data inconsistent with the view that the cases sanctioned and perceived as being sanctioned under Rule 11 are baseless cases with negative expected returns. The most recent and exhaustive of the empirical studies is the survey by Lawrence Marshall, Herbert Kritzer, and Frances Kahn Zemans conducted under the auspices of the American Judicature Society ("AJS").[36] Their findings will be the primary focus of this section. Other studies using different method-

35. It should also be noted that under the "deferential" standard of review set forth in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), the determination that a claim is baseless is less likely to be overturned on appeal.

36. *AJS Study*, *supra* note 9.

ologies and data bases, however, also support many of the major factual findings discussed here.[37]

A. Changes in Pre-Filing Investigation Procedures

A strong finding of many recent surveys is that a substantial percentage of lawyers report that they have changed their pre-filing investigation procedures as a result of the post-1983 revisions to Rule 11. The AJS Study found that 39.5% of lawyers in the Fifth, Seventh, and Ninth Circuits had increased their pre-filing investigations as a result of the Rule.[38] A study of lawyers in the Third Circuit reported that 43.5% had increased their pre-filing factual inquiries and 34.6% had increased their legal inquiries prior to filing.[39] Most commentators view these findings as a positive sign that Rule 11 is effective in causing lawyers to act in a responsible manner and "stop and think" before initiating litigation.[40]

But the very fact that Rule 11 has such a widespread impact substantially undermines the claim that it is only perceived by attorneys as sanctioning baseless claims that should never have been brought. If Rule 11 were only enforcing a minimum level of professional competence, reminding lawyers to perform the pre-filing investigation every good lawyer should make, it is hard to understand why it has caused such a large percentage of practicing attorneys to alter their pre-filing practices. One would have to conclude that, prior to new Rule 11, some 30% to 40% percent of practicing lawyers had not been conducting reasonable inquiries before filing cases. That's a lot of incompetence to assume, even for the legal profession.

However, if Rule 11 is being perceived as a threat to any losing low-probability case, all lawyers who think they may be filing such cases will

37. *See* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989); *FJC Study*, *supra* note 9; Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 334–35 (1992); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988). All these studies focus on periods after the 1983 revisions but before the 1993 amendments.

38. *AJS Study*, *supra* note 9, at 963.

39. BURBANK, *supra* note 37, at 75–76.

40. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES 1–3 (1990) ("Has the financial cost in satellite litigation resulting from the imposition of sanctions perhaps exceeded the benefits resulting from any increased tendency of lawyers to 'stop and think?'").

have increased incentives to conduct a more thorough investigation. First, Rule 11 increases the value of the information obtained through pre-filing investigation. By increasing the downside risk to lawyers of an unsuccessful outcome, Rule 11 increases the value of all information that would help predict the outcome of the case.[41] Accordingly, it becomes worthwhile for lawyers to spend more time and money to make a better pre-filing determination of the value of the claim.[42]

Second, just doing more investigating, even if the lawyer does not believe it will provide any additional information, may independently reduce the probability of sanctions, particularly before a judge who follows a "conduct" rather than a "product" interpretation of Rule 11.[43] Finally, the risk of Rule 11 sanctions alters the relative costs and benefits of pre- and post-filing investigation. Absent concerns over Rule 11, it may well have been cheaper for plaintiffs to defer much of their investigation until after the case was filed and the broad federal discovery procedures became available.[44]

Approximately 40% of all lawyers say they have spent additional time and money on investigation solely because of the threat of Rule 11 sanc-

41. Absent Rule 11, the maximum value of absolute certainty concerning the outcome of a case for a lawyer who will take it on a one-third contingency fee is $(0.33J - C_p) + C_p$ where J is the value of the claim and C_p is the plaintiff's uncompensated litigation costs. (This is the sum of the plaintiff's counsel's upside gain and downside loss, and thus represents the total amount at stake for the plaintiff's counsel.)

If the case is one in which a loss may result in Rule 11 sanctions, the value of absolute certainty increases to $(0.33J - C_p) + (C_p + P_sS)$ where P_s is the probability of sanctions in the event of a loss and S is the amount of sanctions. Since Rule 11 adds to the value of absolute certainty regarding the outcome of such litigation, it presumably also adds to the value of any incremental increases in certainty that would be obtained by further investigation.

42. This analysis assumes that the most likely sanction is an award of attorneys' fees to the opposing party. Empirical evidence for the pre-1993 period strongly supports this view. *See FJC Study*, *supra* note 9, at 9 (in five districts studied, the percentage of sanctions imposed that involved fee awards to opposing parties ranged from 70% to 93%). The 1993 amendments to Rule 11 state that the sanction ordered should be limited to what is "sufficient to deter repetition of such conduct." This may reduce the percentage of attorneys' fees awarded. It appears, however, that even at the time of the FJC Study, the Fifth Circuit had adopted a similar standard for imposition of sanctions. The Western District of Texas was still found to award attorneys' fees in 70% of the cases where sanctions were imposed. *See FJC Study*, *supra* note 9.

43. For a discussion of the difference between a "product" and "conduct" approach to reasonable inquiry, see BURBANK, *supra* note 37, at 19–21. Under a conduct approach, more time spent investigating has value as added protection against a Rule 11 sanction, even if the lawyer believes it will turn up nothing of use.

44. Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1316–17 (1986). This concern (and incentive) may be substantially ameliorated by the "safe harbor" provisions of the 1993 amendments. *See infra* text accompanying note 82.

tions.[45] Either these lawyers are saying they previously did not bother to determine whether a case was baseless before filing it, or they perceive current Rule 11 as posing a substantial threat even to cases they think are not baseless and are worth bringing.[46]

B. Deterring the Filing of Meritorious Claims

The most striking finding of the AJS Study was that 19.3% of practicing lawyers said that Rule 11 had, during the past year, deterred them from filing claims or defenses they believed to be meritorious.[47] This finding, of course, directly refutes the view that Rule 11 is perceived as only applicable to baseless claims. It is, however, perfectly consistent with the view that Rule 11 is perceived as sanctioning long shots which, absent the threat of Rule 11 sanctions, would be "meritorious" in the sense that lawyers would consider them worth bringing.[48]

---

45. Although interestingly, not a *lot* more time and money. The AJS Study found that the increase in investigation time was small for most lawyers, not more than five extra hours. *AJS Study*, *supra* note 9, at 959. The implication is that Rule 11 has had an incremental effect on many lawyers' pre-filing investigations, making it worthwhile to do a little more investigation, but not requiring a wholesale change in the way lawyers select or evaluate cases. Because empirical evidence suggests that the threat of Rule 11 sanctions in any particular case is not very great, this finding is consistent with the analysis set forth above.

46. Considerable support for this analysis of the impact of Rule 11 is provided by a question in the AJS Study. In cases that were identified as involving informal Rule 11 activity, lawyers were asked:

> Over and above what normal good lawyering would require in the *absence* of the provision for sanctions under Rule 11, how many *extra* hours did you and others in your firm spend on this case . . . out of concern that a Rule 11 challenge, justified *or* unjustified, might be brought against you?

Not only did most lawyers respond that they did spend some hours "above what normal good lawyering would require" because of the perceived threat of Rule 11 sanctions, but the most extra hours and the most frequent expenditure of extra hours occurred in cases in which no reference to Rule 11 had been made by the opposing party. *AJS Study*, *supra* note 9, at 959. Seventy-four percent (74%) of lawyers did extra work in such cases and 4.2% did over 20 hours of extra work.

It may be noted that increased pre-filing investigations are unlikely to involve any reference to Rule 11 by an opposing party because the opposing party has not yet been served. The survey data is consistent with the conclusion that lawyers are doing what they perceive to be extra investigation in cases that already appear to them to be worth bringing, but in which they also believe the probability of success is low enough that Rule 11 is a threat.

47. *Id.* at 961–62; *see also* Hess, *supra* note 37, at 337 (survey of lawyers in the Eastern District of Washington found 15% felt Rule 11 made them less likely to accept otherwise meritorious cases, and 23% stated it led them not to assert otherwise meritorious claims or defenses).

48. The authors of the AJS Study note that the definition of "meritorious" will affect whether the deterrence of such cases is viewed positively or negatively. *Id.* at 961 n.56. This seems to obliquely raise the issue of whether deterring long shots is desirable, the question discussed *infra* p.99.

As discussed earlier, a lawyer who thinks there is a 10% chance of winning a lawsuit with a $500,000 recovery, and thereby obtaining a fee of $166,500, would view such a case as having positive expected returns so long as the litigation costs were under $16,650. If she estimates those costs at, say, $10,000, the case would be "meritorious" from her perspective.[49] She has a chance of winning big and the 10% chance of a $500,000 recovery gives the case, as they say in the litigation business, "settlement value."

Now add Rule 11 and a 50% chance that if the claim loses, plaintiff's lawyer will have to pay a sanction of $15,000 (defense counsel's estimated fee).[50] This added risk is enough to deter even a risk-neutral person from taking a case that, absent the threat of Rule 11, appeared meritorious.[51]

C. Differential Sanctioning of Different Types of Claims

A major concern about Rule 11 has been that some types of litigation appear more likely to be sanctioned than others. In particular, there has been a fear that judges have been oversanctioning, and thus deterring, civil rights litigation. The AJS Study provided some support for this view. Dividing sanctioned cases into four categories—civil rights, personal injury, contracts, and a catch-all category labeled "other commercial"—the AJS Study found that a civil rights case was considerably more likely to be sanctioned than a personal injury case, which in turn was more likely to be

---

Another interesting question is why the increased risk of sanctions under Rule 11 is not simply passed along to the client, either in the form of higher hourly fees for those cases that pose a large ex ante risk of sanctions or a greater percentage of a contingency. Lester Brickman has pointed out, however, that contingency fees seem strangely immune to variations based on consideration of risk. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989). Hourly rates also do not seem to vary much based on the risk. It may be difficult to tell clients they have to pay more because their case is viewed as particularly weak. Lawyers may well collect a premium over the hourly rate, however, when one of those weak cases turns out to be a winner.

49. Indeed, it may well be that lawyers intuitively regard as "meritorious" any claims in which expected value exceeds litigation costs.

50. The computation would go something like this:

	No Rule 11	Rule 11
Win	0.10 x (166,500 – 10,000)	0.10 x (166,500 – 10,000)
Lose	0.90 x (–10,000)	0.45 x (–10,000)
Sanctions	0	0.45 x ((–10,000) + (–15,000))
Estimated Value	$6650	–$100

51. Rule 11 will deter cases that are meritorious in that the present expected value of the claim is a positive number but in which that value is less than the present expected value of the possible sanction. If lawyers are risk averse, there will be a greater deterrent effect.

sanctioned than a contract action.[52] This finding both provides interesting insights into the actual workings of Rule 11, and plays a major role in the continuing policy debate over the Rule.[53] We will consider it in some detail.

Confusing the matter somewhat, and providing some solace for those who would defend federal courts from bias against civil rights actions, is the AJS finding that "other commercial" cases[54] were sanctioned at approximately the same rate as civil rights cases. This finding, however, is tentative and involved some technical difficulties.[55]

The clearer and less methodologically controversial finding is that civil rights, personal injury, and contract actions are sanctioned at highly differential rates. The authors of the AJS Study have no good explanation for this disparity.[56]

In fact, there is a clear and objectively demonstrable way in which civil rights cases, personal injury cases, and contract cases differ, and this difference is directly correlated to their respective sanction rates. Administrative Office statistics show that the average success rate for litigated civil

---

52. Twenty-two and seven-tenths percent (22.7%) of the cases in which sanctions were imposed were civil rights cases, while such cases constituted only 11.4% of federal cases filed during that period. Personal injury cases, by contrast, were 19.2% of cases filed, but represented only 15.1% of sanctioned cases. Contract cases were even less likely to be sanctioned. Although representing 23.0% of cases filed, they were only 15.9% of those sanctioned. *AJS Study*, *supra* note 9, at 965–66.

53. *See also* Vairo, *supra* note 37, at 200–01 (finding that civil rights plaintiffs were sanctioned more frequently than others). The FJC Study of five judicial districts, in contrast, found no clear pattern among the district courts that would support a charge of disproportionate sanctioning based on the nature of the case. *FJC Study*, *supra* note 9, at 15–18.

54. The AJS Study's category includes "general commercial litigation, antitrust, corporations law, banking law, insurance coverage, lender liability, securities, dealership and franchise, copyright, patents and trademarks cases." *AJS Study*, *supra* note 9, at 966.

55. The AJS Study found a sanction percentage of 18.7% and a filing rate of "at least" 9.8%. The Study further noted that it was "very probable" that the 9.8% figure was too low because the Administrative Office statistics from which it was derived categorized "other commercial" cases more narrowly than the authors of the AJS Study. Accordingly, the disparity between filings and sanctions for such cases "is not as wide as the table reflects." *Id.* at 966–67.

56. They make a tentative suggestion that what distinguishes civil rights and other commercial litigation from personal injury and contract actions may be the "complexity of the law" and their "sense" that civil rights and other commercial cases "do not tend to contain as many easy, straightforward cases as do the contracts and personal injury categories." *Id.* at 967. One might think the complexity of the legal and factual issues would make it less likely for judges to say with assurance that such cases were baseless. Notice that the AJS Study authors' comments make more sense if we assume that the complex and difficult cases they are talking about are cases with outcomes that are hard to predict, i.e., long shots.

rights cases is approximately 26%,[57] far lower than the success rate for personal injury cases (46%), which in turn is far lower than the success rate for contract actions (62%). In short, the likelihood that a claim will be sanctioned as frivolous seems directly correlated with the likelihood the claim will be a loser.

On one level, this is hardly surprising. Winning cases almost never get sanctioned. Accordingly, any category of cases in which a disproportionate number of cases are winners will display a relative paucity of sanctions.[58] Conversely, if losers make up approximately three-quarters of the litigated cases, as they do in civil rights actions, the pool of cases subject to sanction is larger than that indicated by simply looking at the percentage of such cases that are filed. In this sense, the efforts of the AJS Study authors to compare sanctioned cases to all cases filed was simply a methodological error. They should have compared sanctioned cases to all losing cases.[59]

In another sense, however, the AJS Study authors were simply following the standard view of frivolous cases as somehow qualitatively distinct from ordinary losers. If frivolous cases are the result of some special kind of laziness or incompetence creating a predilection to file baseless cases, there is no reason to suspect such laziness or incompetence will be found among lawyers who bring one type of litigation more than another. Indeed, one would expect lawyers who work for a contingency fee, like many civil rights and most personal injury lawyers, to be more diligent and careful in investi-

---

57. This figure and the other success rates stated in this paragraph are based on data compiled by Theodore Eisenberg. Professor Eisenberg computed success rates for various categories of federal cases based on data obtained from the Administrative Office of the federal courts using the same case categories employed by the Administrative Office. Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 app. (1990).

I have tried to derive success rates for somewhat broader categories of cases by recomputing the success rates for an aggregate of the four largest categories of cases in each of torts, contracts, civil rights, and "other statutes." While these will not be co-extensive with the categories in the AJS Study, they are sufficient to suggest that the cases in the AJS Study also likely had differential success rates. It should also be noted that Professor Eisenberg's data relates to the period 1978–85, earlier than the AJS Study, and including both pre- and post-1983 Rule 11.

58. This follows from the fact that plaintiffs and plaintiffs' claims are sanctioned far more frequently than defendants and defenses. *See supra* note 9.

59. All filings also includes another broad class of cases that are unlikely to be subject to sanctions—settled cases. If more filed contract cases settle than filed civil rights cases, then the number of civil rights cases litigated to judgment and lost will be a greater percentage of filed cases than the contract actions. Because lost litigated cases are those that are likely to be sanctioned, a disproportionate number of civil rights cases in this group will lead to a disproportionate number of sanctions.

gating claims than, say, lawyers who bring contract claims and get paid by the hour.

Accordingly, the AJS Study finding that sanction rates occur differentially among cases with differing probabilities of success is a significant and important result. It shows that "frivolous" litigation does not occur randomly among all lawyers engaged in litigation (which would lead to a distribution of sanctions proportionate to filings), nor does it occur primarily among lawyers with the least incentive to avoid bringing frivolous claims (which would result in fewer frivolous cases brought by contingency fee lawyers). Rather, it shows that frivolous cases are most likely to occur among lawyers who bring the greatest number of low-probability claims. In this sense, it provides further support for the view that cases sanctioned as "frivolous" are mostly long shots that didn't win.

We can go further and speculate that the same factors that lead to differential success rates among different categories of cases also lead to differential sanctions rates among those categories. Unfortunately, no one is quite sure why there are different success rates for different types of cases. The standard economic model, based on expectations theory, assumes that whenever the parties agree as to the likelihood of success at trial, the parties should save litigation costs by settling around the expected value of the claim. This, in turn, has led some theorists to predict that the cases that are most likely to be litigated are close cases, in which probabilities of success are near 50%. This, in turn, is thought to imply that most categories of cases should show a success rate close to 50%. Many categories don't, and the results are clear and consistent over time.[60] Products liability, medical malpractice, private antitrust, and employment discrimination actions all have success rates lower than 50%. In contrast, most contract actions, as well as motor vehicle personal injury claims, trademark, and copyright claims all have success rates substantially higher than 50%.

The low success rate for civil rights litigation has been examined most extensively by Theodore Eisenberg.[61] Utilizing both theoretical models and his own sense of such litigation, he considered a number of possible

60. *See* Eisenberg, *supra* note 57; Gross & Syverud, *supra* note 25, at 319; Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985).

61. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989).

explanations for deviations from the 50% success hypothesis, including asymmetrical stakes, size of recovery, and quality of counsel.[62] Eisenberg points out that many civil rights cases, particularly employment discrimination cases, may display asymmetrical stakes. While a win for plaintiff will likely result only in recovery of lost wages, the consequences of a loss to defendant would include reputational damage, greater likelihood of additional claims being filed, and, due to offensive collateral estoppel and other factors, greater likelihood that those additional claims will succeed. Accordingly, defendants in employment discrimination suits have a strong incentive to settle all cases they perceive as posing a real threat of an adverse outcome. Plaintiffs' counsel, aware of this effect, will have an incentive to bring even claims with rather low probabilities of success if the potential loss to defendants is sufficiently great. All but the weakest of these cases is then likely to settle, leaving a pool of litigated cases consisting only of cases with a low probability of success and, therefore, a low success rate.

Secondly, if the potential recovery is high relative to litigation costs, that fact alone may make it worthwhile to bring low-probability claims. Eisenberg does not think this is much of a factor in civil rights litigation, in which "claimants in all categories recover relatively small amounts."[63] It may well be a factor, however, in such other low-success categories as private antitrust, products liability, and medical malpractice.

Finally, Eisenberg raises the possibility (which is consistent with the data, but which he can neither confirm nor reject) that lawyers bringing civil rights cases are, as a group, less able than lawyers defending them. He also suggests that such plaintiffs' counsel may be "less cost-benefit oriented than other litigants. They might push cases to trial that others would forego."[64] Put slightly differently, we can hypothesize a certain type of lawyer for whom being on the "right" side, fighting for the underdog and

62. A fourth possible explanation for deviation from the 50% hypothesis, low litigation costs relative to settlement costs, was also considered by Professor Eisenberg. *Id.* at 1581. He viewed it as a possible explanation for the low success rate of certain types of prisoner petitions, but not for nonprisoner litigation in which "costs will not be unusually low in relation to settlement costs." *Id.* Similarly, it does not appear that any of the categories of federal litigation we are considering will have particularly low litigation costs relative to settlement costs.

63. *Id.* at 1580.

64. *Id.* at 1582–83.

opposing perceived injustice, may provide sufficient psychic satisfaction that she is willing to pursue many cases that she knows are likely to be losers, because she thinks these plaintiffs are entitled to have their day in court, and because she thinks she can manage to win at least a few of these cases.[65] Such lawyers will also bring a portfolio of low-probability cases, but without the expectation of a big financial payday.

Having considered in some detail the possible reasons for low success rates in civil rights litigation, let's consider again the AJS Study's category of "other commercial" litigation, which seems to have been sanctioned almost as much as the civil rights cases. Note that some of the types of cases that make up this category are private antitrust (43% success rate), securities, commodities exchange (48%), and may include claims that would fall in the Administrative Office category of "other statutory" (47%). On success rates alone, these cases would seem to fall closer to the personal injury category than the civil rights cases. This might be the case if, as the AJS Study authors suggest, the sanction rate relative to filing rate for these cases is overstated. Further, categories like antitrust and securities may contain many low-probability cases simply because of the large potential recoveries.

What can we conclude from this data? Certainly it shows that different categories of cases are sanctioned at different rates. Frivolous cases are not distributed randomly among all case types, nor are they more frequently brought by lawyers who get paid by the hour. Rather, the rate of sanctioning seems correlated with the rate of success of a given case category. Because case categories with low rates of success are likely to contain the most long shots, this data is certainly consistent with this Essay's view of Rule 11. Moreover, the theoretical explanations of why certain categories of cases have low success rates are also explanations, by and large, of why plaintiffs have incentive to bring such claims even if they have a low probability of success. Accordingly, the same factors—asymmetrical stakes, large potential recoveries, and lawyers who don't mind losing a lot of cases to win a few, may explain both low success rates and high sanction rates.

Does this finding absolve the federal courts of the charge of bias against civil rights cases? To the extent that the charge was that federal

65. Some people who might be thought to fit this description (and who have incurred substantial Rule 11 sanctions) are Julius Chambers, later the Director-Counsel of the NAACP Legal Defense Fund, *Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); William Kunstler, *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991); and the Christic Institute, which acted as counsel for the plaintiffs in *Avirgan v. Hull*, 705 F. Supp. 1544, 1551 (S.D. Fla. 1989), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992).

judges were oversanctioning civil rights cases out of a particular animus toward those litigants or that type of litigation, it seems to me it does. The overall structure of the data is more consistent with the view that civil rights cases are indeed being disproportionately sanctioned under Rule 11, but primarily because a disproportionate number of the low-probability cases litigated in federal courts are civil rights actions.

We might, however, reconsider the charge that Rule 11 chills civil rights cases not as an allegation of judicial animus, but simply as the observation that, because civil rights lawyers and litigants have more incentive and inclination than most others to file and pursue cases they know are long shots, their litigation activities and judgments are disproportionately being deterred by Rule 11. This claim is quite consistent with, and supported by, the data.

D. The Persistence of Frivolous Cases

If one compares the AJS Study data about lawyers' perceptions of Rule 11 with the Federal Judicial Center ("FJC") Study of judges' perceptions, a curious anomaly emerges. Most of the lawyers responding to the AJS Study reported that Rule 11 had a major impact on their practice. Over 60% said they had taken significant case-specific actions during the past twelve months in response to Rule 11.[66] Almost a quarter of the respondents (24.5%) stated that during that time they had discouraged a client from filing a "questionable" case.[67] Yet the FJC Study indicates that judges were almost evenly split as to whether Rule 11 was having any impact at all on frivolous cases. Forty-one and four-tenths percent (41.4%) of federal district judges believed that there was less groundless litigation post-1983. Forty-two and six-tenths percent (42.6%) thought that the problem had stayed the same. Eight and two-tenths percent (8.2%) thought that the problem had gotten worse and 7.9% thought that there never was a problem.[68] If the AJS Study is right and Rule 11 is having a substantial impact on lawyer conduct, why don't most of the judges in the FJC Study see it?

Put slightly differently, even though Rule 11 provides clear and powerful incentives not to file frivolous litigation, there still seem to be enough

66. *AJS Study*, *supra* note 9, at 961.
67. *Id.*
68. *FJC Study*, *supra* note 9, at 4. It should be noted, however, that over 75% of the judges also said groundless litigation was either no problem (9.9%) or a small or very small problem (64.6%). *Id.* at 2.

frivolous cases being filed that many judges don't see any change. Accordingly, there must be some powerful incentive, something beyond mere stupidity or laziness, that keeps lawyers bringing these cases.[69] We have seen that low-probability cases, particularly when the potential recovery is high or the stakes are asymmetrical, can still be well worth bringing from an economic point of view, even with the threat of sanctions.

For example, the threat of sanctions doesn't alter Sandy Flywheel's basic strategy for selecting litigation. She still looks for cases with big potential recoveries or asymmetrical stakes that give her increased leverage in settlement discussions. She now does a little more investigation before each case, and the threat of sanctions causes her to forego bringing some low-probability cases she previously would have considered "meritorious." Nonetheless, she still wins only about one of every five cases she litigates to judgment, and many of the losers are cases that opposing counsel, viewing them from a hindsight standard, seek to sanction as frivolous cases that Sandy should never have brought. Judges, looking at the large number of weak cases still being brought by people like Sandy, are divided as to whether Rule 11 has had any substantial impact on the number of frivolous cases that come before them. But Sandy never brings cases she thinks are baseless and have negative expected returns or no chance of success. I submit that the majority of lawyers who bring cases subsequently sanctioned as frivolous under Rule 11 have adopted similar litigation strategies.

E. Uncertainty as to the Merits of the Case

In setting forth our "long shot" theory of frivolous litigation, we have assumed that decisions to file lawsuits are probabilistic decisions made under conditions of uncertainty. Here, at least, I have the comforting support of Supreme Court and other controlling precedent. The traditional justification of the "American Rule," under which each side in a litigation pays their own attorney's fee regardless of outcome, is that "litigation is at

69. We might also note, as a similarly curious phenomenon, the failure of Rule 11 motions to decrease as lawyers became more familiar with the requirements of the Rule. *See* Hess, *supra* note 37, at 319 ("The number of Rule 11 requests did follow the predicted pattern from 1984 through 1988: it rose, plateaued, and tapered off. However, the formal Rule 11 activity initiated in 1989 and 1990 increased dramatically."). The incentive of lawyers to bring Rule 11 motions to recover their fees may partially explain this, but it nonetheless shows that many arguably frivolous cases are still being filed in federal court.

best uncertain."[70] Indeed, part of the justification for Rule 11's implicit abandonment of the American Rule is that the cases being sanctioned are presumed to be so baseless they fall outside the zone of inherent uncertainty and into the zone of certain losers that should never have been brought.

Our long shot model, in contrast, assumes that there is as much uncertainty at the bottom range of probability as there is in the middle, that lawyers and litigants can have as much difficulty distinguishing long shots (say, 20% chance of success) from absolute losers (0%) as they have distinguishing cases in which the chances of winning are good but not great (60%) from those in which the chances are only fair (40%). If one then agrees (and this is a big "if") that lawyers should not be penalized for bringing long shots, the same litigation uncertainty which justifies the American Rule would argue against application of Rule 11 sanctions in low-probability cases.

It is easy enough to point to potential sources of litigation uncertainty even for low-probability cases.[71] I suspect that one of the biggest sources of uncertainty with respect to Rule 11 is the variance in judicial attitudes toward threshold motions like 12(b)(6) and summary judgment.[72] Many Rule 11 cases seem to involve situations in which the lawyer is essentially betting on the ability of the complaint to withstand a motion to dismiss and/or for summary judgment.[73] If the outcome of such motions is uncer-

---

70. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); *see also* Association of Flight Attendants, AFL-CIO v. Horizon Air Indus., Inc., 976 F.2d 541 (9th Cir. 1992); Shimman v. International Union of Operating Eng'rs, Local 18, 744 F.2d 1226 (6th Cir. 1984); Oscar Gruss v. Geon Indus., Fed. Sec. L. Rep. (CCH) ¶ 97,917 (S.D.N.Y. 1981).

71. These would include vagueness or indeterminacy of legal doctrine, imperfect knowledge of the facts, uncertainty as to the impact evidence will have on the decisionmaker, and uncertainty as to the identity of the decisionmaker.

72. It is widely recognized that the standards for granting such motions vary widely among judges, courts, and substantive fields. Different judges require different levels of specificity in pleading, and the stringency of the standard courts use in granting summary judgment also varies considerably.

73. Defeating such a motion means having the judge endorse the basic theory of the plaintiff's case, getting access to discovery, and generally increasing the chances of success to the point where settlement is likely. If the defendant wins such a motion, however, the plaintiff not only loses, but there is very likely to be an opinion stating that the plaintiff's claims were speculative or simply wrong, not grounded in fact, and that the plaintiff was seeking to engage in a "fishing expedition," all of which sets up the plaintiff as a prime target for a Rule 11 motion. *See, e.g.*, Jeffrey Neal Cole, *Rule 11 Now*, 17 LITIGATION 10, 17 (1991) (describing commodities fraud case in which the author offered not to seek Rule 11 sanctions if opposing counsel withdrew rather than contested the summary judgment motion and noting that the offer was declined).

tain, lawyers may find it worthwhile to take their chances, while knowing that any such case they file carries with it a serious risk of sanctions.[74]

There is substantial *empirical* support for the assertion that it is hard to tell cases with no chance of success from those with a fighting chance, or at least that judges don't agree among themselves on this question. The FJC study, in surveying reported appellate decisions in which sanctions awards were reversed, found that in 19% of those cases, the reversal was based on a finding that the underlying claim was meritorious.[75] I suspect these were mostly cases in which appellate courts reversed 12(b)(6) dismissals or summary judgments granted by the lower court.[76] Also instructive is a study of judges conducted in the early 1980s, in which it was shown that, on the same set of facts, 60.3% of the judges would have awarded sanctions and the others would not.[77]

Finally, we should also consider as evidence the fact that many lawyers writing about Rule 11 say that the standards for determining whether a claim is frivolous are vague and uncertain. This means that claims which appear frivolous and baseless in the eyes of one judge may seem respectable losers to others.[78] Further supporting the vagueness of the Rule 11 stan-

---

74. For example, assume that the plaintiff's counsel is considering a claim with a potential recovery of $500,000 (of which counsel will get one-third on a contingency fee basis). She estimates that if she gets past the motion to dismiss, the claim will have a 40% chance of success, will cost her $10,000 to litigate to judgment, and will pose no threat of Rule 11 sanctions. Accordingly, the value of this case after winning a motion to dismiss is:

Success on Merits	(0.40 x 166,666 - 10,000) = 56,666
Loss on Merits	(0.60 x -10,000) = -6,000
Value of Claim After Motion	$50,666

In contrast, if she loses the motion to dismiss, the plaintiff's counsel estimates she will have already incurred $2000 in litigation costs, and assumes there is a 100% chance she will be sanctioned for the defendant's attorney's fee, which she estimates at $4000. Finally, she estimates her chances of winning the motion to dismiss at 50%. Her expected value analysis in bringing the claim therefore looks like this:

Win the Motion	(0.50 x 50,666) = 25,333
Lose the Motion	(0.50 x (-6000)) = -3,000
Expected Value of Claim Before Motion	$22,333

75. *FJC Study*, *supra* note 9, at 21.

76. *See, e.g.*, *In re* Edmonds, 924 F.2d 176 (10th Cir. 1991) (motion to dismiss); Cooper v. City of Greenwood, 904 F.2d 302 (5th Cir. 1990) (summary judgment); Masson v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989), *rev'd on other grounds*, 501 U.S. 496 (1991) (summary judgment).

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

78. *See* George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 8-9 (1991); Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1081-82 (1994); *see also* Grosberg, *supra* note 34, at 635-36; Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1033, 1058 (1993); Charles M. Shaffer, Jr., *Rule 11: Bright Light, Dim Future*, 7 REV. LITIG. 1, 11 (1987) ("No matter what words are used as the objective yardstick, the application of [Rule

dard are empirical studies that show widely different sanction rates being applied in different districts and circuits.[79]

To the extent that judges substantially disagree among themselves as to which cases are frivolous and which are not, it lends further support to the view, which I hope you are now at the point of accepting, that a similar disagreement between judges and lawyers is at the core of most Rule 11 cases. To the lawyer who brought it, the case was a long shot, a risk worth taking. The judge who subsequently finds it frivolous under the objective standard of Rule 11 is simply disagreeing with the lawyer's initial subjective and unprovable assessment that the case, when brought, had enough likelihood of success to make it worth bringing.

III. SHOULD LONG SHOTS BE SANCTIONED UNDER RULE 11?

Having determined that most cases currently being sanctioned under Rule 11 are unsuccessful long shots, we must now squarely confront the question whether lawyers should be sanctioned for bringing such probable losers. The question is clear cut, but it is far from easy. From one perspective (her own, among others), Sandy Flywheel is a courageous fighter for the common people, battling long odds but occasionally bringing a corporate wrongdoer to justice (or at least to a substantial settlement). Why impose added costs and risks on her? From another perspective, Sandy is just another sleazy strike suit lawyer, bringing cases she knows she is likely to lose in hopes of coercing a big settlement out of a risk-averse corporate defendant. Why not seek to deter such behavior?

Except for the florid adjectives, however, these two views of Sandy are not in disagreement over the facts. Sandy is bringing cases that, to the best of her ability to judge, have low, but not negligible, likelihoods of success. That means she simultaneously expects to lose most of them and win, or at least settle big, on a few. She can't get the winners without filing all those losers, and you can't deter her from filing the losers without also deterring her from bringing the winners.

This is the central conundrum of Rule 11, and one that most of the commentary has sought to elide. Yes, it would be nice to have a rule that

---

11] to different facts by different judges inevitably will yield inconsistent results."); Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 316 (1990).

79. *AJS Study*, *supra* note 9, at 982 (substantially higher rate of imposition of sanctions in Seventh Circuit (24.5% of motions) than in Fifth (14.6%) or Ninth Circuits (14.4%)); *FJC Study*, *supra* note 9, at 9 (imposition rate of sanctions in five district courts ranged from 20% to 31%).

deters all the frivolous cases while keeping all the meritorious ones. It would also be nice to have ice cream sundaes that didn't make you fat. I submit both problems are equally soluble with our current state of knowledge.

A. The Hidden Debate over Sanctioning Long Shots

In the policy debate over Rule 11, the issues have been obscured by the failure to recognize that what is really being argued is whether and how stringently to sanction lawyers for bringing long shots. Proponents of stringent enforcement of Rule 11 argue that it will deter "nuisance suits" and substantially reduce the amounts defendants pay to settle frivolous claims. It has never been clear, however, that defendants should, or in fact do, pay anything to settle claims that are objectively baseless and have no chance of success.[80]

Low-probability claims with positive expected returns, on the other hand, do have nuisance value and are, from defendants' perspective, worth deterring. But that nuisance value is directly related to the fact that they are long shots and have a low, but not negligible, likelihood of success. A corporate defendant or insurance company has incentive to settle cases with a ten percent chance of success for ten cents on the dollar, the same incentive plaintiff has for bringing them.

Proponents of a stringent Rule 11 are certainly correct that tougher sanctions will deter more low-probability cases from being filed. As we have seen, the threat of sanctions alters the risk/return analysis plaintiffs' counsel must make in deciding whether to bring the case. The greater the danger of sanctions (either in amount or likelihood of imposition) the more low-probability cases will be deterred. But this argument assumes, rather than supports, its central normative principle, that Rule 11 should be stringently applied to deter the filing of claims that are long shots.

Opponents of stringent application of Rule 11, in contrast, do not deny that stopping baseless litigation is a desirable goal. They worry about its undesirable collateral effects, most notably the chilling effect it is alleged to have on potentially meritorious claims, particularly in civil rights

80. Not only does the theoretical literature predict that cases with zero expected value should not, under most circumstances, receive positive settlement offers, but the empirical evidence is that defendants are often reluctant to offer any settlement to claims they view as weak. Gross & Syverud, *supra* note 25, at 343 (noting that in 25.2% of the personal injury cases later tried to judgment, no monetary settlement offer was made by defendants).

cases.[81] But the cases that are going to be deterred by Rule 11 are not those that plaintiffs are confident they are going to win. Rather, the chilling effect of Rule 11 is inherent in its application to long shots, cases that plaintiffs might win, but are substantially more likely to lose.

Critics of Rule 11 are certainly correct that stringent Rule 11 sanctions will deter some cases that, if brought, would have been successful. Indeed, the more stringent the sanction, the greater the percentage of potentially successful cases that will never be filed. But their arguments assume, rather than support, their central normative principle, that Rule 11 should be not be applied when a case is not baseless, but is merely a long shot.

This same reluctance to confront the long shot issue can be found at the level of judicial enforcement of the Rule. The enormous variation in standards and statements in the case law as to what makes a case frivolous indicate that judges themselves are unclear as to whether they should be sanctioning cases that they find baseless but which probably seemed worth bringing to the lawyers who, in fact, brought them.

The problem seems intractable because it is intractable. Any sanction rule that effectively deters must, by definition, get lawyers to act in a way they would not otherwise have acted, i.e., to not file claims they would otherwise have brought. Because the cases these lawyers would otherwise have brought are long shots, any rule that seeks to deter a substantial amount of litigation must seek to deter long shots.

B. Can a Better Rule 11 Separate the Truly Baseless from the Merely Bad?

Looking for ways out of this dilemma, commentators on Rule 11 have suggested that Rule 11 be understood as requiring certain objective conduct, a reasonable amount of legal and factual inquiry, prior to the bringing of a claim. After all, who can object to a rule that simply requires lawyers to work harder and think smarter before filing claims?

But unless this conduct is defined in purely formal terms (e.g., interview at least five potential witnesses, spend at least two full days in the law library before filing), the conduct approach to Rule 11 inevitably slips back into a hindsight review by the trial judge of the lawyer's ex ante judgment of the potential merits of the case. Was it reasonable not to interview a certain witness? Was it reasonable to think that a controlling precedent

81. *See* Nelken, *supra* note 7, at 386.

could be distinguished? This ultimately becomes simply another way for a judge to second guess a lawyer's litigation judgment.

Moreover, even a rule designed to get lawyers to work harder and think smarter is not without costs. If lawyers are forced to put in more time and effort investigating cases, they will investigate fewer cases. The cases they will drop are the ones that appear, prior to investigation, to look the weakest. But since these are cases the lawyers have not yet even investigated, there are probably some potential winners hidden in there as well.

Most importantly, however, there is no good reason to believe that the reasonable inquiry requirement will substantially reduce the ratio of frivolous cases filed relative to meritorious ones. If substantially greater certainty about the merits of most cases could be obtained by simply doing more pre-filing investigation, one would expect most lawyers to be conducting that "reasonable" amount of investigation without the prod of Rule 11. While extra legal or factual research into long shots may sometimes reveal the case to be totally worthless or a likely winner, I suspect that far more often it simply confirms the lawyer's prior view that the law and facts are uncertain and the case is, indeed, a long shot. We have seen that there is empirical evidence of substantial litigation uncertainty as to whether a case is frivolous even among judges who have far more access to the facts and law than lawyers do at the pre-filing inquiry stage.

Finally, if one considers the sources of litigation uncertainty, it is clear that many of them simply cannot be resolved prior to filing. If the critical variable is the particular judge's view of 12(b)(6), or the documents in defendant's files, or how rattled a client will get when deposed, these are not issues that can be resolved by any amount of pre-filing investigation.

What can resolve much of this uncertainty is the actual process of litigation. Once the litigation is filed, the identity of the judge is determined, one may get access to the other side's documents and information, and get a sense of how seriously opposing counsel views the case and how strong their defenses are. The most significant of the 1993 changes in Rule 11 may, therefore, well be the "safe harbor" provision, which permits a party to withdraw a "challenged" claim within twenty-one days after a Rule 11 motion is served and thereby avoid the threat of sanctions. The service of a Rule 11 motion can then give plaintiffs' lawyers another chance to stop and think and decide whether a claim that was a long shot when filed still looks worth pursuing. The additional information available at this later stage in the proceedings, plus a chance to avoid sanctions, may well

cause lawyers to drop those long shots that don't reveal much chance of success.[82]

While this change in the Rule does provide a way for plaintiffs' counsel to later change their mind as to whether a case is worth pursuing, it has all the drawbacks that are inherent in that benefit. It doesn't save nearly as much judicial or defendant time and energy and doesn't deter nearly as many long shots as the prior Rule 11 did.[83] Indeed, as plaintiffs' lawyers realize they can now file lawsuits without any threat of Rule 11 sanctions (since they can always withdraw when the Rule 11 motion comes), the incentive to restrain from filing weak long shots, as well as the incentive to conduct extensive pre-filing investigation, is substantially reduced.[84]

C. The Case Against Long Shots

The arguments for a stringent application of Rule 11 are obscured by the myth that the Rule is directed only at baseless claims, which means if it is in fact deterring the filing of cases with a small chance of being successful, then it is automatically having an impermissible chilling effect. But if we disregard the rhetoric of Rule 11, and ask simply whether a stringent application of Rule 11 against low-probability litigation will do more good than harm, the case against long shots looks surprisingly strong. I expect it would go something like the following.

First of all, it is silly to view the deterrence effect of Rule 11 against some hypothetical baseline where every meritorious claim gets filed. As

82. The critical question, and one that the drafters have left to "case-by-case" resolution, is the timing of the Rule 11 motion. It no longer makes sense to wait until a case is dismissed to bring a Rule 11 motion, as the drafters recognize. I suspect that most defendants will try to serve such motions simultaneously with their dispositive motions to dismiss or for summary judgment, thereby making the decision to file a low-probability claim even more of a bet on the outcome of such threshold motions.

83. Justice Scalia argued that the safe harbor provision "would render the Rule toothless." Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401 (1993). Others argue that these "perverse incentives" can be avoided "[i]f judges are inclined to impose sua sponte Rule 11 sanctions (which are not subject to the safe harbor provisions)." Comment, *Developments in the Law—Lawyers Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1641 (1994).

84. It makes more sense for lawyers to file these cases, and see how much they can learn about the case post-filing before the Rule 11 motion comes. Moreover, the only litigation costs saved are probably those involved in briefing and deciding the threshold motion, and perhaps not even all of those. In short, to the extent the 1993 revisions make the threat of Rule 11 less stringent, they are likely to result in the filing of more long shots.

long as litigation is costly, whether in money, time, or psychological stress, a substantial number of people with potentially meritorious claims will choose to forego them because the amounts to be gained are simply not worth the trouble. There is substantial empirical evidence that, even before new Rule 11, the vast majority of meritorious claims were never filed in a court of law.[85] In this sense, every rule of civil procedure that increases costs, delay, or uncertainty of result has the effect of deterring some meritorious cases. It is not a dispositive argument against the stringent application of Rule 11 that it will deter some potentially meritorious cases. The question is whether the advantages of its application outweigh that cost.

The advantages are substantial. First are the savings of time and money that would be wasted litigating long shots, the vast majority of which, everybody agrees, plaintiffs are going to lose. Indeed, one might even argue that to the extent an effective Rule 11 frees up court dockets and reduces litigation costs and delays, it may actually encourage the filing of stronger cases with smaller potential damages. The main point here is that the civil justice system is a scarce public resource. It makes sound administrative sense to allocate those resources towards the adjudication of claims that have the greatest likelihood of being successful.

Moreover, Rule 11 allocates these resources in a particularly efficient and appropriate way. Rather than prioritize or delete cases by subject matter or by an initial judicial determination that some cases deserve expeditious treatment, Rule 11 simply provides lawyers with the greatest incentive to drop the weakest claims. The more marginal a claim is, the more likely it is to be deterred by the threat of a Rule 11 sanction. For example, if we knew that the Rule deterred claims with probabilities of success of 10% or under, we could state with assurance that over 90% of the cases being deterred were losers. Eliminating such cases automatically allocates scarce judicial resources to cases having a higher likelihood of being winners. One can't give the same assurance when one raises the jurisdictional amount for diversity cases or tightens the rules about application of a statute of limitations.

Further, there is an extortive aspect to these cases. Although most are not straight holdups for litigation costs, they combine the certain threat of litigation costs with the more remote threat of a plaintiff's verdict. This

85. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

threat does create a situation in which defendants, particularly corporate defendants, find themselves settling many very weak and dubious claims. The costs of such settlements, of course, are ultimately borne by shareholders or passed along to consumers. Either way, they are a clear social cost that seems to provide no countervailing benefit except to line the pockets of lawyers.

Finally, think about just how ugly a low-probability claim really is. To say that a case has only a 10% or even 20% chance of succeeding means that going into the case you know that either the theory of causation is dubious (like cancer-causing high voltage electrical lines), the witness's credibility is questionable, the case law does not support your position, or maybe all of the above. Granted, every now and then a plaintiff's lawyer lucks out and, with the help of a lenient judge and a sympathetic jury, actually manages to win one of these cases. But even if the Rule does deter some such "successful" cases, this is surely no great social loss.

D. The Case for Long Shots

Not a bad argument, is it? A case can indeed be made for the sanctioning of long shots, which means that those, myself included, who think that Rule 11 is a mistake, need to show more than just that some potentially successful claims are being deterred. We must show that the cost of such deterrence is significantly greater than its purported benefits, and that is the task of this final section.

Let's begin by recognizing that the social cost of deterring a winning case is far greater than the social benefit of deterring a loser.[86] Whether a losing case is deterred or is filed and ultimately lost, the "right" legal result occurs. No injustice has been done to the actual litigants,[87] and the incen-

86. This argument proceeds from the fact that, despite the formal applicabilty of Rule 11 to defenses as well as claims, its primary effect, as previously demonstrated, is the deterrance of low-probabiliy claims by plaintiffs.

87. This claim is sometimes disputed on the ground that frivolous charges of misconduct are at least as bad as the misconduct itself. *See, e.g.*, Blue v. United States Dep't of the Army, 914 F.2d 525, 534 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991) ("Racial or religious discrimination is odious but a frivolous or malicious charge of such conduct . . . is at least equally obnoxious." (quoting Carrion v. Yeshiva Univ., 535 F.2d 722, 728 (2d Cir. 1976))).

In comparing the costs and benefits of Rule 11, however, this purported equivalence is plainly untrue. A frivolous claim of discrimination, if litigated, will be shown to be false and thus provide defendants with vindication, admittedly at the cost of incurring litigation. If the charges were not made maliciously or in bad faith, it is hard to see how being *mistakenly* accused (and then vindicated) is a harm so great as to warrant sanctions. A valid claim of discrimination, by contrast, if deterred, goes entirely unredressed.

tive and deterrent effects that we presume are created by enforcement of the liability rules are effective whether the case is litigated or never brought. The only social cost of the litigation of losers, in short, is the cost of litigation.

The costs of deterring potentially winning cases, however, include all the costs inherent in reaching the wrong legal result. Plaintiff has been deprived of a recovery to which he or she was entitled, and a defendant thereby unjustly enriched. Moreover, the failure of the legal system to enforce its liability rules increases the incentive on defendants to risk violating those rules in the future, particularly if the injuries can be inflicted on people who will be unsure and uncertain that they have viable legal claims. The cost of litigation seems a small price to pay for enforcement of liability rules; indeed, enforcement of those rules is why we have a civil justice system in the first place.[88] Because the cost of deterring a winning case is so much greater than the cost of litigating a loser, the argument that Rule 11 will deter more losing cases than potential winners is hardly dispositive in its favor.[89]

---

88. *See* A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 236–38 (1985) (arguing that lessening of employment discrimination through judicial enforcement and deterrent effect of civil rights laws should be considered one of the "benefits of a civil justice system").

89. Although this argument does show that deterring a single meritorious case is more harmful than permitting litigation of a single loser, the argument lacks a limiting principle. That is, it could well be argued that while avoiding litigation costs in one case, or even five cases, does not justify deterring a meritorious action, what about avoiding litigation costs in a hundred cases, or a thousand? Would the deterrence of a single meritorious case still outweigh that benefit?

Obviously, at some point, the benefit of litigating every single potentially meritorious long shot must give way to other societal concerns. Otherwise, not only Rule 11, but every procedural rule that limits access to the courts or makes litigation more expensive would be unjustifiable.

I would argue, however, that Rule 11 is sui generis and more objectionable than other rules that also have the effect of deterring litigation or making it more costly, in that those rules, be they limits on jurisdiction, filing fees, or automatic stays, are believed to provide some benefits of fairness or efficiency to the litigation process. Granted, a lawyer must take them all into account in deciding whether a case is worth bringing, but they are not specifically intended, as Rule 11 is, to alter the risk/return analysis of a lawyer so as to discourage the filing of long shots. While the ordinary costs and risks of the litigation, absent Rule 11, cannot be considered a "natural" baseline from which to evaluate potential claims, it is at least a fairly neutral one.

As to the Rule 11 trade-off, I am not prepared to opine as to precisely how many losing cases it is "worth" litigating to vindicate a single meritorious claim. (I suspect, however, that the number is more than 10 and less than 100.) I would point out however, that the more stringently Rule 11 is interpreted and enforced, the greater the percentage of meritorious claims that will be deterred. Moreover, the claims with the lowest probabilities of success (say, under 1%) are unlikely to be brought even without Rule 11, because even if potential damages were so high as to give the claim positive expected value, a lawyer would have to bring (and litigate) an enormous number of such claims to have any reasonable chance of winning a few.

What about the argument that Rule 11 is an appropriate and efficient way to clear dockets of cases that are mostly going to lose? First of all, who says the dockets need clearing? Many have argued (to my mind persuasively) that there has been no litigation explosion.[90] Without getting deeply into that debate, however, let us at least recognize that the case for sanctioning long shots is premised on the controversial and far-from-established premise that there is a strong need to reduce judicial caseloads.

Even if we agree that caseload reduction is a desirable goal, the purported efficiency of the Rule 11 solution is questionable. If one seeks to pare caseloads by limiting subject matter jurisdiction, expanding alternative dispute resolution procedures, or other methods, exclusion of such claims entails at least some consideration of alternative means for their resolution. If one seeks to reduce caseloads by deterring frivolous litigation, in contrast, no one ever worries about what happens to the cases that are deterred, even though some are likely to be meritorious.[91]

The argument that the filing of potential winners may actually be enhanced if Rule 11 succeeds in reducing the costs of litigation is clever, but otiose. There are lots of ways to reduce the costs of litigation to encourage filing of more meritorious cases. Rule 11 is the only method, however, that imposes sanctions on people for bringing lawsuits.[92]

As to the coercive, ugly nature of these low-probability cases, most of what makes them coercive is the likelihood that they might succeed. It seems strange to cite the coercive nature of these cases as a reason for removing them from the legal system, when it is their potential viability as successful legal claims that give them their coercive power in the first place.[93]

To be sure, one can argue that certain liability rules and other aspects of the civil justice system create overdeterrence in some substantive areas.

---

90. Galanter, *supra* note 85; Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 137 (1991); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 829–31 (1993).

91. Moreover, while it is true that the weakest claims are the ones primarily deterred by Rule 11, the more stringently sanctions are applied under Rule 11, the less true that becomes. If Rule 11 is enforced to deter cases with only a 10% probability of success, fewer than 10% of the cases deterred will be potential winners. If enforcement is more stringent and cases with a 20% probability of success are deterred—well, you get the point.

92. The most prominent innovations are alternative dispute resolutions, small claims courts, and other experiments encouraged by the Civil Justice Reform Act of 1990.

93. Moreover, if one seeks to obtain the full deterrent effect of the liability rules, it is just as important to encourage settlement of claims with a 10% chance of success for 10 cents on the dollar as it is to encourage cases with 90% likelihoods of success to settle for 90% of the claims.

It is not unreasonable to think, for example, that the current offensive collateral estoppel rules create asymmetrical stakes in mass tort and products cases that give weak claims too much settlement value. The threat of punitive damages may also create overdeterrence. But to the extent that these are problems of substantive law, damages, and collateral estoppel, they should be debated and resolved as issues of substantive law, damages, and collateral estoppel. They do not justify using Rule 11 to counteract presumed overdeterrence in all types of cases.

This brings us to the unique benefits of having weak claims adjudicated or settled rather than deterred by the legal system. In addition to the fact that some of them will be winners, it seems to me there are two powerful arguments not to exclude low-probability cases, the losers as well as the winners, from the litigation process.

First, the presence of such claims helps clarify and keep honest the debate over substantive liability rules. Legal changes are often brought about by debates over an extreme case. Proponents of tort reform, for example, may decry a big jury award or settlement given to a plaintiff in a case they view as weak and not deserving of recovery. Conversely, when sympathetic plaintiffs are thrown out of court or are unable to obtain redress, such cases may be used to argue for liberalization of the legal or evidentiary standards relevant to such claims.[94] Such extreme cases are likely to appear as low-probability cases to the lawyers who bring them. To deter such long shots from the legal system would deprive the system of an important source of information about the operation of its liability rules.[95]

In this sense, Rule 11 may be viewed as a violation of the ideal of a transubstantive and formally neutral system of civil procedure.[96] The substantive liability rules, in conjunction with such procedural devices as collateral estoppel, class actions, punitive damages, etc., create incentives for private litigants to bring actions. We have seen that those incentives, which include high potential recoveries, asymmetrical stakes, and perhaps

94. *See* Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698 (1986).

95. This argument, which is generally made in opposition to over-reliance on settlement and alternative dispute resolution techniques, *see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), applies even more strongly to claims which, if deterred, will never be resolved in any manner.

96. Among other places, this ideal is embodied in the Rules Enabling Act, 28 U.S.C. § 2072(b) (1994), which prohibits Rules of Civil Procedure that "abridge, enlarge or modify any substantive right." Indeed, I think an argument could be made that Rule 11, by deterring the filing of some meritorious claims, was a violation of the Rules Enabling Act. Of course, winning such an argument would be a long shot.

socially conscious lawyers, are likely to result in the filing of more weak or questionable claims in certain substantive areas than others. By sanctioning and deterring weak claims that are disproportionately brought in these areas, Rule 11 is making a substantive change in the level of enforcement of these liability rules. It is doing so, however, not as part of an ongoing debate about the substantive rules, but hidden as a rule of procedure directed at cases that are described as objectively frivolous.[97]

Furthermore, I believe there are important societal values inherent in maintaining a system of courts that is available and open to all sincerely brought claims for redress, even those with low probabilities of success. In many ways the closest analogue is the right to free speech. The free speech theorists have elucidated policies underlying the First Amendment that explain why it is appropriate to protect not only high-minded and politically responsible speech, but also uninformed, bigoted, and crassly commercial speech.[98] Too much of the attack on Rule 11 has focused on the need to avoid deterring high-minded arguments for legal change, leaving its defenders free to argue that such cases are rarely, if ever, sanctioned under the Rule and that responsible advocates of legal change, therefore, need not fear it.

A more honest and straightforward attack on Rule 11 would proclaim the right of lawyers to file even cases that are poorly investigated, badly thought out, and blatantly coercive, so long as they are brought with the good faith belief they might possibly succeed. Indeed, many of the values thought to justify tolerance of unattractive speech can also be used to justify the filing of unattractive claims.

The truth or "marketplace of ideas" notion, which argues that the free exchange of ideas expands human knowledge,[99] surely has its parallel in the recognition that even lawyers trying to do nothing more than make a buck may alert society to the harmful effects of breast implants or the narcotic effects of nicotine, both theories once thought more dubious than

---

97. This argument assumes that the role of the courts is not merely to resolve disputes but to implement the policies embodied in substantive legal rules. On the difference between conflict-solving and policy-implementing judicial systems, see MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986).

98. A discussion of such policies (which provides the basis for our own discussion of Rule 11 analogues) is found in Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 677–96 (1991).

99. *See* JOHN STUART MILL, ON LIBERTY (D. Spitz ed., 1975) (1859); R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 156–63.

they are today. The argument that free speech gets special protection because it plays a vital role in democracy[100] leads us to recognize that free access to the courts also has an important role to play in a constitutional democracy and a society built on the rule of law. Just as free political debate is such an important core value that it must be protected by tolerating much less valuable speech, the principle that any individual deprived of constitutional or legal rights may seek redress in the courts is similarly central to our system, even if many of those legal or constitutional claims for redress are dubious.

The argument that speech requires special protection because of its role in individual self-realization[101] reminds us that the same concepts of individual autonomy and freedom that underlie this theory also support the freedom of an individual to put her own conception of legal rights and entitlements before a court of law, even if that conception of rights is idiosyncratic, misguided, and unlikely to succeed.

The Bollingerian "tolerance" thesis, that by permitting even hateful speech we, as a society, teach ourselves to tolerate diverse points of view,[102] is perhaps even more relevant to judicial tolerance of hateful claims. Clearly, "tolerance" in the sense of openness to new ideas, receptivity to diverse viewpoints, and willingness to engage in dialogue with those of different perspectives, is a quality we seek to foster in the judiciary. Requiring judges to confront and evaluate low-probability claims, even if they ultimately reject most of them, surely helps foster the openness and flexibility of judicial attitude that is a central value of our society.[103] Indeed, from this perspective, Rule 11, which singles out certain cases for sanctions simply because the lawyers who brought them do not agree with the consensus view of what constitutes an acceptable claim, looks positively intolerant.[104]

---

100. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (asserting that freedom of speech and an educated citizenry are the basis of the social compact).

101. *See generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (asserting that free speech serves the value of individual self-realization).

102. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

103. Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 676 (1991) ("Federal judges must countenance, as part of their jobs, attempts to prove marginal claims. . . .").

104. Steven Schiffrin's emphasis on the importance of dissent in justifying First Amendment protections, STEVEN SCHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990), leads to similar conclusions. One of the few ways one can express dissent from governmental policies within a legitimate governmental framework is by filing a case and making a dissenting argument, even if you know it is likely to lose.

Finally, there are the negative theories that justify free speech protections not because of the positive value of all speech, but because the governmental effort to suppress undesirable speech (i.e., censorship) poses dangers far worse than those created by undesirable speech.[105] The same danger that decisionmakers will not get it right and that they will suppress desirable as well as undesirable activity, is central both to these arguments and to those of opponents of Rule 11. It even goes by the same name—"chilling effect."

The case for long shots is sufficiently strong and so deeply related to the fundamental values of our legal system, that it is not surprising that judges and commentators have been reluctant to confront the fact that the effect of Rule 11 over the past thirteen years has been to discourage and deter the filing of long shots. Concerns that this might be occurring gave impetus to the 1993 changes designed to reduce the stringency of the Rule. But the uncertainty and probabilistic nature of all litigation judgments makes these halfway measures untenable. Any rule that requires a lawyer to worry that a judge might sanction her for filing a case the judge subsequently finds to be groundless is going to deter that lawyer from filing long shots.

It seems clear to me that the costs and controversy surrounding Rule 11, including the deterrence of long shots, meritorious and otherwise, far outweigh any putative benefits the Rule might be providing. A pre-1983 Rule 11, prohibiting actions brought in bad faith or for improper purposes, would give litigants all the protection necessary against the small class of cases brought solely to harass or to extort a settlement based solely on litigation costs. Are the decisionmakers likely to follow this advice—scrap current Rule 11 and the elaborate, if obscure, jurisprudence that has grown up around it? I'd have to say it looks like a long shot.

105. *See, e.g.*, Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1490 (1987); Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989) (arguing that the First Amendment is "an embodiment of a risk-averse distrust of decisionmakers").