NO ARMISTICE AT 11: A COMMENTARY ON THE SUPREME COURT'S 1993 AMENDMENT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure

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Since 1938, the Supreme Court has supervised the development of procedural rules for the federal courts by a system of committees that now operate under the Judicial Conference of the United States. In 1993, for the first time in the history of that process, the Court promulgated several new rules proposed by the committee system without endorsing the content of the rules. One of the 1993 amendments seeks to reduce the costs of "satellite" litigation under Federal Rule of Civil Procedure 11, which governs the imposition of sanctions for filing frivolous suits in the federal courts. Using a game-theoretic model, Professors Kobayashi and Parker show that the new Rule 11 is likely both to increase the rate of frivolous filings, and perhaps more importantly, to increase the rate at which litigants invoke Rule 11 to challenge their adversaries' pleadings. As a result, both the volume and cost of "satellite" Rule 11 litigation is likely to increase, rather than decrease, contrary to the expressed intention of the Amendment's drafters. The authors argue that this outcome suggests the need for more rigorous supervision of the rulemaking process by the Supreme Court.

I. Introduction

One of the Supreme Court's more remarkable recent actions was not a judicial decision at all. The Court's 1993 Amendments to the Fed-

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eral Rules of Civil Procedure[1] are extraordinary in both form and content. In form, the 1993 Amendments may represent a turning point in the Court's attitude toward its quasi-legislative role under the Rules Enabling Act of 1934.[2] For the first time ever, the Chief Justice's letter transmitting such amendments to Congress contains a very explicit and pointed disclaimer of any substantive agreement with their contents.[3] Furthermore, the Court's order adopting the Amendments is

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[1] Order of April 22, 1993, 146 FRD 401, 404 (amending Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76; adding new Civil Rule 4.1; abrogating Form 18-A; amending Forms 2, 33, 34, and 34A; and adding new Forms 1A, 1B, and 35).

[2] Act of June 19, 1934, ch 651, Pub L No 73-415, 48 Stat 1064, codified as amended and supplemented at 28 USC §§ 2072-2075 (1988 & Supp 1992). Under the Rules Enabling Act, the Supreme Court is empowered "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals," 29 USC § 2072(a), and for bankruptcy courts, see 28 USC § 2075. The basic substance of the Act's grant of rulemaking power to the Court remains unchanged from its original enactment, although the Act has been amended on several occasions. The Court's rulemaking power was restated and expanded in Title IV of the Judicial Improvements and Access to Justice Act of 1988, Pub L No 100-702, § 401(a), 102 Stat 4612, 4648, and further amended in Title III of the Judicial Improvements Act of 1990, Pub L No 101- 650, § 315, 104 Stat 5089, 5115 (adding 28 USC § 2072(c), which granted the Court power to define by rule when a district court decision is "final" within the meaning of 28 USC § 1291 and therefore appealable).

Over the years, the Court's rulemaking process has evolved into a highly bureaucratized form. From a single temporary advisory committee to assist the Court in developing the original Federal Rules of Civil Procedure in the 1930's, the rulemaking bureaucracy has developed into multiple permanent advisory committees, one for each of the five different sets of rules that the Court now promulgates, and those five committees now report to an overcommittee called the Standing Committee on Rules of Practice and Procedure, which in turn reports to the Judicial Conference of the United States, which then reports to the Supreme Court. This bureaucratization of the judicial rulemaking process has been ratified and formalized by amendments to the Rules Enabling Act, most notably the 1988 amendments, which imposed process controls on the work of the various committees and conferences that are evocative of the provisions of the Administrative Procedure Act. See 28 USC §§ 2071, 2073, 2077 (as amended in 1988).

[3] Chief Justice Rehnquist's transmittal letter describes the Amendments as "adopted by the Supreme Court," but then adds:

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accompanied by a separate statement of Justice White, providing an extended apology for the Court's disclaimer.[4] Justice White's views seem to cast the Court in the role of something like a second-tier administrative agency opining only on the "rationality" of the sub-bureaucracy's proposals, or perhaps only on the "integrity" of the sub-bureaucrats.[5]

> While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

146 FRD at 403. The contemporaneous amendments to the Federal Rules of Appellate, Bankruptcy, and Criminal Procedure, and the Federal Rules of Evidence, all contained an identical disclaimer, which has not appeared in any of the previous transmittals of amendments to the Civil Rules. Compare 147 FRD at 277, 289, 389, & 525 with 134 FRD 525, 526 (1991); 480 US 953, 954 (1987); 461 US 1095, 1096 (1983); 456 US 1013, 1014 (1982); 446 US 995, 996 (1980); 401 US 1017, 1018 (1971); 398 US 977, 978 (1970); 389 US 1064 (omnibus transmittal letter), 1121 (civil rules amendments) (1968); 383 US 1029, 1030 (1966); 374 US 861, 863, 871 (1963); 368 US 1009, 1011 (1961); 341 US 959, 961 (1951). Prior to 1951, the rules amendments were transmitted through the Attorney General, and those transmittal letters also lacked any such institutionalized disclaimer. See 335 US 919, 921 (1948); 329 US 839, 841 (1947); 308 US 645, 647 (1938) (original promulgation of the Federal Rules of Civil Procedure). The 1947 transmittal letter, however, did contain the statement that "Mr. Justice Frankfurter joins in the approval of the proposed amendments essentially because of his confidence in the informed judgment of the Advisory Committee." 329 US at 841.

[4] 146 FRD at 501–06 (Statement of White).

[5] In his separate statement, Justice White seeks to justify, by reference to the Court's history of rubber-stamping most prior rules amendments and the assumed expertise of the various advisory committees on rules and the Judicial Conference, the Court's newly explicit reticence to endorse the substance of procedural rules. See 146 FRD at 501–04. He concludes by framing something like a "rational basis" test to characterize his perception of the Supreme Court's role:

> [W]e should not perform a *de novo* review and should defer to the Judicial Conference and its committees as long as they have some rational basis for their proposed amendments.
>
> Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity.

146 FRD at 504–05.

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It remains to be seen what these curious signals about the Court's self-image imply for the future of judicial rulemaking. The Court may simply be ducking potential controversy over the process or contents of the 1993 Amendments in particular;[6] it may be seeking to redefine its role more permanently;[7] or it may be inviting a new attack on the rulemaking process.[8] In any event, the innovations in the way the Court

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[6] Justice White's reference to the "integrity" of the "committee system," id at 505, may be a response to Justice Scalia's criticism of the Advisory Committee's process and his pointed references to prior positions taken by two specific individuals involved in the process. See id at 511–12 (dissenting statement of Scalia, joined by Souter and Thomas). Justice White was even more explicit in disavowing agreement with the content of the 1993 Amendments, relying instead on "process" control:

> In connection with the proposed rule changes now before us, there is no suggestion that the rulemaking process has failed to function properly. No doubt the proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.

Id at 505.

[7] Justice White refers almost truculently to "repeated protestations" in the past by former Justices Black and Douglas against the Court's involvement in rulemaking, despite which "Congress did not eliminate our participation," and "Congress insisted on our 'prescribing' rules." 146 FRD at 504, 505. Those remarks, plus the across-the-board application of the disclaimer to all of the 1993 rules amendments, and not only the civil rules, see note 3 above, suggest that there may be institutional support within the Court for throwing down the gauntlet to Congress on the longstanding debate over the Court's role.

[8] Among other possibilities, the Court's restatement of its role opens up the argument that its new process-only orientation is unlawful under the statute requiring the Court to "prescribe" the procedural rules, see note 2 above, or renders the Court's involvement unconstitutional by undermining the judicial-expertise rationale for permitting judges' involvement in the "legislative" business of rulemaking. The possibility of such a constitutional argument is more clearly suggested in recent Supreme Court separation-of-powers decisions than in the older decisions upholding its rulemaking authority for the procedural rules. Compare *Mistretta v United States*, 488 US 361, 380–408 (1989) (judicial involvement in promulgating criminal sentencing guidelines), and *Morrison v Olson*, 487 US 654, 677–85 (1988) (judicial appointment and supervision of independent counsel under the Ethics in Government Act) with *Hanna v Plumer*, 380 US 460 (1965), and *Sibbach v Wilson & Co.*, 312 US 1 (1941).

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treated the 1993 Amendments are likely to generate their own controversy for some years to come.

In content, the 1993 Amendments are even more extraordinary. For the first time in many years,[9] and despite Justice White's argument for deference to the rulemaking committees and the Judicial Conference, the Court was split sharply over the content of two controversial amendments: (1) changes to the discovery rules that impose a new burden of what might be called "spontaneous" or "automatic" disclosure on adverse parties,[10] and thereby, in the words of Justice Scalia's dissenting statement, "introduce into the trial process an element that is

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[9] Not since 1980 have as many as three Justices dissented from an amendment to the Civil Rules. Ironically, that dissent was occasioned by an earlier generation of the "litigation explosion" debate. See 446 US 995, 997 (1980) (Powell, joined by Stewart and Rehnquist, dissenting from a previous package of "reforms" to the discovery rules).

[10] The key amendment is to Rule 26(a), which now requires parties to disclose, shortly after the case has been commenced and without any request from the adverse party, an enormous amount of information generically—and vaguely—described by the Rule, including the identity of "each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information"; "all documents . . . that are relevant to disputed facts alleged with particularity in the pleadings"; and "a computation of any category of damages claimed by the disclosing party." These disclosures must include "the information then reasonably available" to the disclosing party— whatever that means—and that party "is not excused from making its disclosures because it has not fully completed its investigation." 146 FRD at 606–08 (new Rule 26(a)(1)). The new Rule also provides for spontaneous disclosures of similar breadth as to expert witnesses—both direct and rebuttal—and for identification of all trial witnesses and exhibits, including both those the party expects to call or offer and those that the party "may" call or offer "if the need arises," no later than 30 days before trial, excluding only matters to be used "solely for impeachment purposes." 146 FRD at 608–11 (new Rule 26(a)(2),(3)). All trial objections (except relevance) to any deposition testimony by anyone on the opposing party's trial list, or to any document, are waived unless stated in writing 14 days after that exchange. Id at 611 (new Rule 26(a)(3)).

In broad terms, this new rule requires each side's lawyer to do the other side's lawyer's work in preparing the case—apparently without any help, but undoubtedly with much criticism, from the lawyer whose case it is—which

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contrary to the nature of our adversary system," a "radical alteration" that is "extreme, costly, and essentially untested";[11] and (2) a major revision to Rule 11, which governs the imposition of sanctions for what has come to be called "frivolous" or "abusive" litigation.[12] Like the Court's formal innovations, both of these substantive revisions—whether or not they ultimately become effective[13]—are likely to generate continuing controversy.

Indeed, both these amendments themselves are artifacts of a long-standing conflict over the role of lawyers and litigation in American life

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is then followed by a canned pretrial on papers. And these new obligations are backed up by specialized mandatory sanctions under Rule 26(g), for which, unlike the Rule 11 pleading standards, there is no "safe harbor." As Justice Scalia notes in his dissent, this new regime is a "radical alteration" of the adversarial system.

[11] 146 FRD at 507, 510–12 (Scalia dissenting). Justice Scalia was joined in his objections to the discovery proposal by Justices Souter and Thomas.

[12] The changes made by the 1993 Amendment to Rule 11, with the accompanying Notes of the Advisory Committee, are set forth in 146 FRD at 577–92. See also id at 527–29 (Advisory Committee Report), 517 (Standing Committee Report on further modifications). Justice Scalia also dissented from the Rule 11 Amendment, id at 507–10, in this instance joined only by Justice Thomas.

[13] Under the enabling statute, 28 USC § 2074(a), the 1993 Amendments will take effect automatically on December 1, 1993, unless legislation affirmatively disapproving the Amendments is enacted. In the past, very few procedural rule changes have been disapproved by Congress, and the nature of the legislative agenda this year does not make 1993 a prime candidate for an exception to this pattern of acquiescence. Nonetheless, there has been at least some congressional attention to the controversial discovery amendments, which, as Justice Scalia's dissent noted, were made "in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations." 146 FRD at 512 (citing Griffin B. Bell, Chilton Davis Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 Ga L Rev 1, 28–32 & nn 107–121 (1992)). Hearings were held during July and August 1993 on both the House and Senate sides of Congress. In the Senate hearings, the Justice Department asked that Congress "delete or, at a minimum, delay implementation of the proposed amendment to Rule 26(a)(1)." Hearings Before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103d Cong, 1st Sess 2 (July 28, 1993)

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that has been popularized in recent years under the rubric of "the litigation explosion"—the explicit critique that there is "too much" litigation in America, usually accompanied by the suggestion that the misbehavior of lawyers, or some deficiency of the procedural system, is to blame.[14] Whether in fact there is any such "explosion"—in the sense of a socially wasteful volume of litigation—and, if so, whether it suggests a pathology of the procedural system or the legal profession, are interesting and important questions that have yet to be answered with any rigor.[15] What is clear, however, is that there has been a recent "explosion"—indeed, a series of them—in public debate and academic writing about "abusive" or "excessive" litigation. That debate has led to procedural rule changes, which in turn have produced an entirely

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(statement of Frank W. Hunger, Assistant Attorney General for the Civil Division). On the House side, the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee voted on August 5, 1993 to recommend a bill, HR 2814, that would strike the amendment to Rule 26(a)(1). See 51 *Cong Q* 2229 (Aug 14, 1993).

As this article goes to press in mid-September 1993, congressional opposition to the Rule 26 Amendment appears to be gathering momentum. See Richard B. Schmitt, *Plan to Cut Civil Litigation Costs Blocked*, Wall St J B8 (Sept 15, 1993).

[14] See, among many other examples, Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (Truman Talley, 1992) (making all of the standard arguments); Peter W. Huber, *Liability: The Legal Revolution and its Consequences* at ix (Basic Books, 1988) (expansion of tort liability system "has benefited almost no one but the lawyers who run it"); Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 4–5 (Basic Books, 1991) (on expert and scientific evidence: "how to stop legions of case-hardened lawyers from attacking false causes, on behalf of false victims, on the basis of what nobody but a lawyer and his pocket expert call science").

[15] For a dissent from the "litigation explosion" perception, see Marc S. 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); Marc S. Galanter, *The Day After the Litigation Explosion,* 46 Md L Rev 3 (1986).

For an interesting analysis of the problems of judicial administration created by increases in the federal courts' caseload, written by a sitting federal circuit judge, see Richard A. Posner, *The Federal Courts: Crisis and Reform* (Harvard, 1985). However, as Judge Posner notes, "[v]olume alone lacks policy significance." Id at 94. There also have been several issues of

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new body of law about litigation "abuse" and thereby led to another round of academic and public debate over the deficiencies of that body of law. The 1993 Amendments to the discovery rules and Rule 11 represent only the latest phase in that ongoing dialectic.

Although the discovery rules undoubtedly have played an important role in the debate over litigation "abuse," to a large extent it is Rule 11 that symbolizes the overall conflict,[16] for it is Rule 11 that most directly seeks to curb baseless litigation. As originally enacted in 1938, Rule 11 simply required subjective honesty in pleading;[17] violations were seldom alleged and the Rule was virtually unknown for the first 45 years of its existence. But then came the litigation "explosion," and Rule 11 was seized upon as a means of addressing the perceived problem of litigation abuse by imposing sanctions on litigation lawyers. In 1983, the Rule was amended to lower the threshold of violation, to expand the Rule's scope and complexity, and to make sanctions mandatory.[18] The unsurprising result of the 1983 Amendment was an "explosion" within Rule 11 itself, leading to some 6,000 reported cases within the first nine years and scores of law review articles and studies analyzing this new and burgeoning area of law. Thus, the ultimate result of the 1983 Amendment was the 1993 Amendment.

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economics journals devoted to the issue of recent trends in tort litigation and proposals for reform. See, for example, *Critical Issues in Tort Law Reform: A Search for Principles,* 14 J Leg Stud 459 (1985) and *Symposium: The Economics of Liability,* 5 J Econ Persp 3 (1991). As the papers in these journals show, assessing the overall welfare effects of litigation requires an examination of the costs of both the substantive rule and its enforcement taken together.

[16] The history of Rule 11 is discussed in more detail in Part II below.

[17] The original Rule 11 required an attorney's signature on a represented party's pleadings or other papers, and provided that:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not ben served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.

Former FRCP 11, as promulgated at 308 US 645, 676 (1938).

[18] The texts of the 1983 and 1993 versions of Rule 11, showing the changes made on each occasion from the prior rule, are set forth in Appendix B to this article.

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Ironically, much of the criticism that led to the 1993 Amendment was directed at Rule 11's own "litigation explosion": the amount of time, effort, and resources devoted to what has become known as "satellite litigation." That term has been used to refer to litigation that focuses on the sanctioning process itself and on the litigants' or lawyers' compliance with Rule 11 standards, rather than on the merits of the underlying litigation. Despite extensive study and debate, the true extent of satellite litigation and its implications for social welfare are only partially known.[19] However, there is no question that the thousands of reported cases under Rule 11, plus their unreported counterparts, represent a substantial expenditure of resources on litigation extraneous to the merits of the underlying legal disputes, and are therefore potentially wasteful. Criticism of that expenditure, plus questions about its efficacy as a deterrent to baseless claims, were important factors provoking the 1993 Amendment.

The drafters of the 1993 Amendment to Rule 11 purported to address the satellite litigation problem in two principal ways. First, the Amendment partially "decouples" the sanction from the incentives of the adverse litigant to challenge a pleading under Rule 11. Second, the Amendment provides what the drafters call a "safe harbor"—an option to withdraw a challenged filing without sanction, if the exit option is exercised within 21 days after the challenge.[20]

In this article, we analyze the second of these two mechanisms—the exit option—by modelling its effect on both the rate of "frivolous" filings (namely, those violating Rule 11) and the amount of satellite litigation, while holding other factors constant. We find that the likely effects of the 1993 Amendment are unfavorable in both dimensions. First, the rate of frivolous filings is likely to increase. Second, whether or not the rate of frivolous filings increases, the exit option will increase the rate at which all filings—frivolous or nonfrivolous—will be challenged under Rule 11; satellite litigation costs are therefore also likely to increase. The first result is fairly straightforward, and was the principal basis for the dissent by Justices Scalia and Thomas. Intuitively, the exit option reduces the "effective" sanction

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[19] See notes 77–78 and accompanying text below.

[20] See Appendix B for the full text of the 1983 and 1993 Amendments, showing the changes from the previous versions.

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facing a frivolous pleader, thus causing the level of the activity subject to the sanctions to rise. The second result is less obvious, but it is exposed by a consideration of the dynamic interaction of expectations that characterizes litigation. Because responding parties now know that pleaders have a stronger incentive to plead frivolously, they will challenge more frequently, which will produce more Rule 11 litigation. That is, if responding parties want to maintain the level of deterrence, they must react to the reduction in the "effective" sanction by increasing the challenge rate.

We develop our analysis in the following four parts of the article. Part II presents a brief history of Rule 11 that focuses the analysis by concentrating on the key features of the 1983 and 1993 versions of the Rule. Part III presents our analytical model and develops our principal results; it is supplemented by the formal proofs given in Appendix A. Part IV discusses the limitations and implications of our analysis. Part V concludes with a call for more rigorous empirical investigation of the problems surrounding Rule 11, which could and should have been undertaken before the Supreme Court approved the 1993 Amendment.

In summary, we conclude that the drafters of the 1993 Amendment to Rule 11, to the extent that in fact they did seek to achieve an armistice on the satellite litigation front, have failed. The Rule 11 wars will continue, and they may well have been escalated by this latest intervention of the rulesmakers.

From this perspective, it is particularly unfortunate that a majority of the Supreme Court Justices apparently have seen fit to choose this occasion to announce their retirement from the field of procedural rulemaking. Even if the Justices properly might distance themselves from the content of the rules, they at least could impose a more rigorous discipline on the rulesmakers, by requiring them—as lawyers are required under Rule 11—to "stop and think" before acting.

II. A BRIEF HISTORY OF RULE 11

The history of Rule 11 is essentially a tale of its two major amendments—in 1983 and 1993.[21] Prior to 1983, Rule 11 was a simple require-

[21] For a more detailed treatment, see 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* §§ 1331–1339 (West, 1990 & Supp 1993) ("Wright and Miller").

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ment of honesty in pleading[22] that produced very little reported case law or commentary.[23] All of that changed in 1983, when a "tougher" Rule 11 was proposed as a palliative for the "litigation explosion." The resulting 1983 Amendment touched off its own "explosion" of controversy over its deterrent benefit and satellite litigation costs. The 1993 Amendment is, at least ostensibly, an attempt to cope with this new controversy over Rule 11 itself.

A. The 1983 Amendment and the "Cottage Industry of the 1980's"[24]

The 1983 Amendment to Rule 11 emerged from an atmosphere of agitation, beginning in the late 1970's, over the litigation "explosion"

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[22] For the original text of the Rule, see note 17 above. There were no amendments to the rule until 1983. The case law under the original rule interpreted the rules' certification standard as requiring only subjective honesty in the lawyer, and both the imposition and magnitude of sanctions were deemed discretionary with the district judge, see Wright & Miller § 1331 (cited in note 21).

[23] Writing in 1976, Risinger found 19 reported decisions applying Rule 11, only 3 of which resulted in the imposition of sanctions. D. Michael Risinger, *Honesty in Pleading and its Enforcement: Some 'Striking' Problems with Federal Rule of Civil Procedure 11*, 61 Minn L Rev 1, 35–37 (1976). Whether the incidence of sanctions was higher in unreported cases is a matter of speculation, as there are no extant studies of this early period, which might have provided the baseline for comparison with the later experiments.

[24] The quoted phrase is from a 1984 monograph, published shortly after the 1983 Amendment became effective by Arthur Miller, who was the Reporter to the Advisory Committee that drafted the 1983 Amendment, and, as such, a principal architect of that version of the Rule. See Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* (Federal Judicial Center, 1984) ("Miller, *The August 1983 Amendments*"). Miller's monograph (a revision of remarks given at a Federal Judicial Center workshop) is perhaps the single most useful and revealing statement of the background to the 1983 Amendment. His reference to the "cottage industry" acknowledged a risk that critics of the Amendment had envisioned:

> There is the risk that if class actions were the great cottage industry of the 1960's and 70's, the great cottage industry of the 1980's will be sanction proceedings—which, of course, means satellite proceedings and more work for judges, which arguably may completely chew up the efficiencies

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and its "abuses."[25] Of course, one major target of criticism was the broad scope of pretrial discovery permitted under the Federal Rules of Civil Procedure. As a result, the discovery rules were amended in 1980[26] and again in 1983.[27] Although the discovery amendments included some modest changes to the discovery mechanisms themselves, their major theme was to displace the private incentives operating upon litigants with more "managerial" authority for district court judges to control the scope and extent of discovery on a case-by-case basis.

In addition, the 1983 Amendments to the discovery rules were accompanied by a package of "sanctions" amendments—to Rules 7, 11, 16, and 26[28]—all motivated by a perception that much of the litigation "abuse" was due to improper conduct by participants in the process, primarily litigation lawyers. These miscreants henceforth were to be sanctioned for failing to meet a new standard of responsibility to the courts or the public.[29] The centerpiece of this new sanctions package was the 1983 Amendment to Rule 11.

> and the economies that these rules might have produced. That was the great experiment; we didn't write these rules with no recognition that that was plausible.

Id at 39–40. Ultimately, the critics were proved to have been prescient.

[25] See, for example, Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Calif L Rev 264 (1979); Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 Am Bar Found Res J 873.

[26] 446 US 995, 997 (1980) (amending Rules 4, 5, 26, 28, 30, 32, 33, 34, 37, and 45). With the exception of the amendment to Rule 4 and part of the amendment to Rule 45, all of the 1980 Amendments to the Civil Rules related to discovery.

[27] 461 US 1095 (1983). Aside from the "sanctions" package discussed below, the key amendment was to insert a new paragraph in Rule 26(b)(1), the general rule on the scope of discovery, granting the district courts authority to limit discovery perceived as cumulative, protracted, or unduly burdensome or expensive. See id at 1103.

[28] Id at 1097.

[29] "The most important thing to realize in looking at these new rules is that rules 7, 11, 16, and 26—which are the four that I will examine—represent an integrated package. They are not four individual rules, they are four intertwined rules that have a certain global theory in back of them." Miller, *The*

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The 1983 Amendment made two key changes to Rule 11. First, the former conduct standard of subjective honesty was replaced by an "objectified" standard that required a lawyer or litigant signing a pleading or other court paper to certify that "after reasonable inquiry," the paper "is well grounded in fact" and "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[30] Second, and equally important for future developments, the 1983 Amendment made sanctions mandatory upon a finding of a violation, and strongly endorsed fee-shifting (that is, awarding the adverse party its "reasonable" attorneys' fees and expenses caused by the violation) as the presumptive measure of the sanction.[31]

Thus, the specific provisions of the 1983 changes, combined with the philosophy animating those changes, made the subsequent "explosion" of Rule 11 litigation all but inevitable. The conduct standard itself was made significantly broader, more complex, and more stringent—all under relatively vague language—which is always a prescription for increased disputation.[32] But those changes may not have had

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August 1983 Amendments at 2 (cited in note 24). After reciting the "litigation explosion" litany, id at 2–10, Miller's monograph then identifies "four themes" underlying the Amendments:

> Theme one is somehow to try and engineer improved or increased lawyer responsibility, to moderate lawyer behavior in litigation so that there is less of the aimless, less of the pavlovian, less of the drifting.
>
> Theme two is . . . increased judicial management—or oversight, or control, or whatever word you want to use for the phenomenon of judicial involvement . . .
>
> Theme three is . . . discovery [limitation] . . .
>
> Theme four, unfortunately, is a dirty business. Theme four I like to think of as the mortar holding the first three bricks together. Simply put, it is sanctions. How do you achieve themes one, two, and three? One answer chosen by the rulemakers is to impose sanctions.

Id at 10–11.

[30] FRCP 11, as amended in 1983, 461 US at 1099–1100 (1983).

[31] See id at 1100.

[32] See, for example, Richard Craswell and John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J L Econ & Org 279 (1986); Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 Int'l Rev L & Econ 381 (1992).

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such dramatic effects without the new sanctions regime, coupled with the "public duty" philosophy, which together created a permanent conflict of interest between litigation lawyers and their clients, as well as an irresistible incentive for the adverse party to exploit that conflict. Because the lawyer's certification was conceived as a non-delegable duty to the court or the public, usually only the lawyer would be sanctioned for a violation. Whatever its nominal amount, the sanction could have large adverse effects on the lawyer's reputation, which would not be transferred to the client or fully reflected in the lawyer's fee.[33] On the other hand, the transferable amount of the sanction—in terms of either monetary payment or tactical advantage—would redound almost completely to the adverse client's interest. Clients therefore could be expected to pressure their lawyers to file Rule 11 challenges to adverse litigants' pleadings.

Furthermore, and this is important to the analysis in this article, a filing was a high-stakes gamble for the filing lawyer, because once the paper was filed, it was potentially subject to Rule 11 sanctions even if later withdrawn. Indeed, two of the four Supreme Court decisions under the Rule as amended in 1983 address and confirm this feature of the Rule, in the extreme situations of a pleading withdrawn prior to any

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[33] In effect, the increased risk of sanctions operates much like a tax on lawyers, which is likely to be absorbed in part by lawyers' incomes because an increase in the relative price of lawyering will cause consumers to shift toward substitutes.

In addition, the heightened sanctions regime could segment the litigation bar into "high reputation" and "low reputation" components. As the "low reputation" component has lower reputational costs of sanctioning, its members are likely to compete away any premium that the "high reputation" component would charge, so that the "low reputation" component would specialize in filing questionable pleadings for a marginal fee approximating the expected sanctions cost. For a similar analysis in the context of "surrogate" (for-hire) crimes, see Roger L. Faith & Robert D. Tollison, *The Pricing of Surrogate Crime and Law Enforcement,* 12 J Leg Stud 401 (1983). For a general discussion of reputation, see Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance* 89 J Pol Econ 615 (1981). For evidence on the magnitude of reputational penalties, see John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?,* 30 Econ Inq 583 (1992); John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation,* 21 J Leg Stud 159 (1992).

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response by the opposing party[34] and of an action over which the federal courts lacked subject matter jurisdiction.[35]

Given its expansive and vague provisions, and the sanctioning incentives, the dramatic expansion of Rule 11 litigation under the 1983 Amendment should have come as no surprise. In fact, some increase in litigation activity was expected even by its drafters.[36] But the volume of increase has been staggering: in the first 38 years of practice under the original rule, there were about 20 reported decisions addressing the rule;[37] while in the first nine years of practice under the 1983 Amendment, there were some 6,000 reported decisions under the rule, including 600 decisions by courts of appeals and four decisions by the Supreme Court.[38] With that amount of new law being made, the secondary literature also grew dramatically: in the first nine years after the 1983 Amendment, Rule 11 was the primary or exclusive subject of some 140 law review articles,[39] a variety of monographs and studies,[40] and

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[34] *Cooter & Gell v Hartmarx Corp.*, 496 US 384 (1990).

[35] *Willy v Coastal Corp.*, 112 S Ct 1076 (1992). The other two Supreme Court decisions under the 1983 version of Rule 11 are *Business Guides, Inc. v Chromatic Communications Enterprises, Inc.*, 111 S Ct 922 (1991), and *Pavelic & LeFlore v Marvel Entertainment Group*, 493 US 120 (1989) (see note 47 below).

[36] See Miller, *The August 1983 Amendments* at 40–41 (cited in note 24).

[37] See note 23 above.

[38] Georgene Vairo's treatise on Rule 11 reports that "5,929 Rule 11 opinions were reported between August 1983 and July 1992," including "over 600 reported court of appeals decisions." Georgene M. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* § 2.02(b) at 2–21, § 2.04(a) at 2–61 (Prentice Hall, 2d ed 1992) ("Vairo, *Rule 11 Sanctions*").

[39] Vairo's treatise contains a bibliography of the law review articles, listing some 140 articles from 1983 through mid-1992. Vairo, *Rule 11 Sanctions*, Appendix F (cited in note 38).

[40] For example, Miller, *The August 1983 Amendments* (cited in note 24); American Bar Association, Section of Litigation, *Sanctions: Rule 11 and Other Powers* (ABA, 2d ed 1988) ("ABA, *Sanctions*"); Warren Freedman, *Frivolous Lawsuits and Frivolous Defenses: Unjustifiable Litigation* (Quorum Books, 1987); Thomas E. Willging, *The Rule 11 Sanctioning Process* (Federal Judicial Center, 1988); Saul M. Kassin, *An Empirical Study of Rule 11 Sanctions* (Federal Judicial Center, 1985) ("Kassin, *An Empirical Study*"); Stephen B. Burbank, ed, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (American Judicature Society, 1989).

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three new legal treatises.[41] In this way, the 1983 Amendment has fulfilled the prophecy that Rule 11 sanctions would become "the great cottage industry of the 1980's."[42]

The reported case law has addressed a wide variety of issues and revealed significant differences of opinion among courts on virtually all issues.[43] Both the reported cases[44] and opinion surveys of federal judges[45] show differences over such basic questions as the distinction between "frivolous" pleadings and those that are "well grounded" in fact and "warranted" in law.[46] More sophisticated issues, such as the

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[41] Vairo, *Rule 11 Sanctions* (cited in note 38) (now in its revised and expanded second edition); Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (Michie, 1990 & Supp 1992); Jerold S. Solovy, Laura A. Kaster, Norman M. Hirsch, & James L. Thompson, *Sanctions in Federal Litigation* (Butterworth, 1991).

[42] Miller, *The August 1983 Amendments* at 40 (cited in note 24).

[43] The second edition of Professor Vairo's treatise on Rule 11, published in 1992, contains an entirely new chapter on "Rule 11 by the Circuit," in recognition of the inconsistencies among the various federal circuits:

> Rule 11 has not been applied consistently. This inconsistency has been aggravated by the different twists and turns Rule 11 case law has taken in the thirteen federal courts of appeals.

Vairo, *Rule 11 Sanctions* § 11.01, at 11–3 (cited in note 38). See also ABA, *Sanctions* (cited in note 40), which is an entire work devoted to unraveling the intercircuit differences in Rule 11 law. Its introduction (by Charles M. Shaffer, Jr.) notes that "[d]espite a few definitive rulings from the circuit courts, application of the Rule continues to generate varying results." Id at 8.

[44] One of the best-known examples from the reported case law is the *Eastway Construction* litigation, involving a sharp difference in perception among distinguished district and appellate judges as to the meaning of "frivolousness" under the 1983 Amendment. See *Eastway Construction Corp. v City of New York*, 762 F2d 243 (2d Cir 1985) (Judge Irving Kaufman), on remand, 637 F Supp 558 (EDNY 1986) (Judge Jack B. Weinstein), aff'd in part and rev'd in part, 821 F2d 121 (2d Cir 1987) (Judge Jon Newman).

[45] See Kassin, *An Empirical Study* at 19–20, 45 (cited in note 40) (finding "a good deal of interjudge disagreement over what actions constitute a violation of the rule").

[46] Somewhat surprisingly, the "legal" branch of the test has proved to be even more indefinite than the "factual" branch, as is illustrated by the *Eastway Construction* litigation (see note 44 above), and, even more dramatically, by *Golden Eagle Distributing Corp. v Burroughs Corp.*, 801 F2d 1531 (9th Cir 1986), rev'g 103 FRD 124 (ND Cal 1984) (Judge William W. Schwarzer).

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vicarious responsibility of non-signing lawyers for a violation, the standard of appellate review, and the "continuing" nature of the Rule 11 obligation, have opened up ongoing conflicts among the circuit courts.[47] The Rule's sanctioning provisions have produced an enormous body of law that combines all the complexities of causation and damages law—including such questions as the duty to "mitigate" Rule 11 damages, and the imposition of "punitive" Rule 11 sanctions consisting of a multiple of the opposing party's fees and expenses—with the problems entailed in quantifying a "reasonable" attorneys' fee.[48]

Most of the extensive scholarly commentary on the 1983 Amendment has been critical of the Rule and the developing case law. Pointing to the lack of predictability in the Rule's substantive standard, critics argue that the threat of sanctions is "chilling" legitimate advocacy;[49]

"Difficulties have been encountered . . . when an imaginative lawyer confronts an unimaginative judge or when an imaginative judge sees possibilities in a legal argument most judges would consider beyond the pale. In effect a lawyer making an unorthodox argument has to estimate when unorthodoxy will be regarded as heresy by the judicial authorities. The history of doctrine indicates that this involves an unavoidable element of peril." Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, *Civil Procedure,* § 3.13, at 166 (Little, Brown, 4th ed 1992).

[47] The first two of these conflicts were resolved by the Supreme Court's decisions in *Pavelic & Leflore v Marvel Entertainment Group*, 493 US 120 (1989) (holding that only the signing attorney, and not his firm, was liable to sanctions under the Rule), and *Cooter & Gell v Hartmarx Corp.*, 496 US 384, 405 (1990) (holding, inter alia, that an "abuse of discretion" standard of review applied to all questions under Rule 11, but also that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."). The "continuing duty" debate—whether a paper that was nonfrivolous when filed could become sanctionably frivolous if not withdrawn spontaneously in light of after-acquired information—continued to divide the courts of appeals until the 1993 Amendment, which endorses a version of this concept. See Vairo, *Rule 11 Sanctions* § 5.04 (cited in note 38); note 59 and accompanying text below.

[48] See generally Vairo, *Rule 11 Sanctions* ch 9 (cited in note 38); Wright & Miller §§ 1336, 1338 (cited in note 21).

[49] See Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo L J 1313 (1986) ("Nelken, *Sanctions*"); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv L Rev 630 (1987).

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they charge that the Rule's application is "unfair" because plaintiffs' lawyers (who usually do the pleading) are sanctioned more frequently than defendants' lawyers, or that certain types of cases give rise more frequently to sanctions;[50] they question the emphasis under the Amendment on the "regulation" of lawyer competence as inappropriate and ineffective;[51] they worry about a purported inconsistency in the Rule's underlying purpose, which is viewed as split among incompatible objectives of deterrence, punishment, and compensation;[52] they question whether in fact Rule 11 is having any beneficial effect in terms of deterring "frivolous" litigation;[53] and, to increasing effect as the case law has accumulated, they argue that any positive effect is outweighed by the costs of "satellite" litigation.[54]

This new atmosphere of controversy, now focused more on the problems of Rule 11 itself—especially satellite litigation— ultimately produced the 1993 Amendment.

B. The 1993 Amendment: Truce or Escalation?

In July 1990, the Advisory Committee on Civil Rules[55] initiated a process of considering amendments to Rule 11 that extended over the following two years. The process involved extensive public comment, commissioned studies by the Federal Judicial Center, public hearings, and, as always, controversy, both in the public debate and within the judiciary's rulemaking bureaucracy itself.[56] What ultimately has

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[50] See, for example, Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 Fordham L Rev 475 (1991) ("Vairo, *Where We Are*").

[51] See Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 Vill L Rev 575 (1987).

[52] See Nelken, *Sanctions* (cited in note 49); Vairo, *Where We Are* (cited in note 50).

[53] For example, see Vairo, *Where We Are* at 481 (cited in note 50).

[54] William W. Schwarzer, *Rule 11 Revisited*, 101 Harv L Rev 1013 (1988); William W. Schwarzer, *Sanctions under the New Federal Rule 11—A Closer Look*, 104 FRD 181 (1985); Vairo, *Where We Are* (cited in note 50).

[55] See note 2 above for a description of the rulemaking committee structure.

[56] For a description of the amendment process through mid-1992, see Vairo, *Rule 11 Sanctions* § 2.04 (entitled *Amending Amended Rule 11*) (cited in note 38).

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emerged is yet another dramatic recasting of Rule 11 in the 1993 Amendment.

The 1993 Amendment once again makes Rule 11 longer and more complex.[57] The Rule is entirely rewritten, although many of the concepts of the 1983 Amendment are carried forward.[58] The scope of the Rule 11 obligation is actually broadened by the 1993 Amendment, which endorses the "continuing duty" concept.[59] In response to the "fairness" criticisms, the Rule now differentiates between the standards applicable to affirmative factual contentions (those usually

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[57] See Appendix B below. The new text is in 146 FRD at 419–24. The old text with the changes indicated are set forth at 577–83, followed by the Advisory Committee Notes at 583–92.

[58] Thus, the "reasonable inquiry" standard is expanded only by adding "under the circumstances"; the "legal" branch of the "grounds" requirement is changed only by substituting "nonfrivolous" for "good faith" in the formulation "warranted by existing law or by a nonfrivolous [formerly good faith] argument for the extension, modification, or reversal of existing law," and the phrase "or the establishment of new law" is added at the end of the formulation. Id at 579, 580. Interestingly, although Rule 11 has been referred to at least since 1983 as regulating "frivolous" pleadings and papers, the addition of the word "nonfrivolous" to this portion of the Rule is the first time—and still the only instance—in which the Rule itself uses the term "frivolous" or some variant thereof. Moreover, in this particular context of substituting for "good faith," it is unclear whether the change makes the Rule's standard more or less stringent. The Advisory Committee's notes on the change could be read as indicating a *more* stringent standard. See id at 586–87.

[59] The concept is executed by the Rule's new formulation of the sanctionable act as "presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper." Id at 579. As the Advisory Committee note explains:

> [The Amendment] emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable. . . .
>
> . . . [A] litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as 'presenting to the court' that contention and would be subject to the obligations of [the Rule] measured as of that time.

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made by plaintiffs) and denials (usually made by defendants) by allowing plaintiffs what appears to be a more permissive standard.[60]

By providing a standard for setting the sanction level as "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated," the Rule as now amended fairly clearly indicates that its rationale is deterrence.[61] The Amendment also permits "decoupling" of the sanction from the adverse party's damages. It does this by providing that "the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay money into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."[62]

Although the Advisory Committee apparently viewed the permissive decoupling feature as some protection against satellite litigation, it pinned most of its hopes in this regard on a new "safe harbor" provision, which grants an exemption from sanctions if, within 21 days after a paper is attacked by a Rule 11 motion, the challenged paper is "withdrawn or appropriately corrected."[63] However, the "safe harbor" does

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146 FRD at 585. Furthermore, the background to the 1993 Amendment shows that the Advisory Committee rejected a proposal to confine Rule 11 standards to a pleading "as a whole," see id at 524 (Advisory Committee Report to the Standing Committee), which would have imported a sort of "materiality" requirement. Thus, the Rule applies to any claims, defenses, and "contentions"—legal or factual—apparently without regard to their importance to the case, although the Advisory Committee's note purports to discourage Rule 11 challenges for "minor, inconsequential violations." Id at 590.

[60] Thus, under new subdivision (b) of Rule 11, affirmative "allegations and other factual contentions" need only "have evidentiary support," while denials must be "warranted on the evidence." 146 FRD at 580 (new paragraphs (b)(3) and (b)(4)).

[61] New Rule 11(c)(2). 146 FRD at 582.

[62] Id. The Advisory Committee note is somewhat more directive on both of these points, though hardly descriptive of the actual text of the rule: "Since the purpose of Rule 11 sanctions is to deter rather than compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty." 146 FRD at 587–88.

[63] New Rule 11(c)(1)(A). 146 FRD at 581. This subparagraph also contains a sentence essentially overruling the Supreme Court's interpretation of the Rule

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not extend to court-initiated sanctions proceedings,[64] and neither the "safe harbor" nor any other feature of the 1993 Amendment will be applicable to discovery requests, responses, or motions, which are expressly excluded by new Rule 11(d).[65]

The Advisory Committee believed that these changes were sufficient to achieve its stated objectives of "increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions."[66] However, in an unusual example of open disagreement within the judicial rulemaking bureaucracy, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference, to which the Advisory Committee reports, further amended the proposal to make the imposition of Rule 11 sanctions discretionary rather than mandatory with the trial court.[67] Although this last change reverses not only the considered opinion of the Advisory Committee[68] but also one of the major innovations of the 1983 Amendment, it is unclear whether

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in *Pavelic & LeFlore*, see note 47 above, by providing: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." 146 FRD at 581. Accordingly, we now can expect the creation of an entirely new body of Rule 11 law on vicarious liability under the 1993 Amendment.

[64] New rule 11(c)(1)(B). 146 FRD at 582.

[65] 146 FRD at 583. In dissent, Justice Scalia noted this differential treatment, which he characterized as an "inconsistency" and "curious." 146 FRD at 510 n 1. As we discuss below, however, it may—particularly when coupled with the parallel amendments to the discovery rules—be somewhat more than merely "curious." See Part IV.C below.

[66] 146 FRD at 523 (Advisory Committee Report to the Standing Committee).

[67] 146 FRD at 517 (Standing Committee Report).

[68] The Advisory Committee had considered and rejected such a proposal on a split vote, primarily on the rationale that the exit option went far enough:

> Two members of the Advisory Committee prefer this approach [of discretionary sanctions], though do not request that this view be expressed as a formal minority view in the Committee Notes. The other members of the Advisory Committee believe that, particularly given the opportunity through the 'safe harbor' provisions to withdraw an unsupportable contention before a Rule 11 motion is even filed, some sanction should be imposed if the court is called upon to determine, and does determine, that the rule has been violated.

146 FRD at 524 (Advisory Committee Report to the Standing Committee).

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this additional route to permissive "decoupling" will have a dramatic impact in practice.[69]

The Judicial Conference's version of the proposal was forwarded to the Supreme Court and adopted without further change as the 1993 Amendment, although with a strong dissent by Justice Scalia, joined on this point by Justice Thomas.[70] Justice Scalia's dissent focuses mainly on the weakened deterrent effect of the "decoupling" and "safe harbor" provisions:

> The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day 'safe harbor' within which, if the party accused of frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.[71]

Justice Scalia noted the contradiction between the "safe harbor" provision and the Court's recent decision construing Rule 11 to require sanctions even when the entire action had been withdrawn.[72] He suggested that judges' incentives made the discretionary sanctions less likely to be imposed.[73] He challenged the viability of a deterrence rationale for guiding district courts' exercise of the permissive "decoupling" authority.[74] And he questioned whether in fact there was any empirical

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[69] The effect of discretionary sanctions will depend to a large extent on judicial attitudes. Furthermore, discretionary sanctions, and indeed all forms of "decoupling," may have only a limited effect on litigants' strategic behavior so long as expected sanctions remain above a critical threshold. See Part IV below.

[70] 146 FRD at 507–10 (dissenting statement of Scalia). Justice Souter joined the dissent only on the discovery rules amendments.

[71] Id at 507–08.

[72] Id at 508 (citing *Cooter & Gell v Hartmarx Corp.*, 496 US 384 (1990)).

[73] "Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession. They do not immediately see, moreover, the system-wide benefits of serious Rule 11 sanctions, though they are intensely aware of the amount of their own time it would take to consider and apply sanctions in the case before them." Id at 508. For a generalization of these observations, see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup Ct Econ Rev 1 (1993) ("Posner, *What Do Judges and Justices Maximize?*").

[74] "Since the deterrent effect of a fine is rarely increased by altering the identity of the payee, it takes imagination to conceive of instances in which

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basis for believing that "the current Rule 11 regime is ineffective, or encourages excessive satellite litigation."[75]

Justice Scalia's critique exposes the problems that have plagued Rule 11 in recent years: despite the enormous volume of attention to Rule 11 in the interim, we actually know very little more about its systemic effects in 1993 than we did in 1983, when even the Reporter to the Advisory Committee that drafted the 1983 Amendment could not say whether they were addressing a genuine problem or were simply victims of a "cosmic anecdote" about litigation abuse.[76] The problem is not merely a shortage of data. The "empirical" studies to date are to a large extent uninformative[77] because we do not even know what we

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this provision will ever apply. And the commentary makes clear that even when compensation is granted it should be granted stingily.... As seen from the viewpoint of the victim of an abusive litigator, these revisions convert Rule 11 from a means of obtaining compensation to an invitation to throw good money after bad. The net effect is to decrease the incentive on the part of the person best situated to alert the court to perversion of our civil justice system." Id at 509.

[75] Id.

[76] This candid admission was made by Arthur Miller in his monograph on the 1983 Amendments:

> There is a widespread feeling that there is a lot of frivolous conduct on the part of lawyers out there, a lot of vexatious conduct, a lot of inefficient conduct.... Lawyers, it is said, need to be controlled to some degree. I repeat, we do not know how much of this there really is, because what one person would call frivolous, somebody else would call meaningful or substantive. We may be the victims of the phenomenon known as the cosmic anecdote: Somebody tells a war story at one bar association meeting, and it is picked up by ten other lawyers who then tell the same anecdote at ten other bar association meetings, and before you know it people are rioting in the streets saying the foundations of the republic are crumbling, because this incident, which has only happened once, now appears to have happened a thousand times. *We really don't know*, but the advisory committee... felt that there had to be some meaningful restraint put on lawyer behavior to cut back on some of this type of conduct.

Miller, *The August 1983 Amendments* at 11–12 (cited in note 24) (emphasis added). One might legitimately ask why the Advisory Committee thought itself competent to legislate on its "feeling"—and thereby create an enormous new body of law and litigation—rather than to recognize its ignorance. More to the immediate point, having done so in 1983 to no obvious good effect, why is it back doing essentially the same thing in 1993?

[77] Most of the studies to date, see note 40 above, are composed primarily or exclusively of opinion surveys of judges and lawyers. Although the results

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seek. What is needed first is some theory of how Rule 11 sanctions could work, which could then be tested against the data. But without any theory, even a multitude of data will tell us nothing, and the rulesmakers are likely to be back at the problem again in the future, again without meaningful guidance from past experience.

The following part of this article offers the beginnings of a theory of Rule 11 sanctions by examining one important feature of the 1993 Amendment—the "safe harbor" provision—in terms of the Advisory Committee's stated goals of deterring frivolous filings and reducing the frequency of Rule 11 motions. Because we find that frivolous filings are likely to increase, our conclusions agree with Justice Scalia's critique of the reduced deterrent value of the amended Rule. However, we also find a second, and seemingly paradoxical, effect that is even more robust: that under plausible assumptions about the litigants' incentives, the rate of Rule 11 motions also will rise under the 1993 Amendment, whether frivolous filings rise or fall.

III. Analysis of the 1993 Amendment's "Safe Harbor"

Analysis cannot proceed effectively without some level of abstraction from reality and isolation of the variables of interest. A simplified model can then be constructed and investigated rigorously. We have chosen here to focus on the 1993 Amendment's "safe harbor" provision, and to investigate the effects of that provision on both the rate of "frivolous" filings and the rate of Rule 11 motions, as compared with the conditions under the pre-existing structure created by the 1983

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certainly are interesting in terms of perceptions, they tell us nothing about reality. The most comprehensive prior study was commissioned by the Advisory Committee, after it had begun the rule amendment process, see *Interim Report on Rule 11* (1991) (reprinted in Vairo, *Rule 11 Sanctions* Appendix I (cited in note 38)), and that study embraced only five federal districts, which were not claimed to be representative. More fundamentally, the study reports only on the gross volume and mechanics of litigated Rule 11 motions. The principal findings were that 2–3 percent of all cases in the districts studied had Rule 11 activity that was discernible from court records, and that most of the sanctions were imposed against plaintiffs. See Vairo, *Rule 11 Sanctions* Appendix I, at I5–I8, I26–I33 (cited in note 38). What do these findings mean? They do not tell us whether Rule 11 is "working" in any articulated sense; they do not answer whether satellite litigation is a problem or not; and they do not indicate whether the rule is "unfair" to plaintiffs. They are just numbers—interesting, to be sure, but useless for policy analysis.

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version of the Rule. As noted above, we find that the 1993 Amendment is likely to have adverse effects on both variables of interest—both increasing frivolous filings and increasing the rate at which filings are challenged by Rule 11 motions. We have elected to focus on the issue of "satellite litigation" rather than more general measures of "social welfare" such as optimal levels of care, broader measures of litigation costs, or the incidence of legal error.[78] This focus is motivated by the drafting committee's emphasis on the problem of "satellite litigation."[79]

Of necessity, our narrow focus requires us to abstract away from other interesting issues presented by the 1993 Amendment, although we revisit some of those issues, most notably the "decoupling" features, in Part IV below.[80] However, to isolate the effects of the "safe harbor" provision, we provisionally assume away any "decoupling" effect. We also suppress the effect of changes in the definition of a "frivolous" filing, and we assume that neither courts nor litigants err systematically in applying the standard of "frivolity"—although they may err in a particular case. We also assume away the problems of conflict of interest between lawyer and client. One value of these assumptions in the analysis is that they appear to be the most favorable to the efficacy of the 1993 Amendment in terms of reducing satellite litigation costs, and yet we nonetheless find an adverse effect.

Under these assumptions, we construct a model of litigation with Rule 11 sanctions in subpart A below, examine the solution conditions in subpart B, and present numerical examples, illustrating the effect of the 1993 Amendment on satellite litigation costs, in subpart C. The structure of our model draws upon game theory, but no technical

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[78] See, for example, Richard A. Posner, *The Economic Analysis of Law* 549 (Little, Brown, 4th ed 1993); Robert D. Cooter and Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 J Econ Lit 1067 (1989).

[79] It is also motivated by the fact that little was known about the nature or empirical relevance of "frivolous litigation," either when the 1993 Amendment was being considered or in 1983 when its predecessor, the current rule, was put into place. See the discussion in note 76 above.

[80] For an explicit analysis of decoupling, see A. Mitchell Polinsky and Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, Georgetown L J (forthcoming 1993) ("Polinsky and Rubinfeld"). See also A. Mitchell Polinsky and Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J Econ 562 (1991).

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knowledge of game theory is required to follow the presentations, and the full mathematical proofs are set out separately in Appendix A at the end of the article. The game-theoretic approach is essential to our analysis, however, because only that approach begins to capture the dynamic interaction of parties' expectations that is so characteristic of actual litigation. Therefore, regardless of their familiarity with the formal techniques of game theory, experienced litigation lawyers are likely to be familiar with the thought process involved in the analysis.

A. A Model of Litigation with Rule 11 Sanctions

The "safe harbor" provision of the 1993 Amendment is something of a misnomer: functionally, the provision is no "harbor" at all, because in order to obtain protection from sanctions, the sponsoring litigant must withdraw the challenged paper. In terms of its effect on parties' incentives, the provision is more accurately characterized as an "exit option" because it permits the pleader to exit without paying the full price that its pleading has caused the adverse party.[81]

To model the effect of the exit option on the parties' decisions, we first construct the decision tree represented in Figure 1 below,[82] which gives both parties' decision points across the sequence of events in a simple litigation scenario of five stages, labeled *A* through *E* in the figure, covering the decision to file through the submission of the merits and any Rule 11 motion to the court. We take the case of a plaintiff filing a complaint against a defendant, although the analysis could be

[81] The effect of procedural rules, particularly those sequencing the various stages of litigation, as creating an "option value" to the litigant, has been shown in the prior law-and-economics literature. See Bradford Cornell, *The Incentive to Sue: An Option Pricing Approach*, 19 J Leg Stud 173 (1990); William M. Landes, *Sequential versus Unitary Trials: An Economic Analysis*, 22 J Leg Stud 99 (1993). For models of strategic behavior in litigation, see Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J Leg Stud 437 (1988) ("Bebchuk, *Suing Solely to Extract*"), Michael J. Graetz, Jennifer F. Reinganum, and Louis L. Wilde, *The Tax Compliance Game: Toward an Interactive Theory of Law Enforcement*," 2 J L Econ & Org 1 (1986) ("Graetz, Reinganum, and Wilde"); Barry Nalebuff, *Credible Pretrial Negotiation*, 18 RAND J Econ 198 (1987); and Ivan P. L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 Bell J Econ 539 (1983) ("P'ng, *Strategic Behavior*"). Our model builds on these prior contributions.

[82] In game theory terminology, this is the "extensive form" representation of the "game."

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generalized to any situation under Rule 11. We also simplify by assuming that the "frivolity" of the complaint can be represented by a variable X, which takes the value of *0* when the claim is "frivolous" and *1* when it is non-frivolous.[83] Thus, in a perfect world there would be no type *0* complaints. But, as the existence and popularity of Rule 11 show, we do not live in a perfect world.

A key assumption motivating the analysis is the existence of "asymmetric information"—meaning that, until the court's decision after stage E, the plaintiff has more information about the frivolousness or nonfrivolousness of its own complaint than does the defendant. In our highly simplified case, this condition is approximated by assuming that plaintiff "knows" costlessly whether its complaint is type *0* or type *1*, but the defendant does not, at least until after stage E.

Why would any plaintiff ever file a type *0* complaint? Although we will specify the conditions in more detail below, the basic answer is that we live in an imperfect world, or, in other words, the plaintiff does not face an absolute certainty that a type *0* complaint will be rejected or even sanctioned, nor, conversely, that a type *1* complaint is a sure winner.[84] The plaintiff's decisions—as with all decisions in reality—

[83] This is merely a simplification to make the analysis more tractable. Obviously, the realistic case is that X exists on a continuum, rather than the stark *0–1* case put in the text. But complicating the analysis with that refinement would not change any of the results. Our model also abstracts from the possibility that the plaintiff is uncertain about his own type. While we do not explicitly address this issue, it is interesting to note that an attorney's ignorance about the attributes of his client's position can subject the attorney to Rule 11 sanctions if this ignorance is interpreted as a failure to make a "reasonable inquiry." This reinforces the point made by others that the notion of what makes a suit "frivolous" is not well defined. For additional discussion of this point, see note 76, above. Our model further abstracts from the possibility that the defendant has private information about the strength of the case. For a discussion of litigation where the defendant has private information, see P'ng, *Strategic Behavior* (cited in note 81).

[84] For a similar discussion of probabilistic or "mixed" strategies, see Bebchuk, *Suing Solely to Extract* (cited in note 81) and Graetz, Reinganum, and Wilde (cited in note 81). The fact that type *0* or "frivolous" suits exist in such an imperfect world does not imply that eliminating or even reducing such

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reflect uncertainty, as represented by the expected (that is, probability-weighted) costs and benefits of the actions available. In our model these facts are represented by the probabilities p_X (that sanctions will be imposed on a type X plaintiff if the complaint is filed) and q_X (that the type X plaintiff will recover damages on the merits of its compliant). As p_X and q_X both are functions of X, the "merit" variable, they each take two different values, depending upon whether the complaint has merit ($X = 1$) or not ($X = 0$), and these values are denoted by the subscripts 0 and 1, such that $p_X = p_0$ when $X = 0$ and $p_X = p_1$ when $X=1$ and that $q=q_0$ when $X=0$ and $q=q_1$ when $X=1$. Again realistically, we assume that p_X is larger when X (the merit of the case) is smaller, and that q_X increases when X increases. In our simple discrete case, p_0 is larger than p_1, while q_1 is larger than q_0.[85] Depending upon the values of these probabilities and the associated payoffs, plaintiffs will file type 0 complaints at some rate.

Stage A of Figure 1, labelled "nature," gives us the "true" state of the contemplated complaint, 0 or 1. Plaintiff's first decision, in stage B, is whether to file the complaint or not, which is called "plaintiff reports type" in the figure and is represented by the variable R, denoting the amount of merit "reported" by the plaintiff. A "report" of 0 means no filing, whereas a "report" of 1 means that the complaint is filed. As indicated in Figure 1, there are two possible decisions to consider at this point, indicated by the "nodes" (the dots connecting the branches of the decision tree) labelled $B1$ and $B2$. Node $B1$ represents the contingency that although "nature" has provided the plaintiff with a weak case ($X = 0$), plaintiff nonetheless may "report" that its case has merit ($R = 1$)—this is the frivolous filing possibility. Similarly, $B2$ represents the possibility that plaintiff also must choose whether or not to file a complaint for a truly meritorious claim.

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suits necessarily moves the world towards perfection—specifically, we do not in any way claim that we know whether increased deterrence of type 0 suits would increase or decrease welfare. For more discussion of this point, see note 76 above.

[85] More generally, p and q are continuous probability distributions that are both functions of X, the "merit" variable, written as $p[X]$ and $q[X]$ respectively. In that case, the conditions stated in the text are that the first derivative of p with respect to X is negative, that is, $p'[X] < 0$, and that the first derivative of q with respect to X is positive, that is, $q'[X] > 0$.

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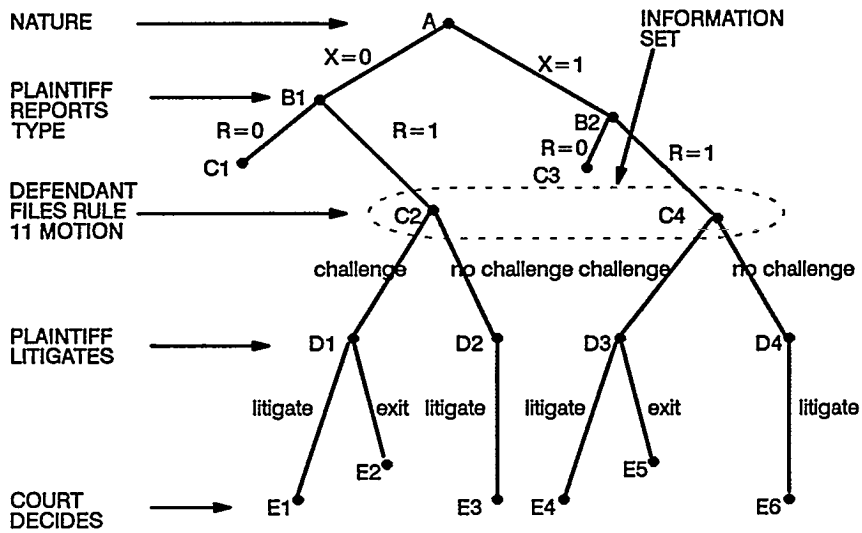

Figure 1
The Structure of Litigation with Rule 11 Sanctions

If plaintiff "reports" a meritorious claim, then the defendant in the next stage *C* must now choose to challenge under Rule 11 or not, and those decision nodes are labelled as *C2* and *C4* in Figure 1.[86] The

[86] If plaintiff "reports" *0*, defendant has no such choice, and therefore nodes *C1* and *C3* fall out of the picture. The game depicted in Figure 1 also abstracts from the possibility that the defendant will choose to concede liability (that is, we have suppressed the defendant's offer to concede liability at node C2 and C4). This is a reasonable abstraction as long as the defendant's payoff to not conceding and not challenging is greater than the amount of damages, (that is, $\alpha_p E3 + (1-\alpha_p)E6 > D$, or equivalently $\alpha_p > (c - (1 - q_1)D)/(q_1 - q_0)D$, where α_p is the proportion of type *0* plaintiffs in the population). Throughout our analysis, we assume that the number of potential type *0* plaintiffs, (N_0) is large relative to the number of potential type *1* plaintiffs (N_1), so that $\alpha_p = N_0 /(N_0 + N_1)$ satisfies this condition. Intuitively, the case where a relatively large number of potential type *0* plaintiffs exists is exactly the case where "frivolous" litigation is likely to be a costly problem. In terms of the numerical simulations presented below, $(c - (1 - q_1)D)/(q_1 - q_0)D = .25$. That is, the defendant will not choose to concede as long as $\alpha_p \geq 1/4$. In the numerical examples we assume $\alpha_p = .8 > .25$.

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dotted line surrounding nodes *C2* and *C4* represents the asymmetrical information assumption: at the time of its decision in stage *C*, defendant does not know whether plaintiff's complaint is type *0* or type *1*. This does not mean that defendant is completely ignorant; it merely assumes that plaintiff has an informational advantage over defendant, which is a realistic portrayal of the situation in litigation.[87] The analysis here assumes that defendant cannot distinguish between nodes *C2* and *C4* at the time of the stage *C* decision; they are, in the terminology of game theory, in the same "information set." However, defendants do have general information about the incidence of meritorious versus frivolous complaints, and will challenge at some rate that depends upon the available payoffs to the defendant from doing so.[88]

If defendant decides in stage *C* to challenge under Rule 11, then the next stage *D* differs as between the 1993 Amendment and the prior rule. Under the 1993 Amendment, plaintiff must decide whether to exercise its exit option, at nodes *D1* and *D3*, if the defendant has challenged. Under the prior rule, plaintiff had no option for avoiding Rule 11 sanctions, having been committed by its original choice to file its pleading, but of course it could conceivably still choose to withdraw its

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[87] In actual cases, there will be many instances where the defense has more information than merely a probability distribution that the particular plaintiff has pleaded frivolously. However, so long as there is any residual uncertainty—a condition that, more than any other factor, characterizes litigation practice—then our model's structure will hold. One way to think of the uncertainty effect is in terms of the "close" case where all available information has been examined and the advocate remains unsure: in that instance, it is the advocate's "instinct" or "judgment," based on professional experience, that acts as the "tiebreaker." What our model recognizes is that one component of the advocate's judgment is an assessment of the opposing party's incentives and likelihood to plead frivolously.

[88] Polinsky and Rubinfeld (cited in note 80) also model Rule 11 type sanctions on attorneys. However, in their model, the issue of withdrawal (the exit option) is not addressed, as Rule 11 challenges are not made until after the merits of the substantive issue have been resolved in favor of the defendant. Even if withdrawal was an option in their model, such an option would not be used in equilibrium. For a general discussion of the value of the option to exit litigation, see the sources cited in note 81 above.

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underlying complaint, leaving only the Rule 11 motion to be litigated. If the plaintiff does not withdraw, the sequence then proceeds to stage *E*, where the court decides the pending issues under Rule 11 and the underlying merits.[89] Finally, we assume that, under either rule, litigation has a positive expected value for both types of plaintiffs if defendant chooses not to challenge, so that the resulting nodes *D2* and *D4* involve no further decision by plaintiff.[90]

Having specified the decision framework, we now can evaluate the possible outcomes by assigning variables to represent the costs and benefits of the decisions faced by the parties.[91] We define the variable f

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[89] Our model suppresses the final stage that exposes the court's decision, by collapsing the possible outcomes into expected value payoffs at the terminal nodes *E1* through *E6*.

[90] We assume that $p_X D - c - f > 0$—that is, in the absence of sanctions, the suit has a positive expected value for both types of plaintiffs. Thus, we do not address negative expected value suits of the type discussed in Bebchuk, *Suing Solely to Extract* (cited in note 81). P'ng, *Strategic Behavior* (cited in note 81), also addresses negative present value suits. However, his model and analysis differ from ours in several ways, including his informational assumptions (in his model, the plaintiff is uncertain about the type of defendant he is facing), his focus on non-probabilistic (or pure) strategies, and the method used to solve for the equilibrium actions. As Bebchuk notes, P'ng's analysis depends upon the "implausible" assumption that the defendant believes that the plaintiff will go to trial in the absence of settlement even though the plaintiff would be better off dropping the case at this point.

[91] Our model assumes the "American rule" under which parties bear their own costs of filing and litigating, that is, f, g, c, and k. However, this is not as limiting an assumption as might first appear, given the distinctive structure of Rule 11 litigation. For example, under the 1993 Amendment, Rule 11 provides for a limited application of the "English rule"—a presumptive or at least suggested fee-shift of Rule 11 motion costs to the prevailing party when the motion is fully litigated:

> If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

New Rule 11(c)(1)(A), 146 FRD at 581. In our model, this feature is accommodated simply by assuming that the sanction S includes motion costs. The costs of filing (f and g) and satellite litigation (k) still have independent analytical significance, as they will be incurred in any event, whereas sanctions are subject to uncertainty.

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as the cost of preparing and filing a complaint, and g as the cost of preparing and filing a Rule 11 motion.[92] The variable k represents the cost of litigating a Rule 11 motion (when the parties reach nodes *E1* and *E4* under both the 1983 and 1993 Rules, or *E2* and *E5* under the 1983 but not the 1993 Rule), while the variable c represents the costs of litigating the underlying claim on the merits (which occurs when the parties reach nodes *E1*, *E3*, *E4*, or *E6*).[93] Rule 11 sanctions are represented by the variable S, and damages on the underlying claim by the variable D. Under the definitions of p_X and q_X given above, the expected sanction level is $p_X S$ and the expected damages level is $q_X D$.

With these variables defined, we now can specify each party's "payoff" function (expected costs and benefits of actions) at each decision node in the tree, under both the 1983 and 1993 versions of Rule 11. Those payoff functions are summarized in Table 1 below, for stages D and E. As shown by the Table, the 1993 Amendment affects the parties' payoffs in the final stage E only at nodes *E2* and *E5*, which are the "exit option" outcomes resulting from plaintiff's decision to withdraw in stage D. We distinguish the payoffs under the 1983 and 1993 rules by the superscripts * for the 1983 rule and ** for the 1993 rule.

The parties' decisionmaking can now be analyzed by using the decision tree and payoff functions together. Until reaching the "information set" affecting the defendant's decision in stage C, we can follow the process of "backward induction," which investigates a particular decision node by working "backward" from the consequences in sub-

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By similar reasoning, we also suppress the possibility that a Rule 11 motion itself could be subject to Rule 11 sanctions, which was Arthur Miller's "recurrent nightmare" at the time of the 1983 Amendment, and which in fact did occur in some cases under that Amendment. See Miller, *The August 1983 Amendments* at 41 (cited in note 24); Wright & Miller § 1335, at 86 & n 100 (cited in note 21). The 1993 Amendment continues to permit such counter-motions, but the Advisory Committee note discourages them by pointing to the motion costs fee-shifting provision. See 146 FRD at 591. Here again, the point is captured by simply assuming that motion costs are included in S, the sanction amount.

[92] As is realistic in the circumstances, because preparing complaints is equally or more costly than preparing Rule 11 motions, $f > g$.

[93] Unlike f and g, the variables c and k are assumed to be symmetrical, although none of our results necessarily depend on this assumption.

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sequent stages of the process to the party's ex ante decision. A summary of this analysis, for the plaintiff's decision to withdraw or continue in stage *D*, is shown in the bottom part of Table 1.

For example, consider decision node *D1*, at which plaintiff decides whether or not to exit, given that it has filed a "frivolous" complaint that has been challenged by the defendant. In order to investigate that decision, we compare the outcomes *E1* and *E2*. Under the 1983 version of the Rule, plaintiff's comparative payoffs are: at *E1*, $q_0D - c - p_0S - k - f$, or in words, the expected damages recovery minus the cost of litigation on the merits, the expected sanction cost, satellite litigation cost, and filing cost; and at *E2*, $-p_0S - k - f$, or in words, the expected sanction cost, satellite litigation cost, and filing cost, all of

Table 1
Payoffs from Litigation

* – Current Rule ** – Amended Rule

Stage E Payoffs

Node	Plaintiff	Defendant
E1	$q_0D - c - p_0S - k - f$	$-q_0D - c + p_0S - k - g$
*E2**	$-p_0S - k - f$	$p_0S - k - g$
*E2***	$-f$	$-g$
E3	$q_0D - c - f$	$-q_0D - c$
E4	$q_1D - c - p_1S - k - f$	$-q_1D - c + p_1S - k - g$
*E5**	$-p_1S - k - f$	$p_1S - k - g$
*E5***	$-f$	$-g$
E6	$q_1D - c - f$	$-q_1D - c$

Stage D Payoffs

Node	Outcome	Condition
*D1**	*E1*	if $q_0D - c > 0$
*D1***	*E2***	if $q_0D - c - p_0S - k < 0$
D2	*E3*	
*D3**	*E4*	if $q_1D - c > 0$
*D3***	*E4*	if $q_1D - c - p_1S - k > 0$
D4	*E6*	

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which are negative. If we eliminate the terms common to both branches ($-p_0S-k-f$), we can see that plaintiff's decision whether to continue or withdraw is based entirely on whether its expected net damages recovery, less the cost of litigating the merits, is positive ($q_0D-c > 0$). If so, then plaintiff chooses to continue (*E1*); otherwise, plaintiff chooses to withdraw (*E2*), because in either event the plaintiff remains at the same hazard to Rule 11 sanctions.

Now consider how the exit option affects this same decision: under the 1993 Rule structure, the payoff at *E2* is more favorable (less negative), because it is simply filing costs ($-f$); therefore, the condition for choosing to continue (*E1*) is stronger at any positive level of sanctions or satellite litigation cost, and now requires that the net expected recovery minus the expected sanction cost be positive ($q_0D-c-p_0S-k > 0$). Otherwise, plaintiff will exercise the exit option (choosing *E2* from *D1*). This was the intended effect of providing the exit option.

However, while the 1993 Amendment obviously does increase the plaintiff's incentive to exit once the complaint has been challenged under Rule 11, this does not necessarily imply that the amount of satellite litigation will decrease, because there are multiple stages, and multiple actors, that affect the process. In order to evaluate the full impact of the exit option on satellite litigation, we first need to investigate its effect on the overall process in terms of two other factors: the rate of Rule 11 challenges by defendants, and the rate of frivolous filings by plaintiffs. We now turn to those subjects.

B. Effects of the Exit Option on Challenges and Initial Filings

As we have seen, the 1993 Amendment's exit option certainly changes plaintiffs' incentives to continue, once the defendant has challenged the complaint under Rule 11. But does the exit option also affect the rate at which defendants will challenge under Rule 11, or the rate at which plaintiffs will file weak cases, or both?

Intuitively, it seems plausible that, given the interdependent expectations of parties in litigation, and the asymmetry of information between them, both of these rates may change in the direction of increased opportunities for satellite litigation. The provision of the exit option reduces the ex ante "price" to plaintiffs of filing frivolous complaints, and thereby could encourage a higher rate of frivolous filings.

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Indeed, this was the main point of Justice Scalia's dissent from the Amendment. Moreover, it is a point that will not be lost on defendants' lawyers: they also know that plaintiffs now have a stronger incentive to plead frivolously, and therefore have every reason to believe that plaintiffs will do so at a higher rate than before. Under the conditions of our model, where defendants' ex ante information about the "true" merit of a complaint is imperfect, a rational defense strategy in this context is to challenge at a higher rate.

By these arguments, the 1993 Amendment would have the doubly perverse effects of both undercutting the deterrent efficacy of Rule 11 and encouraging a higher rate of Rule 11 motions—the exact opposites of what the Advisory Committee stated as its objectives.[94] An examination of the problem within the structure and payoff functions of our model shows that these effects are the likely outcomes of the 1993 Amendment under plausible assumptions of the conditions for Rule 11 litigation.

To set these conditions, we revisit the question of when weak complaints ($X = 0$) would be filed. We assume—favorably for the deterrent value of the rule—that the expected net sanction level, $p_0S + k$, is greater than the expected net damages recovery, $q_0D - c$, but that the expected net damages recovery exceeds the filing cost f. If these conditions do not hold, then Rule 11 essentially is pointless: either the Rule will have no deterrent effect on frivolous filings (that is, if $q_0D - c > p_0S + k$), or it is completely unnecessary because frivolous filings never pay (when $q_0D - c < f$). These conditions, plus the asymmetry of infor-

[94] This statement should not be taken to imply that achieving the Committee's objectives will increase social welfare. Note that the amended rules, by inducing type *0* plaintiffs to choose the exit option, may reduce both the volume and costs of primary litigation. Intuitively, although the exit option causes an increase in the number of type *0* pleadings, only the unchallenged pleadings are litigated. In contrast, both challenged and unchallenged type *0* pleadings are litigated under the current rule. Thus, even if the cost of satellite litigation rises under the amended rule, this does not imply that total litigation costs will rise (or that broader measures of social welfare will fall). The fact that the effect on total welfare is ambiguous reinforces the criticisms of the Committee's objectives and procedures noted above in note 76 and the surrounding text—that the Committee does not know if it is addressing a real problem.

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mation between plaintiff and defendant, lead to the conclusions that we have stated. To see how this occurs, we consider the 1993 Amendment in comparison with the pre-existing structure under the 1983 version of the Rule, under the assumed conditions. We assume that litigation lawyers generally know their own business, and therefore will choose optimal strategies that take account of what the adverse litigant is likely to do. In the language of game theory, this assumption corresponds with the condition of "equilibrium" in the game structure. In other words, opposing lawyers choose strategies that mutually force each other to the margin—the point of indifference between available choices. This concept can be operationalized within our model by equating the parties' payoff functions at their decision nodes; in "equilibrium," the party will be indifferent between the two choices.

Applying the equilibrium analysis within the decision tree (Figure 1) and payoff functions (Table 1) of our model, we wish to investigate both plaintiff's and defendant's strategies to take account of the fact that weak cases ($X = 0$) are sometimes filed ($R = 1$), thus leading to decision node *C2*. The defense's problem is the "information set"—by assumption, it cannot determine whether it is facing node *C2* or node *C4* (where $X = 1$), although it knows that there is some probability of frivolous filing. A rational strategy is to choose, on average, some rate of challenge, which we denote by the parameter θ, which represents the probability that the defense will challenge a plaintiff's filing under Rule 11. Given some rate of defense challenge, there will be an "equilibrium" response by plaintiffs having "type *0*" complaints, which we denote by the second parameter α, which is the rate of frivolous filings. Our two propositions are that both θ and α can rise under the 1993 Amendment as compared with the 1983 version of Rule 11.

The proofs, which are formalized in Appendix A, rest on the analysis of equilibrium under the two rule structures.

1. *Increase in the Challenge Rate.* First taking the rate of defense challenge, θ, we examine the "type *0*" plaintiff's decision to file. Equilibrium implies that θ has been chosen by the defense such that plaintiff's payoffs at nodes *C1* and *C2* have been equated, so that the type *0* plaintiff is indifferent between filing and non-filing at its decision node *B1*. Because the payoff at *C1* is by definition zero, then the payoff at *C2*

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also must be zero. We can now solve, by "backward induction," for the plaintiff's payoff at *C2*.

Under the 1983 rule structure, the possibility of *E2* (plaintiff will withdraw when challenged) is excluded by the assumption that the filing was worthwhile ex ante ($q_0D - c > 0$), so that plaintiff's payoff at *C2* is $\theta^* E1 + (1-\theta^*)E3$, where θ^* is the defense challenge rate under the 1983 version of the rule. Under the 1993 rule structure, however, the plaintiff will choose the exit option (*E2* from *D1*) whenever the expected net sanction cost exceeds the expected net recovery, which was our starting assumption. Therefore, the 1993 Amendment causes "type *0*" plaintiffs to choose *E2* (exit) rather than *E1* (stay), which changes the payoff function at *C2 to* $\theta^{**}E2^{**} + (1-\theta^{**})E3$, where θ^{**} is the defense challenge rate under the 1993 Amendment.

By the assumption of equilibrium, the payoffs under both rules equal zero, and therefore equal each other. *E3* is identical in both payoffs. If the defense challenge rate were unchanged or lower under the amended rule, this would imply that $E2^{**}$ presents plaintiff with an expected payoff that is less than or equal to *E1*, which cannot be true under our assumptions. Otherwise, the exit option would never be used and the Amendment would have no effect at all. Therefore, the challenge rate must rise under the 1993 Amendment.[95]

Notice that this result follows whether or not the rate of frivolous filings increases. However, the 1993 Amendment also is likely to produce a higher rate of frivolous filings.

2. *Increase in Frivolous Filings.* The rate of frivolous filings, α, is the rate at which "type *0*" complaints will be filed, given some supply of those filings—what might be called the "propensity" to file frivolously. In equilibrium, this rate will be determined by equating the payoffs to

[95] Intuitively, the increase in the challenge rate offsets the reduction in the "effective" sanction induced by the plaintiffs' ability to "exit." That is, in order to maintain equilibrium, the probability of a challenge must rise in order to offset the decrease in the magnitude of the expected penalty. High-probability—low-penalty enforcement strategies are generally associated with higher costs. See, for example, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J Pol Econ 169 (1968). See also Bruce H. Kobayashi and John R. Lott, Jr., *Low Probability-High Penalty Enforcement Strategies and the Efficient Operation of the Plea-Bargaining System,* 12 Int'l Rev L & Econ 69 (1992).

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the defense at the decision encompassed by the "information set" including nodes *C2* and *C4*, summed across both nodes, that is, we equate expected defense payoffs at *D1* plus *D3* with the payoffs at *D2* plus *D4*.[96] These differ as between the 1983 and 1993 rules only in the payoffs from challenging, given some level of α: under the 1983 rule, the payoffs from challenging are $\alpha^{*}E1 + (1-\alpha^{*})E4$; while under the 1993 rule, they are $\alpha^{**}E2^{**} + (1-\alpha^{**})E4$. The term *E4* is identical under both rules, and, in equilibrium, the payoffs must equal each other. Therefore, by similar reasoning to the first proposition, if $E2^{**}$ is less than *E1*, then α^{**} is greater than α^{*}.[97] This will be true whenever there are expected net gains to challenging a frivolous complaint, that is, when $p_0S - q_0D > c + k$.

C. The Costs of Satellite Litigation

The analysis given above shows that neither of the Advisory Committee's objectives of improving the efficacy of deterrence against frivolous pleadings or "reducing the frequency of Rule 11 motions,"[98] is likely to be achieved by the "safe harbor" provision. Indeed, exactly the opposite effects are more likely. However, this does not completely answer the question whether overall satellite litigation costs will rise or

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[96] In essence, this is the same "backward induction" analysis, modified to take account of the defendant's "information set" problem by combining the two nodes into one, and equating the payoffs to reflect the "mixed strategy" equilibrium.

[97] In the extreme case, where there is free exit before any significant costs must be borne by the plaintiff, all potential cases will be filed, that is, $\alpha^{**} = \alpha_p$. P'ng, *Strategic Behavior* (cited in note 81) examines this case.

[98] 146 FRD at 523 (Advisory Committee Report to the Standing Committee). Note the subtle distinction between this statement and the statement contained in the Advisory Committee's notes, which state only that the Amendment "should reduce the number of motions for sanctions presented to the courts," 146 FRD at 584. As our model reflects, these are two different propositions under the 1993 Amendment: in order to trigger the plaintiff's incentive to exit, the defendant either will have to prepare and serve the Rule 11 motion, as the text of the Rule contemplates, see new Rule 11(c)(1)(A), 146 FRD at 581, or at least make a credible commitment to do so, which are activities that will create costs for defendants whether or not they result in "filed" motions, which occurs only when the plaintiff does not exercise the exit option.

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fall because, under the 1993 Amendment, some Rule 11 litigation that would have taken place now will be dropped, and this may have some offsetting effect even though both the rate of frivolous filings and the frequency of Rule 11 challenges will increase.

To place this effect within the terms of our model, note that under the 1983 Rule, the total cost of satellite litigation will be the number of suits multiplied by the total costs of litigating Rule 11 motions:[99]

$$C^{*} = N_1\theta^{*}(g + 2k)/(1 - \alpha^{*}) \tag{1}$$

where N_1 is the number of Type 1 plaintiffs.

Under the 1993 Amendment, Rule 11 challenges against type *1* plaintiffs are litigated, while those against type *0* plaintiffs are dropped. Thus, the total costs of satellite litigation equals:

$$C^{**} = N_1\theta^{**}(2k + (g/(1 - \alpha^{**})). \tag{2}$$

Subtracting (1) from (2) yields the increase in the costs of satellite litigation:

$$\begin{aligned}\Delta C &= C^{**} - C^{*} \\ &= [N_1(g + 2k)(\theta^{**} - \theta^{*})] + [g(N_0^{**}\theta^{**} - N_0^{*}\theta^{*})] + [-2kN_0^{*}\theta^{*}]\end{aligned} \tag{3}$$

where $N_0^{*} = N_1\alpha^{*}/(1 - \alpha^{*})$ and $N_0^{**} = N_1\alpha^{**}/(1 - \alpha^{**})$. Holding N_1 constant, $N_0^{**} > N_0^{*}$ if $\alpha^{**} > \alpha^{*}$.

Each component of equation (3) has an intuitive interpretation. As we have shown above, the defense challenge rate increases under the new Rule, and therefore $\theta^{**} - \theta^{*} > 0$, so the first term in (3) is positive, and it represents the increased costs resulting from the increase in the number of Rule 11 challenges filed and litigated against type *1* plaintiffs. The second term is also positive, and it represents the increase in costs from the increased number of Rule 11 challenges against type *0* plaintiffs, resulting from an increase in pleadings by type 0 plaintiffs ($\alpha^{**} > \alpha^{*}$) and from an increase in the Rule 11 challenge rate ($\theta^{**} > \theta^{*}$). Finally, the last term is negative, and it represents the savings from the fact that Rule 11 challenges against type *0* plaintiffs that used to be litigated now lead to plaintiffs' exercise of the new exit option.

[99] Note that this analysis abstracts from settlement, which would reduce (but not eliminate) the cost of satellite litigation. This abstraction does not necessarily affect our analysis, as settlement would affect the cost of litigation under both the 1983 and 1993 Rules.

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To illustrate the effects of the 1993 Amendment, we present a numerical example in Table 2 below. The upper part of the Table lists the assumed parameter values, while the lower part of the Table lists the equilibrium Rule 11 challenge rate, the proportion of type *0* plaintiffs, the total number of type *0* plaintiffs, the magnitude and cost of Rule 11 litigation involving each type of plaintiff, and the total costs of satellite litigation for both the 1983 and 1993 Rules.

The assumed parameter values in Table 2 are chosen simply to represent what may be a typical relationship among the various costs, benefits, and conditions of litigation. D, the damage recovery, is set at $100,000, while S is set at $70,000 in this example.[100] It is assumed that the cost of preparing and filing a complaint, f, is $2,000. The remaining costs of litigation on the merits are assumed to equal 15 percent of the total amount in controversy, divided equally between each side, so that c = $7,500. Similarly, total "satellite" litigation costs are set at 10 percent of the total sanction amount; these costs are divided between g = $1,000 for the defendant to prepare and file a Rule 11 challenge motion, and k = $3,000 for each side's cost of litigating the motion to conclusion. N_0 and N_1 are assumed population sizes of frivolous and meritorious complaints, respectively. The probabilities of winning or losing on a complaint or a Rule 11 motion, as a function of "true" merit or demerit, are set at what are probably the outermost practical limits of .1 and .9, so that the party with the meritorious complaint or motion has a 90 percent chance of winning, while the party with a meritless complaint or motion has a 90 percent chance of losing.

We stress that there is nothing magical about any of these numbers; they are simply assumed relationships for purposes of constructing the numerical example. Changes in the assumed relationships can change the total of satellite litigation costs—as is illustrated by our second example below—but nothing about the propositions above or the proofs given in Appendix A turns on these particular numbers or relationships, except as given in the conditions stated. However, given the stated conditions, the result (namely, an increase in satellite litigation costs) holds over a wide range of assumed parameter values.[101]

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[100] An alternative sanction level is considered in the second example below.

[101] See Appendix A below for an explanation of the conditions and for proofs.

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Table 2
Effect of Amendments on Cost of Satellite Litigation: First Numerical Example

Initial Conditions	
A. Number of Potential Plaintiffs	
Type *0*:	N_0 = 8,000
Type *1*:	N_1 = 2,000
B. Original Pleading	
Cost of Filing:	f = $2,000
Cost of Litigating Pleading:	c = $7,500
Probability Plaintiff Wins:	
Type *0*:	q_0 = .1
Type *1*:	q_1 = .9
Damage Award:	D = $100,000
C. Rule 11 Challenge	
Cost of Filing:	g = $1,000
Cost of Litigating Rule 11:	k = $3,000
Probability Sanctions Imposed:	
Type *0*:	p_0 = .9
Type *1*:	p_1 = .1
Sanction Amount	S = $70,000

Results

	Current Rule	Amended Rule
Probability of a Rule 11 Challenge	θ^* = .023	θ^{**} = .600
Proportion of Type *0* Suits	α^* = .449	α^{**} = .652
Number of Type *0* Suits	N_0^* = 1,627	N_0^{**} = 3,754
Rule 11 Challenges (Type *0*)	F_0^* = 37	F_0^{**} = 2,252
Rule 11 Challenges (Type *1*)	F_1^* = 45	F_1^{**} = 1,200
Cost of Type *0* Satellite Lit	C_0^* = $.26 mil	C_0^{**} = $2.3 mil
Cost of Type *1* Satellite Lit.	C_1^* = $.32 mil	C_1^{**} = $8.4 mil
Total Cost of Satellite Litigation	C^* = $.58 mil	C^{**} = $10.7 mil

Under the assumed parameter values, the example clearly demonstrates the effects shown in subpart B above. That is, the probability that a Rule 11 challenge will be made increases from 2.3 percent[102] under the 1983 Rule to 60 percent under the 1993 Amendment, under the assumed figures for costs, sanctions, and damages. Given that type *1* plaintiffs always litigate in response to Rule 11 challenges, the costs

[102] We note that some support for our assumed parameter relationships is found in this challenge rate, which is similar to that measured by the most extensive prior empirical study, see note 77 above.

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per case involving type 1 plaintiffs stay the same. The fact that there will be more Rule 11 challenges made and litigated against type *1* plaintiffs implies that the costs of Rule 11 litigation involving type *1* plaintiffs increase. In the example, the number of Rule 11 challenges to type *1* plaintiffs increases from 45 to 1,200, and the cost of litigation involving type *1* plaintiffs rises from $320,000 to $8.4 million.

The number and proportion of type *0* plaintiffs also increase. However, the fact that type *0* plaintiffs drop their action if challenged results in lower costs (by $2k$) per Rule 11 motion.[103] In the example, the rate of frivolous filings by type *0* plaintiffs rises from 44.9 to 65.2 percent, implying that the expected number of type *0* cases will rise from 1,627 to 3,754 cases. The total number of Rule 11 challenges to type *0* plaintiffs rises from 82 to 3,452. The total costs of Rule 11 litigation against type *0* plaintiffs in the example also rise, from .26 million dollars to 2.3 million dollars. The total costs of satellite litigation increase from .58 million dollars to 10.7 million dollars.[104]

Figures 2a and 2b below illustrate the equilibrium payoffs under the 1983 rule and the 1993 Amendment, respectively, with the changed payoffs outlined in Figure 2b. The numbers appearing next to the nodes represent the expected payoffs to the plaintiff and to the defendant. As is clear from the Figures, the only effect on equilibrium payoffs is to reduce the nonfrivolous plaintiff's return from litigating by forcing these plaintiffs to litigate a greater number of Rule 11 motions. In the example, the non-frivolous plaintiff's net recovery falls from $80,227 under the 1983 rule to $73,300 under the 1993 amended rule.

Table 3 below presents a second numerical example, in which the sanction level (S) is assumed to be smaller than in the previous example, and is set equal to the parties' combined costs of litigation on the merits ($2c$), which is $15,000. All other assumed parameter values are unchanged.

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[103] This suppresses the possibility that, on average, type *0* plaintiffs will be able to bluff defendants by declining to exit, thereby signaling—falsely—that in fact they are type *1*. In our model, defendants are not bluffed on average because they continue to litigate against type *1* plaintiffs.

[104] Furthermore, in this example, non-Rule 11 litigation costs, and therefore total litigation costs overall, also rise under the 1993 Amendment.

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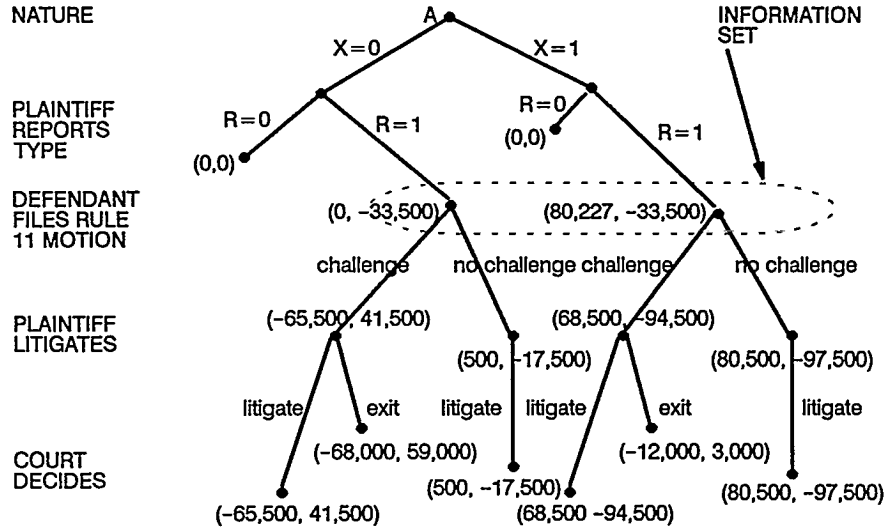

Figure 2a
Payoffs to the Plaintiff and Defendant — 1983 Rule 11

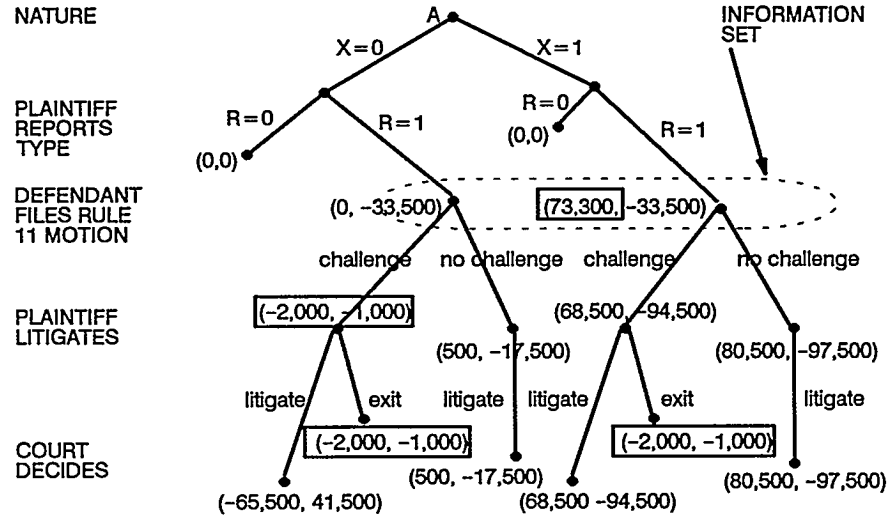

Figure 2b
Payoffs to the Plaintiff and Defendant — 1993 Amendment to Rule 11

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Table 3
Effect of Amendments on Cost of Satellite Litigation: Second Numerical Example

Initial Conditions	
A. Number of Potential Plaintiffs	
Type *0*:	N_0 = 8,000
Type *1*:	N_1 = 2,000
B. Original Pleading	
Cost of Filing:	f = $2,000
Cost of Litigating Pleading:	c = $7,500
Probability Plaintiff Wins:	
Type *0*:	q_0 = .1
Type *1*:	q_1 = .9
Damage Award:	D = $100,000
C. Rule 11 Challenge	
Cost of Filing:	g = $1,000
Cost of Litigating Rule 11:	k = $3,000
Probability Sanctions Imposed:	
Type *0*:	p_0 = .9
Type *1*:	p_1 = .1
Sanction Amount	S = $15,000

Results

	Current Rule	Amended Rule
Probability of a Rule 11 Challenge	θ^* = .023	θ^{**} = .600
Proportion of Type *0* Suits	α^* = .723	α^{**} = .672
Number of Type *0* Suits	N_0^* = 5,216	N_0^{**} = 4,092
Rule 11 Challenges (Type *0*)	F_0^* = 474	F_0^{**} = 2,455
Rule 11 Challenges (Type *1*)	F_1^* = 181	F_1^{**} = 1,200
Cost of Type *0* Satellite Lit	C_0^* = $3.3 mil	C_0^{**} = $2.5 mil
Cost of Type *1* Satellite Lit.	C_1^* = $1.3 mil	C_1^{**} = $8.4 mil
Total Cost of Satellite Litigation	C^* = $4.6 mil	C^{**} = $10.9 mil

As in the earlier example, the probability of a Rule 11 challenge θ rises, as do the costs of satellite litigation involving type *1* plaintiffs. The number of Rule 11 challenges against type *0* plaintiffs also rises, but, in contrast with the earlier example, the number of frivolous filings and the costs of Rule 11 litigation against type *0* plaintiffs fall. However, this reduction in costs is not enough to offset the increase in satellite litigation costs against type *1* plaintiffs, so total satellite litigation

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costs once again rise. Further, the only effect on equilibrium payoffs is once again to reduce the nonfrivolous plaintiff's return from litigating.

This last effect may be the ultimate irony of the 1993 Amendment, broadly considered. Part of the criticism leading to the 1993 Amendment was that the 1983 rule was "unfair" to plaintiffs. Presumably, the advocates of this argument had in mind those plaintiffs with meritorious cases who had been saddled with the costs and delay of satellite litigation, rather than plaintiffs pleading frivolously. But our analysis shows that, to the extent that defendants are unable clearly to distinguish between frivolous and nonfrivolous plaintiffs ex ante, the pronounced effect of the 1993 Amendment is to make life easier for the frivolous plaintiff, who now has an easy "out," and all the more burdensome for plaintiffs with meritorious claims, who now will be challenged more often.[105]

IV. Discussion

So far, we have painted a rather bleak picture of the prospects that the 1993 Amendment will achieve any constructive result. Worse yet, the adverse effects will be very difficult to detect in the litigated cases. If our analysis is correct, the incidence of the actual imposition of sanctions certainly will go down because the exit option will screen out the worst violations. As a result, observed sanctions—and perhaps even observed motions—will decline even as the rate of frivolous filings, and overall satellite litigation costs, increase.

One might ask, however, whether the aspects of the 1993 Amendment that we have ignored so far could have a counterbalancing effect. In this Part, we discuss several of these points in terms of our analysis and results, and generally conclude that, to the extent that they are likely to have any effect at all, they tend in the direction of making the problems worse.

A. Sanction Levels and "Decoupling" Revisited

The 1993 Amendment also makes two changes in the sanctioning structure that could be significant: (1) the imposition of sanctions is now made discretionary rather than mandatory; and (2) there is per-

[105] For a similar result, see Bebchuk, *Suing Solely to Extract* (cited in note 81).

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missive authority for "decoupling" the sanction in the sense that it may be less than compensatory to the adverse party affected by the filing and, at whatever level, may be made payable to the court rather than the adverse party.

In terms of our analysis, discretionary sanctions can be modelled by assuming a lower p_0, the probability that a frivolous complaint will be sanctioned. Obviously, at some point lowering the expected sanction, either by reducing its magnitude S or the probability of its imposition p_X, will affect our starting assumption that the expected net sanction costs exceed the expected net recovery for a "weak" case ($X = 0$). If that assumption is violated, then Rule 11 deters nothing, and our assumption of a "mixed strategy" equilibrium does not hold. In that instance, all possible frivolous filings are made, but, so long as there are returns to challenging, Rule 11 motions continue even though they have no deterrent effect.[106] Short of that condition, however, there is no reason to believe that the dynamic interaction of the parties will change.

The "decoupling" provision implies non-symmetrical costs and benefits to the parties. That is, plaintiff may continue to face the same expected sanction level, given a challenge, but now the defendant's payoffs are changed because sanctions are asymmetrical. In the limiting case where there are no positive returns to challenge by defendants, obviously there will be no challenge. In that case also, the "mixed strategy" equilibrium disappears, because θ, the challenge rate, is now zero, and Rule 11 becomes completely superfluous in our model, which considers only party enforcement. Here again, however, so long as defendant's incentives create positive returns to challenge, the same basic equilibrium will hold, and defendants will challenge. This is particularly true under the 1993 Amendment, where the exit option and asymmetrical stakes between the parties could create positive returns to challenge even when the defendant's recoverable sanction is zero.

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[106] Suppose $q_0D - p_0S - k - c - f > 0$, $p_0S - k - g > 0$, and $p_1S - k - g < 0$. Under these conditions, all type 0 plaintiffs will choose to report $R = 1$, and $E1 > E3$ and $E4 < E6$, so the defendant's return to challenging a filing, $\alpha_p E1 + (1 - \alpha_p)E4$, will be greater than the defendant's return to not challenging, $\alpha_p E3 + (1 - \alpha_p)E6$, when α_p is large. Thus, under these conditions, the defendant will choose to challenge even though such challenges do not deter any frivolous filings.

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We note here that "decoupling" is unlikely ever to be complete, because the sanction S in our model can be re-interpreted to include not only the formal sanctions imposed by the court but also whatever tactical advantage may be implied by making a Rule 11 motion. For example, a Rule 11 motion may be thought to have the tactical advantage of inhibiting vigorous advocacy on the merits by the adverse party; in that case, too, there can be positive returns to challenge even when the formally recoverable sanction is zero.

Thus, to the extent that either lower sanction levels or decoupling of sanctions have any effect at all, they tend to exacerbate the problems of wasteful satellite litigation, frivolous pleading, or both. Unless the changes are sufficiently drastic to upset the "mixed strategy" assumption of our analysis, they do not affect the basic equilibrium, and therefore do not change the tendency of the exit option to make both frivolous pleadings and Rule 11 challenges relatively more frequent. If they are sufficiently drastic to create a "pure strategy," it results essentially in no deterrence of frivolous filings. In that case, the only deterrence of frivolous filings will come from court-initiated enforcement. As Justice Scalia's dissent pointed out, courts probably are not in a very good position to carry out that role.[107] Thus, if "decoupling" is indeed successful, we may expect to see a future proposal to create a "pleadings police" of some sort to enforce the Rule 11 requirements.

B. Lawyers versus Clients

Our analysis so far has suppressed the "agency" problem of Rule 11, which is created by the sanctioning structure that presumptively punishes the pleader's *lawyer,* but rewards the adverse *litigant* for a successful challenge. The effect of this structure—apparently deliberate on the part of the rulesmakers—is to drive a wedge between lawyers and their own clients in terms of their incentives to commence litigation.

Although a full analysis of this problem is beyond the scope of the present article, the situation of the plaintiff's lawyer vis-à-vis the plain-

[107] For a general discussion of judicial behavior, see Posner, *What do Judges and Justices Maximize?* (cited in note 73).

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tiff is somewhat analogous to the positions of the plaintiff and defendant in our model, with the plaintiff's lawyer now in the position of the defendant, including the problem of the "information set."[108] Given that situation, plaintiff's lawyer has an incentive to "challenge" plaintiff's "report" of merit.[109] The 1993 Amendment's "exit option" lessens the lawyer-client conflict to some extent, by curing what was previously an asymmetry of stakes between them: with the exit option (assuming it is exercisable at the lawyer's option rather than the client's), the lawyer now faces lower expected sanctions, and has incentives more closely aligned with the client.

However, this effect does not counterbalance the effects previously noted. On the contrary, it works in the same direction. As both lawyers and clients now have an exit option, whereas previously only clients did,[110] they are more likely to plead frivolously. Moreover, unlike the situation of defendants, plaintiff's lawyer now is likely to lower the "challenge" rate to the client, because the payoff to challenge (namely, sanctions avoided) is now lower as well. Thus, to the extent that the lawyer-client conflict had some positive benefit in "screening" frivolous filings—which we consider to be an open question—that effect is reduced by the 1993 Amendment, and the other effects we have noted are exacerbated.

C. Rule 11 and the Discovery Rules

One of the most startling features of the 1993 Amendment is the exclusion of all discovery requests and responses from the new struc-

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[108] For an illustration of how Rule 11 operates to place a plaintiff's lawyer in serious jeopardy for failing to doubt the client, consider the fact situation in *Pavelic & LeFlore v Marvel Entertainment Group*, 493 US 120 (1989), in which a lawyer received a six-figure personal sanction for what appears to have been the "violation" of trusting his client too much.

[109] This in fact is one of the reasons for criticizing Rule 11. Because lawyers cannot perfectly distinguish between true and false "reports" by clients, they challenge both, resulting in something analogous to "satellite litigation" between lawyers and clients.

[110] Indeed, clients had something better than an exit option; they had what was, in effect, presumptive immunity from sanctions.

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ture of Rule 11.[111] Thus, discovery practice will continue to be governed by the 1983-style regime of mandatory sanctions (which will presumptively consist of fee-shifting) and no "safe harbor."[112] Furthermore, the 1993 Amendments to the discovery rules make those requirements all the more onerous, particularly the new regime of spontaneous "disclosure" under Rule 26(a).[113]

Justice Scalia's dissent characterized this differential treatment as "curious" and an "inconsistency,"[114] and, as he pointed out, it is unexplained by the Advisory Committee's brief note on the subject.[115] It seems unlikely that, given all the attention otherwise lavished on the 1993 Amendment to Rule 11, the Advisory Committee failed to think through the implications of carving out the entire subject of discovery, which supposedly is one of the prime contexts of litigation "abuse."

But whatever the Advisory Committee's actual intent, our analysis suggests that the effect of excluding discovery practice will be to exac-

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[111] New Rule 11(d). 146 FRD at 583.

[112] One of the features of the "integrated package" of 1983 Amendments was to add a new Rule 26(g), which was a Rule 11 counterpart for discovery papers. See Miller, *The August 1983 Amendments* at 2 (cited in note 24). This counterpart was redundant because Rule 11, through Rule 7, always applied to discovery papers. By the 1993 Amendment, Rule 26(g) is "dis-integrated" from the 1983 sanctions package.

[113] See note 10 above.

[114] 146 FRD at 510 n 1.

[115] Id. The entire text of the Advisory Committee's relevant note is as follows:

> Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

146 FRD at 592. As Justice Scalia noted, this is no explanation at all. Even granted that one might want specialized conduct standards for discovery requests, that does not explain why the key changes in sanctioning structure wrought by the 1993 Amendment to Rule 11—if in fact they were deemed to be desirable by the Advisory Committee—were not carried over to discovery practice.

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erbate the cost-increasing effects of the 1993 Amendment still further, particularly when considered in conjunction with the new disclosure requirements of Rule 26(a).

To see how this effect could occur, return now to our simple example of plaintiff[116] and defendant, and consider the effect of the disparate sanctioning structure on each side's incentives. Assume that plaintiff's complaint is "type *0*" (frivolous), but under the 1993 Amendment, plaintiff now has an easy out if challenged under Rule 11, and therefore has a relatively stronger incentive (supplied by the lower expected sanction) to plead frivolously.

Now consider the interplay of this structure with the discovery rules. It may be possible for plaintiff to increase the expected value of its case by imposing large discovery costs on defendant—at least some arguments about discovery "abuse" postulate this strategy—and, if so, the 1993 Amendments provide an attractive vehicle for doing so. Under the spontaneous "disclosure" regime of amended Rule 26(a), plaintiff can now impose larger discovery costs on defendant automatically by pleading more broadly, and is protected against the sanction for doing so by the exit option of Rule 11.

Defendant is now put to a more difficult set of choices: it must either undertake the costly compliance with the spontaneous disclosure regime under a plaintiff's pleading that is by assumption overly broad, or challenge under Rule 11, or buy off the plaintiff with an early settlement, or run the risk of sanction for "underdisclosure." All are costly activities. Furthermore, note the imbalance between the risks of sanction. If the defendant decides to run the risk of underdisclosure, then it is potentially subject to mandatory sanctions under Rule 26(g). Plaintiff, however, as its pleading is not itself a discovery paper, is protected behind the shield of the exit option of Rule 11 if defendant challenges.

Of course, one rational response of defendant is to raise its Rule 11 challenge rate still further. However, to the extent that defendants imperfectly distinguish the overly broad from the proper complaint,

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[116] By using this example, here and throughout, we do not mean to suggest that only plaintiffs plead frivolously, or that there is any less opportunity for defendants to do so. We are simply taking one case to illustrate the point, which could then be extended to other applications.

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this response will tend to raise the costs of satellite litigation, and thereby, as with our basic analysis, make litigation more costly for plaintiffs with properly drawn complaints.

Thus, here again, although our discussion of this point is suggestive only, it would appear that expanding the scope of the analysis presented in this article will tend to magnify the adverse effects that we have identified in the basic analysis. Considering the interplay with the discovery rules tends to magnify both pleaders' incentives to plead frivolously and responders' incentives to challenge, in this instance under the condition of asymmetrical costs and stakes.

In this instance, moreover, there is at least some evidence that the potential for abuse in the differential treatment was foreseen and deliberately permitted by the rulesmakers. The interaction of these provisions is fairly obvious to any experienced litigation lawyer, and the materials accompanying the Rule 26 Amendments reflect that the rulemaking committees focused on the problems that overly broad or vague pleadings would create under that rule.[117] In this context, and considering that the Committees' principal and most controversial subjects were the amendments to Rules 11 and 26, the Advisory Committee's perfunctory note to new Rule 11(d) is eloquent in its silence.

V. Conclusion

Our analysis has demonstrated that the likely effects of the 1993 Amendment to Rule 11 are exactly the opposite of what the rulesmak-

[117] Both the Standing Committee's Report and the Advisory Committee's Report acknowledged that prior drafts had been criticized on this ground. 146 FRD at 517 & n 3 (Standing Committee Report), 527 (Advisory Committee Report). The Advisory Committee explicitly acknowledged its relationship with sanctions, noting that "[c]ritics attacked the timing and scope of the disclosure requirements, as well as the related penalty provisions for noncompliance, viewing them as both impractical, counterproductive, and disruptive of the attorney-client relationship." Id at 527. Nonetheless, the text of new Rule 26(a) makes no provision for resolving the problem, and the Advisory Committee Note offers only exhortations that "litigants should not indulge in gamesmanship" and keep "in mind the salutary purposes that the rule is intended to accomplish." Id at 631. This is weak medicine indeed, especially when considering that the strong incentives to do otherwise were created by the Committee's own choice of the Rules' text.

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ers claimed to seek—fewer frivolous filings and less satellite litigation cost.

Under a game-theoretic structure with an assumption of a "mixed strategy" equilibrium, the "safe harbor" feature of the 1993 Amendment unambiguously raises the rate of Rule 11 challenges. It may also raise the rate of frivolous filings, and very probably increases satellite litigation costs, especially for plaintiffs who are *not* filing frivolously. Furthermore, to the extent that this or the other changes made by the 1993 Amendment do not produce a "mixed strategy" equilibrium, the results are even more perverse. Under these conditions, the "safe harbor" renders Rule 11 useless as a deterrent, consigning it either to fall into total disuse or to generate completely pointless satellite litigation. In either event, the results produced by the 1993 Amendment are not demonstrably better, and could be worse, than a complete repeal of Rule 11,[118] which is sad commentary indeed on any rules amendment.

Although the causes of these perverse effects within the rule structure are clear, their genesis within the rulemaking process is less so. There is no doubt that the judicial rulemaking process has become increasingly bureaucratized over time, and there is at least some evidence to suggest that the resulting bureaucracy has become politicized in the sense that it is affected by interest group pressures.[119] Or, it could simply have become chronically infected with the malaise of the

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[118] At least, complete repeal certainly would have solved the "satellite litigation" problem by approximating the conditions existing prior to the 1983 Amendment. And given the lack of knowledge that preceded the promulgation and transmittal of the 1983 Rules, the effect on total welfare from complete repeal is far from clear.

[119] The highly bureaucratized structure is described in note 2 above. The current structure is largely the product of the 1988 legislation, which had been enacted after an extended critique of the rulemaking process that featured complaints about the lack of "openness" in the process. See Winifred R. Brown, *Federal Rulemaking: Problems and Possibilities* (Federal Judicial Center, 1981); Charles W. Grau, *Judicial Rulemaking: Administration, Access, and Accountablilty* (American Judicature Society, 1978); Geoffrey C. Hazard, *Undemocratic Legislation*, 87 Yale L J 1284 (1978); Jack B. Weinstein, *Reform of Court Rule-Making Procedures* (Ohio State U, 1977). Under the current statute, "all interested persons" are entitled to notice of meetings, 28 U.S.C. § 2073(c)(2), and interest groups apparently participated extensively in the hearings leading to the 1993 Amendments. See Vairo, *Rule 11 Sanctions* § 2.04[b], at 2–66 n 220 (cited in note 38).

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"cosmic anecdote"—rulemaking based on popular perception rather than fact.

In either case, the remedy is to inject more reality into the rulemaking process by insisting upon more rigorously constructed models that are subject to falsification by empirical analysis of actual outcomes in the operating system,[120] and not simply the attitudes or perceptions of lawyers or judges. But who is there to impose the discipline? The most likely candidate is the Supreme Court, which now seems to have announced its intention to retreat from the field.

Under this institutional structure, the most we could hope for is similar to the stated aspirations of the 1983 Amendment to Rule 11, as an admonition for lawyers to "stop and think" before filing.[121] The procedural rulesmakers, or, failing them, the Supreme Court, would do well to heed that same call. Otherwise, yet another area of law and public policy will be abandoned to the perpetual conflict that ensues when reality is subordinated to "perceptions."

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[120] For example, the model we propose in this article can be empirically falsified. Although Rule 11 challenge rates will be difficult to measure once the exit option is in place, and the rate of "frivolous" filings even more so, the costs of satellite litigation would be amenable to empirical measurement, given access to the courts' data.

[121] Miller, *The August 1983 Amendments* at 15 (cited in note 24).

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APPENDIX A

In this Appendix, we formally state and prove the two major propositions stated in the text—that under plausible conditions, both the probability of Rule 11 challenge and the probability of frivolous pleading will rise.

The first Proposition deals with the probability that a defendant files a Rule 11 motion:

Proposition 1. Let θ^* and θ^{**} denote the probability that a Rule 11 motion will be filed under the current and amended rules, respectively. If a mixed strategy equilibrium exists, $\theta^{**} \geq \theta^*$.

Proof. A mixed strategy will exist if the type *0* plaintiff is indifferent between reporting $R = 0$ and $R = 1$. This occurs when the plaintiff's payoff from *C1* equals the payoff from *C2*. The plaintiff will choose to litigate as long as the payoff from *E1* is greater that the payoff from *E2*, or equivalently, if $q_0D - c > 0$. If $q_0D - c < 0$, the type *0* plaintiff's expected value from filing a case will be negative, and he will not choose to incur the cost of filing f. Thus, under the current rules (no free exit), and under the assumption that $q_0D - c > 0$, the plaintiff will choose to litigate (that is, he will choose *E1* over $E2^*$). The payoff from *C2* equals $\theta^*E1 + (1 - \theta^*)E3$. The payoff from *C1* equals zero. Thus the payoff from *C2* equals the payoff from *C1* when:

$$\theta^*E1 + (1 - \theta^*)E3 = 0. \tag{A1}$$

Under the amended rules, the plaintiff's decision to litigate (*E1*) or drop (*E2*) is altered. Now, the plaintiff will choose to litigate if $E1 > E2^{**}$, which is satisfied when $q_0D - c > p_0S + k$. If $q_0D - c < p_0S + k$, then the expected payoff will once again be a linear combination of *E1* and *E3*. As there is no change in the payoff from *E1* or *E3*, there can be no change in the level of θ. Likewise if $q_0D - c - f < 0$, there will be no filings by type *0* plaintiffs, as such a move will have a negative expected value. However, if $f < q_0D - c < p_0S + k$, a mixed strategy can exist where some type *0* plaintiffs will choose to report $R = 1$, but, upon being challenged, will choose to drop their original motion. To see this, we compare the plaintiff's payoff from *E1* and $E2^{**}$. The plaintiff will choose $E2^{**} > E1$ when $q_0D - c < p_0S + k$.

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Under these conditions, the payoff from filing (*C2*) will equal $\theta^{**}E2^{**} + (1-\theta^{**})E3$. The payoff from *C2* will equal the payoff from *C1* when:

$$\theta^{**}E2^{**} + (1-\theta^{**})E3 = 0. \qquad \text{(A2)}$$

If a mixed strategy exists, $f < q_0D - c < p_0S + k$ and $E2^{**} > E1$. Holding θ constant, the second term of the two conditions (*A1*) and (*A2*) are identical. But if $E2^{**} > E1$, the left hand side of (*A2*) will be positive if $\theta^{*} = \theta^{**}$. In order to restore the equality, it must be the case that in equilibrium, more weight is placed on the relatively lower valued outcome. Since $E3 > E2^{**}$, the weight on $E2^{**}$ must rise, that is, θ^{**} must rise. Thus $\theta^{**} > \theta^{*}$. *Q. E. D.*

Proposition 1 contains the intuitive proposition that as plaintiff's costs of a Rule 11 challenge fall, ceteris paribus, the rate of Rule 11 challenges will increase. That is, holding the distribution of original filings constant, there will be more challenges under the Rule, and the total amount of Rule 11 litigation will increase.

The second proposition in the article deals with the effect of the 1993 Amendment on the rate of type *0* ("frivolous") filings.

Proposition 2. Let α^{*} and α^{**} denote the proportion of plaintiffs who report $R = 1$ that are type *0* plaintiffs under the current and amended rule respectively. Under a mixed strategy equilibrium, $\alpha^{**} > \alpha^{*}$ if $p_0S - q_0D > c + k$.

Proof. A mixed strategy equilibrium will exist when the defendant's expected payoff from challenging all filings under Rule 11 ($\theta = 1$) equals the expected payoff from never making a Rule 11 challenge ($\theta = 0$). Under the 1983 regime with mandatory sanctions, both types of plaintiffs choose to litigate both the merits and a Rule 11 challenge, so the defendant's payoffs from challenging and not challenging are equal when:

$$\alpha_p E3 + (1-\alpha_p)E6 = \alpha^{*}E1 + (1-\alpha^{*})E4 \qquad \text{(A3)}$$

where α_p is the proportion of type *0* plaintiffs in the population. That is, if there are N_0 potential type *0* and N_1 potential type *1* defendants, $\alpha_p = N_0/(N_0 + N_1)$.

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Under the amended rule, the type *0* plaintiff drops when challenged, so the defendant's payoffs from challenging and not challenging are equal when:

$$\alpha_p E3 + (1-\alpha_p)E6 = \alpha^{**}E2^{**} + (1-\alpha^{**})E4. \qquad \text{(A4)}$$

Note that the left hand side of expressions (*A3*) and (*A4*) (the defendant's expected payoff from never challenging) are identical. If (*A3*) was satisfied at α^*, and if $E2^{**} < E1$, then the right hand side of (*A4*) will be less than the left hand side of (*A4*) at α^*. Thus, it must be the case that, in equilibrium, more weight is placed on the higher valued outcome. Since $E4 < E1$ and $E4 < E2^{**}$, $\alpha^{**} > \alpha^*$ for the equality (*A4*) to hold. Finally, we must examine the conditions where $E2^{**} < E1$. Substituting the values from Table 1, this occurs if $p_0S - q_0D > c + k$. *Q. E. D.*

Intuitively, Proposition 2 says that there will be more frivolous pleadings under the new regime as long as the gross expected value of a Rule 11 challenge against the weak (type *0*) plaintiff is large relative to the expected damages.

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Appendix B

1. Text of Rule 11 – The 1983 Amendment and Changes from the 1938 Rule (Additions in boldface)

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

Every pleading**, motion, and other paper** of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading**, motion, or other paper** and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney **or party** constitutes a certificate by him that he has read the pleading**, motion, or other paper**; that to the best of his knowledge, information, and belief ~~[there is good ground to support it;]~~ **formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,** and that it is not interposed for ~~[delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not ben served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted]~~ **any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.**

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2. Text of Rule 11 – The Proposed 1993 Amendment and Changes from the 1983 Rule[a] (Additions in boldface)

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

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

(b) Representations to Court. [~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~] **By presenting to**

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[a] The 1983 text given here includes technical amendments made in 1987 to adopt gender-neutral language. See 480 U.S. 953 (1987).

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the court (whether by signing, filing, submitting, or later advocating) a leading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable in the circumstances, —

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

(2) the claim, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

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

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

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the

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motion. Absent exceptional circumstances, a law firm shall be held responsible for violations by its partners, associates, and employees.

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

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

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

(B) Monetary sanctions many not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

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

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

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