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The Applicability of Rule 11 Sanctions upon Removal from State to Federal Court: Imposing a Continuing Obligation

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Notes

The Applicability of Rule 11 Sanctions Upon Removal from State to Federal Court: Imposing a Continuing Obligation

Rule 11 of the Federal Rules of Civil Procedure requires an attorney of record to sign every pleading or motion filed in a case.[1] The attorney's signature certifies that the attorney has read the pleading, stipulates that it is well-grounded in fact, and believes either that current law warrants it or permits an argument for a good faith modification.[2] Originally, Rule 11 required a showing of actual "willfulness" or bad faith on the part of an attorney before the court imposed Rule 11 sanctions.[3] Courts rarely enforced the rule, however, because they found it difficult to establish that an attorney acted willfully or in bad faith. Consequently, the lack of judicial action undermined Rule 11's expected deterrent effect.[4]

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1. FED. R. CIV. P. 11 (1990); *see also* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). The *Oliveri* court recognized that the Rule repeatedly refers to the signing of papers, and the Rule's distinctive feature is the certification established by the signature. 803 F.2d at 1274.

2. FED. R. CIV. P. 11 (1990); *see also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), *modified on other grounds*, 821 F.2d 121 (2d Cir. 1987), *cert. denied*, 484 U.S. 918 (1987). In *Eastway*, the seminal case discussing the 1983 amendment to Rule 11, the Second Circuit recognized that the Supreme Court designed amended Rule 11 to "reduce the reluctance of courts to impose sanctions . . . [while] *emphasizing the responsibilities of the attorney*." 762 F.2d at 253 (emphasis in original).

3. The original Rule 11, promulgated in 1938, read as follows:

> Every pleading 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. . . . 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 this purpose of the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (1938).

4. Federal courts seldom used Rule 11's sanctions prior to 1983. *See* Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword*, 12 WM.

Widespread concern over frivolous litigation and abusive practices led to the Supreme Court's amendment of Rule 11 in 1983.[5] The amendment incorporated an objective standard[6] that imposes a duty on attorneys to certify that they have con-

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MITCHELL L. REV. 731, 735 (1986). One study indicated that between 1938 and 1976, there were only 23 reported cases in which a party invoked former Rule 11 to strike a pleading, and only nine cases in which violations of Rule 11 were found. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-35 (1976). According to the advisory committee notes to the 1983 amendment to Rule 11, there was a great deal of confusion over the application of the prior rule, the standards required of attorneys, and the availability of appropriate sanctions. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).

5. Amendments to the Federal Rules are promulgated by the Supreme Court pursuant to 28 U.S.C. § 331 (Supp. 1982). Under this system, the Judicial Conference of the United States serves as a standing "advisory committee" to the Supreme Court. *See* J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 1.02a[2] (2d ed. 1986 & Supp. 1988). The Chief Justice of the Supreme Court appoints these advisory committees to formulate recommendations initially to the Judicial Conference and then to the Supreme Court. *See id.* The Supreme Court submits proposed rules to Congress, and these recommended rules become effective in 90 days, absent congressional action to repeal or amend them. *Id.* The 1983 amendments were approved by the Supreme Court on April 28, 1983, and became effective on August 1, 1983. *See* Amendments to Rules, 97 F.R.D. 165 (1983).

The amendment to Rule 11 in 1983 was part of an "integrated package" of amendments to Rules 7, 11, 16, and 26. The Supreme Court designed these changes —

> to make lawyers more accountable for their actions, increase judicial management of cases, improve the discovery process, and encourage use of sanctions where appropriate. They focus on the pretrial process and attempt to remedy the perceived inefficiencies and abuses of the system by increasing judicial oversight of litigation and by diminishing the incentives for certain kinds of litigation behavior through sanctions provisions.

Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO L.J. 1313, 1317 (1986).

Rule 7 was amended to make it clear that courts could impose sanctions in motion practice. Oliphant, *supra* note 4, at 736. Rule 16 was amended to give the judiciary greater control over filing as well as control over the negotiation stage of a proceeding. *Id.*; *see also* FED. R. CIV. P. 16 advisory committee's note. Rule 16(f) illustrates the nature of the control courts are expected to wield. Oliphant, *supra* note 4, at 736. For example, it authorizes imposition of sanctions for failing to participate in good faith in pretrial proceedings. *Id.* Amended Rule 26 focuses on the problem of abusive discovery and provides the judiciary with enlarged power to limit and control discovery. *Id.* Rule 26(g) provides for sanctions for abuse of the discovery process by imposing a certification requirement similar to that under Rule 11 with respect to discovery requests and responses. *Id.*; *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4 (1980).

6. FED. R. CIV. P. 11 (1990).

ducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and not introduced for an improper purpose.[7]

The amended Rule 11, however, may not be as effective as the amenders of Rule 11,[8] courts,[9] and commentators,[10] first

7. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 199 (1983). The courts have noted that the standard for testing conduct is reasonableness under the circumstances. *See* Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985).

8. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).

9. For a survey of recent cases discussing the standards for analyzing Rule 11 claims, see Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990); Schoenberger v. Oselka, 909 F.2d 1086 (7th Cir. 1990); Dahnke v. Teamsters Local 695, 906 F.2d 1192 (7th Cir. 1990); Hilton Hotels Corp. v. Banov, 899 F.2d 40 (D.C. Cir. 1990); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc., 877 F.2d 938 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1133 (1990); *In re* Summers, 863 F.2d 20 (6th Cir. 1988); Kale v. Combined Ins. Co. of America, 861 F.2d 746 (1st Cir. 1988); Herron v. Jupiter Transp. Co., 858 F.2d 332 (6th Cir. 1988); Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024 (7th Cir.), *cert. denied*, 488 U.S. 909 (1988); Foval v. First Nat'l Bank of Commerce, 841 F.2d 126 (5th Cir. 1988); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866 (5th Cir. 1988); Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987); Cannon v. Kroger Co., 832 F.2d 303 (4th Cir. 1987), *reh'g denied*, 837 F.2d 660 (4th Cir. 1988) (en banc); Hurd v. Ralphs Grocery Co., 824 F.2d 806 (9th Cir. 1987); Adduono v. World Hockey Ass'n, 824 F.2d 617 (8th Cir. 1987); Hamer v. County of Lake, 819 F.2d 1362 (7th Cir. 1987), *cert. denied*, 110 S. Ct. 146 (1989); Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805 (2d Cir. 1987); Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451 (7th Cir. 1987); Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); Brown v. Capitol Air, Inc., 797 F.2d 106 (2d Cir. 1986); Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (1985), *cert. denied*, 484 U.S. 918 (1987); Schmitz v. Campbell-Mithun, Inc., 124 F.R.D. 189 (N.D. Ill. 1989); Sauls v. Penn Virginia Resources Corp., 121 F.R.D. 657 (W.D. Va. 1988); Advo Sys., Inc. v. Walters, 110 F.R.D. 426 (E.D. Mich. 1986).

10. *See, e.g.*, Dyer, *A Genuine Ground in Summary Judgment for Rule 11*, 99 YALE L.J. 411, 418-20 (1989); Nelken, *supra* note 5, at 1317-23; Oliphant, *supra* note 4, at 736-40; Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1013-15 (1988) [hereinafter Schwarzer II]; Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 182-84 (1985) [hereinafter Schwarzer I]; Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 903-04 (1988); *see also* Note, *Has a "Kafkaesque Dream" Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment?*, 67 B.U.L. REV. 1019, 1019-22 (1987); Note, *Rule 11 of the Federal Rules of Civil Procedure and the Duty to Withdraw a Baseless Pleading*, 56 FORDHAM L. REV. 697, 701-09 (1988) [hereinafter Note, *Duty to Withdraw*]; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 630-32 (1987) [hereinafter Note, *Plausible Pleadings*]; Note, *Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through an Analysis of Federal and State Civil Procedure Rules*, 72 IOWA L. REV. 701, 706-08 (1987) [hereinafter Note, *Divining an Approach*]; Note, *The Intended Application of*

thought. Rule 11 fails to address whether federal courts may review pleadings originally filed in state court and subsequently removed to federal court. Some interpretations of Rule 11 may allow calculating plaintiffs to skirt the reach of Rule 11 and still have their complaints tried in federal court, simply by filing a claim in state court that the plaintiff knows the defendant likely will remove. The interpretation of Rule 11 that could lead to such an occurrence is commonly known as the "one-time obligation" theory. This theory posits that Rule 11 only applies at the time of filing. Because the complaint in a removal case originally is filed in state court and Federal Rule 11 does not apply to claims filed in state courts, the federal court cannot apply Rule 11 to the complaint. Other courts, however, allow a Rule 11 review on removal, employing a "continuing obligation" rule. These courts hold that Rule 11 imposes a "continuing obligation" on the plaintiff and plaintiff's attorney to ensure that the complaint satisfies Rule 11, regardless of where the complaint originally is filed.

This Note demonstrates that in removal cases, the plaintiff and plaintiff's counsel should have a continuing Rule 11 obligation. Part I of this Note examines Rule 11 and its connection to removal. Part II explores the desirability of imposing a continuing obligation. Part III argues that the "continuing obligation" theory should govern future removal questions under Rule 11. Consequently, under the continuing obligation view, plaintiff, plaintiff's attorney, and other future litigants would be wary of filing a removable claim in state court to escape the reach of Rule 11.[11] In turn, a continuing obligation rule would bolster Rule 11's deterrent effect. Only through such a consistent approach will the courts accomplish the goal that the drafters of the 1983 amendment envisioned — to deter the flow of frivolous claims into federal court.[12]

Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and a Reinforcement of Ethical Standards, 41 VAND. L. REV. 343, 352-61 (1988).

11. Of course, a litigant may still file a claim under the continuing obligation view after weighing the costs and benefits of such a move against possible sanctions. Discussion of types of sanctions and their effects are beyond the scope of this Note.

12. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983). In interpreting Rule 11, courts and commentators have created a virtual quagmire in attempting to define the term "frivolous" claim. *See* Schwarzer II, *supra* note 10, at 1015. The proper definition of the word "frivolous" is, however, beyond the scope of this Note and irrelevant to the present analysis. For purposes of this Note, a claim that violates any of the courts' def-

I. THE HISTORY OF RULE 11 AND ITS CONNECTION TO REMOVAL

A. THE 1983 AMENDMENT TO RULE 11

Faced with an increasing number of frivolous suits, dilatory tactics, and an ineffective Rule 11 with which to combat such measures, the Supreme Court amended Rule 11 in 1983.[13] Amended Rule 11 attacks litigation abuse by increasing the sig-

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initions of "frivolous" is considered baseless and potentially subject to sanctions. This Note addresses the issue of whether an attorney has a one-time or continuing obligation to monitor these potentially baseless pleadings upon removal of a case from state to federal court.

13. Federal Rule of Civil Procedure 11, as amended, provides:

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

FED. R. CIV. P. 11 (1990).

The original Rule 11 had been adopted in 1938 as part of the Federal Rules of Civil Procedure. *See* Order Adopting the Federal Rules of Civil Procedure, 308 U.S. 649, 676 (1939) (order dated Dec. 20, 1937). The rule attempted to deter frivolous claims, *see* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983), and Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 4 (1985), by requiring an attorney to certify that to the "best of [the attorney's] knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." *See supra* note 3; *see also* Schwarzer I, *supra* note 10, at 183. Under the original Rule 11, an attorney seeking to avoid the imposition of sanctions had to establish only a subjective good faith belief that the complaint was well-supported in both fact and law. Attorneys easily could establish this "subjective" belief, and consequently, courts were unwilling to impose penalties. *See, e.g.*, Smith

nificance of the lawyer's signature on pleadings, motions, and other papers.[14] Specifically, as amended, Rule 11 contains the following changes: Rule 11 applies to every paper filed in court, not just the pleadings;[15] mandates a reasonable pre-filing inquiry;[16] specifies that papers filed must be well-grounded in fact and based on existing law or on a good faith argument for the extension, modification, or reversal of existing law;[17] pro-

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v. Detroit Fed'n of Teachers, 829 F.2d 1370, 1379 (6th Cir. 1987); Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980), *aff'd*, 704 F.3d 652 (2d Cir. 1983).

The original Rule, however, did not effectively deter abuses of the litigation process; the amended Rule 11 requires an objective pre-trial examination. This enables courts to dispose of cases at an earlier stage, thereby fostering judicial economy and minimizing frivolous claims. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 199 (1983); *see also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987). The extent to which judges were reluctant to impose sanctions prior to the 1983 amendments is evidenced by the fact that between 1938 and 1976, Rule 11 motions had been filed in only 19 reported cases. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 2 (Fed. Jud. Center 1985). Among these cases, violations were found in only 11 instances, and attorneys sanctioned in only three. *Id.*

14. *See* Note, *Plausible Pleadings*, *supra* note 10, at 632. Amended Rule 11 is designed to make the federal courts operate more efficiently by curbing the expense and court delays that litigating frivolous claims creates. *See* Note, *Duty to Withdraw*, *supra* note 10, at 702. As the advisory committee note states, the amended rule "should discourage dilatory or abusive tactics and help . . . streamline the litigation process." FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).

The original Rule 11 was utilized rarely because striking a pleading was an ineffective penalty. *See* Schwarzer I, *supra* note 10, at 181. Occasionally, the courts imposed sanctions or dismissal, but confusion among the courts concerning the application of the rule minimized the application of such sanctions. *Id.*

15. *See* Hilton Hotels Corp. v. Banov, 899 F.2d 40, 45 (D.C. Cir. 1990). The *Banov* court noted that a district court could sanction an attorney for any "*specifically identified* pleading, motion, or other paper" submitted during the cause of action. *Id.* at 45 (emphasis in original).

16. The Advisory Committee noted that the new language emphasizes the need for some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty that the Rule imposes. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198-99 (1983).

17. This standard is one of reasonableness under the circumstances, which is more stringent than the original good-faith formula. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198-99 (1983). The court may consider the circumstances of a case before imposing sanctions. These factors may include how much time was available for investigation; whether the signer had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading was based on a reasonable interpretation of the law; or whether the signer depended on information provided by a forwarding counsel or another member of the bar. *Id.*; *see also* Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985). However, the rule does not permit the use of the "pure heart and

hibits papers interposed for any improper purpose;[18] and directs

empty head" defense. Schwarzer I, *supra* note 10, at 187. Instead, the rule imposes an obligation on the attorney analogous to the railroad crossing sign, "Stop, Look, and Listen." It may be rephrased, "Stop, Think, Investigate, and Research" for an attorney filing suit in federal court. Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987). An attorney may not evade the duty to make a reasonable inquiry into the facts and law by claiming that duty to the client comes first. Advo Sys., Inc. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986); *see also* Pawlowske v. Chrysler Corp., 623 F. Supp. 569, 573 (N.D. Ill. 1985), *aff'd*, 799 F.2d 753 (7th Cir. 1987). The *Pawlowske* court held that creativity by itself is not enough. The creativity must be in service of a good faith application of the law or at least a good faith request for a change in the law. 623 F. Supp. at 573. However, distortion of the law or of a statute is precisely the sort of creativity Rule 11 should chill. *Id.*

Consequently, the amendment will trigger more violations of the Rule. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 199 (1983); *see also* Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986). One commentator discussed the nature of purposes of such sanctions. The commentator noted that:

> a key distinction must be maintained between the purpose of Rule 11 and the purpose(s) of any particular sanction imposed under the Rule. The purpose of Rule 11 itself would seem to be general deterrence: The Rule's existence serves as a general threat to discourage lawyers and litigants from engaging in prohibited conduct. On the other hand, the purpose of any particular sanction is primarily specific deterrence. A sanction is actually imposed only when general deterrence (via the threat of sanctions) has failed.
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> Choosing the most severe sanction in each case would discourage or "chill" legitimate lawsuits and valid litigation techniques. In addition, massive sanctions could, in an individual case, go well beyond the needs of specific deterrence. What is needed, then, is a more uniform approach to imposing and calculating individual sanctions — one that takes into account the differential need to specifically deter — so that the general deterrent aim is achieved without overdeterrence. Specific deterrence should be the guiding principle in the imposition of individual Rule 11 sanctions.

Untereiner, *supra* note 10, at 908-09.

18. FED. R. CIV. P. 11 (1990); *see also* Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985). The *Westmoreland* court emphasized that Rule 11 was promulgated to deter the flow of frivolous claims into federal court. 770 F.2d at 1274. In addition, the type of sanction to be imposed lies within the discretion of the district court. *Id.* at 1275. However, when it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be made for the extension of existing law, Rule 11 has been violated. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987). Such an interpretation punishes those who manipulate the federal court system "for ends inimicable to those for which it was created." *Id.*

In contrast, the only improper purpose for conducting litigation acknowledged by the original Rule was delay. "The Rule failed to recognize that litigation can be conducted for other improper purposes, such as to mislead the court, to harass an opponent, to impose defense costs, or to pressure an opponent into a settlement." *See* Note, *Duty to Withdraw*, *supra* note 10, at 701.

the courts to impose sanctions upon its violation.[19]

Amended Rule 11 has proved somewhat effective. Federal courts increasingly have imposed Rule 11 sanctions for frivolous filings.[20] Nevertheless, despite the increasing number of court decisions and scholarly works exploring and explaining the scope of Rule 11, the appropriate application of Rule 11 in the removal context has received relatively little attention.

B. REMOVAL OF CASES FROM STATE TO FEDERAL COURT

Interpreting Rule 11 to impose either a one-time or continuing obligation on the plaintiff and plaintiff's counsel is critical in determining whether a federal court can sanction them for Rule 11 violations based solely on state court pleadings once a case is removed to federal court.[21] Clearly, the defendant's motion for removal is subject to Rule 11:[22] The Judicial Improve-

19. The new Rule *mandates* the imposition of sanctions when a violation is found. *See* INVST Financial Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 401 (6th Cir.), *cert. denied*, 108 S. Ct. 291 (1987); *see also* Kale v. Combined Ins. Co. of America, 861 F.2d 746, 757 (1st Cir. 1988) (the "shall impose" language of the new Rule *mandates* the imposition of sanctions whenever an objective violation of its tenets is found). Although courts retain discretion to determine the type and amount of the sanction, *see* Note, *Duty to Withdraw*, *supra* note 10, at 704, the mandatory nature of such sanctions encourages their use. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198-99 (1983).

20. In the first two years under the new Rule 11, district courts reported 233 cases in which sanctions were considered. *See* Nelken, *supra* note 5, at 1326. As of July 1, 1987, there had been 564 reported Rule 11 decisions in the district courts and courts of appeals. *See* Vairo, Report to the Advisory Committee on Amended Rule 11 of the Federal Rules of Civil Procedure 5 (unpublished, Sept. 1987) (cited in Schwarzer II, *supra* note 10, at 1013 n.2). However, other commentators have suggested that Rule 11 has produced over 1000 cases in its first five years of operation. *See* Untereiner, *supra* note 10, at 901; Joseph, *The Trouble with Rule 11*, A.B.A. J., Aug. 1, 1987, at 87, 88. The discrepancy between some of these estimates may be due to the fact that publishing an opinion is one form of sanctions, and, consequently, some cases in which the sanctions arose may not have been published. *See* Chrein, *The Actual Operation of Amended Rule 11*, 54 FORDHAM L. REV. 13, 16 (1985).

21. 28 U.S.C. § 1441 (Supp. 1990). In general, cases that involve a federal question or one in which the district court would have original jurisdictions are removable. In addition, cases involving diversity of citizenship between all parties may be removed. 28 U.S.C. § 1441(a)-(c) (Supp. 1990).

22. The statute on removal provides:

> A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal.

28 U.S.C. § 1446(a) (Supp. 1990).

ments and Access to Justice Act of 1988[23] provides that, pursuant to Rule 11, the defense attorney must sign the notice of removal.[24] Whether the federal court may impose any similar type of Rule 11 requirement to verify the merits of the original state court pleadings upon removal, however, remains unresolved.

The United States circuit courts of appeals are split over whether a defendant can mount a Rule 11 challenge to a plaintiff's state court pleadings once a case is removed to federal district court, thereby forcing a plaintiff to verify that the pleadings represent a reasonable belief in the validity of a claim.[25] The courts' debate centers around discussion of the

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23. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

24. The commentary on the 1988 Revision to the removal statute provided that:

> The requirement that a verified petition be part of the removal papers was eliminated and in its place is a "notice of removal signed pursuant to Rule 11." Rule 11 of the Federal Rules of Civil Procedure, the rule that authorizes sanctions for a paper whose averments are not "well grounded in fact and . . . warranted by . . . law," would apply by its own terms; the reference to it is included to resolve all doubt. The sanctions authorized by the controversial Rule 11 were deemed an adequate substitute for a false statement in a verified petition.

28 U.S.C. § 1446(a) (Supp. 1990). This amendment was part of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988). Subdivisions (a) and (b) were amended, old subdivision (d), which required a bond with good and sufficient surety, deleted, and old subdivisions (e) and (f) relettered (d) and (e). *Id.*

Under the statutes, the removing defendant must satisfy both the substantive requirements of 28 U.S.C. § 1441 governing the types of removable cases, *see* 28 U.S.C. § 1441 (Supp. 1990), and the procedural provisions of 28 U.S.C. § 1446. In general, cases that involve a federal question or one in which the district court would have original jurisdictions are removable. In addition, cases involving diversity of citizenship between all parties may be removed. 28 U.S.C. § 1441(a)-(c) (Supp. 1990). After the substantive requirements are met, a defendant must meet the procedure of removal as described at 28 U.S.C. § 1446 (1990). This section provides in part:

> [a] defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1446(a) (Supp. 1990). In summary, if the case is removable under § 1446, the defendant must sign a notice of removal pursuant to § 1441.

25. Courts and commentators have divided on this issue. *Compare* Herron v. Jupiter Transp. Co., 858 F.2d 332, 335-36 (6th Cir. 1988); Note, *Duty to Withdraw*, *supra* note 10, at 716-17 (both advocating continuing duty) *with* Corpora-

one-time versus continuing obligation theories, and only a resolution of this debate will enable courts to fashion a consistent approach to Rule 11 sanctions in removal cases.

1. One-Time Obligation

The one-time obligation theory has generated substantial support from the United States circuit courts of appeal. At least eight circuits, including the District of Columbia, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh,[26] follow the one-time obligation interpretation of Rule 11.[27] In addition, the Eighth and Tenth Circuits[28] apparently support the one-time obligation position, although these circuits may not have adopted such a circuit-wide rule.

The courts backing the one-time obligation theory in the case of removal[29] focus on the time of signing the pleadings and the plain language of the rule.[30] These courts observe that

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tion of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc., 877 F.2d 938, 943 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1133 (1990); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc); Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987); Oliveri v. Thompson, 808 F.2d 1265, 1274-75 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (all opposing continuing duty).

26. *See, e.g.*, Hilton Hotels Corp. v. Banov, 899 F.2d 40, 44-45 (D.C. Cir. 1990); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Associated Contractors, Inc., 877 F.2d 938, 942-43 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1133 (1990); Thomas v. Capital Sec. Servs., 836 F.2d 866, 874 (5th Cir. 1988) (en banc); United Energy Owners Comm., Inc. v. United Energy Management Sys., Inc., 837 F.2d 356, 364-65 (9th Cir. 1988) (Rule 11 applies only to litigation misconduct involving signing of paper); Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987); Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987); Hamer v. County of Lake, 819 F.2d 1362, 1370 n.15 (7th Cir. 1987), *cert. denied*, 110 S. Ct. 146 (1989); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

27. *Id.*

28. *See* Adduono v. World Hockey Ass'n, 824 F.2d 617, 621 (8th Cir. 1987) ("Rule 11 is not a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of civil cases."); *cf.* Conklin v. United States, 812 F.2d 1318, 1319 (10th Cir. 1987) (reversing without discussing sanctions based in part on the continuation of litigation).

29. A number of circuits have construed Rule 11 not to apply to complaints filed in state court that are subsequently removed to federal court. *See, e.g.*, Hurd v. Ralphs Grocery Co., 824 F.2d 806 (9th Cir. 1987); Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805 (2d Cir. 1987); Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Brown v. Capitol Air, Inc., 797 F.2d 106 (2d Cir. 1986).

30. FED. R. CIV. P. 11 (1990). In support of this position, the Second Circuit emphasized that the advisory committee's note to the amended rule states that the signer's conduct is to be judged as of the time the pleading or other

Rule 11's emphasis on the need to perform a "reasonable inquiry" before signing a pleading, motion, or other paper[31] suggests that the rule authorizes sanctions for inadequate pre-filing inquiries only at the time the papers are filed.

For example, the Seventh Circuit adopted the one-time obligation theory in *Dahnke v. Teamsters Local 695*,[32] finding that a Rule 11 challenge may be based only on inadequate inquiry as of the time the pleadings, or other papers, are filed.[33] Consequently, a litigant, if challenged, merely has an obligation to verify the merits of a claim or motion once — at the time of filing — and a Rule 11 violation cannot be made with respect to a previously filed paper.[34] Further, the *Dahnke* court noted that Rule 11, a federal court rule, does not apply to pleadings or any other paper originally filed in state court or a state administrative agency.[35] Reading the rules together, the Seventh Circuit found that Rule 11 does not apply at the time the pleadings are filed in the state agency, and, therefore, the court could not impose sanctions unless it could identify a frivolous federal court pleading.[36]

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paper is signed. Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). The *Oliveri* court found it difficult to imagine why this comment would be made if the rule were meant to impose a continuing obligation on the attorney. *Id.*

31. FED. R. CIV. P. 11 (1990); *see supra* notes 5-7 and accompanying text.

32. 906 F.2d 1192 (7th Cir. 1990). *Dahnke* involved an employee who was fired after he accrued the requisite number of points under the company's no-fault absentee program. *Id.* at 1194. The employee brought suit against the Wisconsin Employment Relations Commission, alleging that the employer had discharged him without just cause. *Id.* The Court of Appeals held that the plaintiff could not pursue the breach of contract claim against the employer after the determination that the union did not wrongfully refuse to process his grievance. *Id.* at 1197. However, the court determined that Rule 11 sanctions should not have been imposed upon plaintiff and his attorney for the period prior to the date that the attorney filed documents in district court. *Id.* at 1201.

33. *Id.* at 1199 (stating that parties merely must conduct a pre-filing inquiry).

34. *Id.* at 1200-01. The *Dahnke* court held that a federal court cannot sanction an attorney for conduct that occurred solely in state court or a state administrative proceeding. *Id.* at 1199. For a vivid description of this requirement, see Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc) ("Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken — when the signature is placed on the document.").

35. *Dahnke*, 906 F.2d at 1199-1200 (emphasizing that federal courts cannot reach back to a state court filing to impose sanctions).

36. *Id.* at 1200. Because Dahnke and his attorney filed their claim with the Wisconsin Employment Relations Commission, sanctions must be imposed based on state sanction rules, not federal rules. The court held that Rule 11 sanctions could not be imposed from the time of removal until the party first

Other circuits have reached the same result.[37] The Second Circuit agreed with *Dahnke*, noting that amended Rule 11 does not provide for retrospective application.[38] The District of Columbia Circuit emphasized that requiring only a one-time pre-filing inquiry under Rule 11 is consistent with an attorney's professional responsibility obligations.[39] Under prevailing professional responsibility standards, an attorney has broad discretion in determining whether to initiate representation of a client and in taking particular steps once litigation has begun.[40] The court reasoned that requiring only a pre-filing inquiry would adequately preserve the federal courts' interest in controlling abusive litigation while preserving the attorney's freedom to present a case.[41]

The one-time obligation courts also emphasize that other statutory and procedural provisions can fill any gaps in fighting

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files in federal court. *Id.* at 1201. The Seventh Circuit continues to adhere to this view. *See* Schoenberger v. Oselka, 909 F.2d 1086, 1088 (7th Cir. 1990) (holding that because Rule 11 did not govern the plaintiff's complaint when filed, the signing of the complaint could not have violated Rule 11).

37. *See, e.g.*, Gaiardo v. Ethyl Corp., 835 F.2d 479, 484 (3d Cir. 1987) (Rule 11 sanctions are improper "in situations which do not involve signing a paper"); Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 256-57 (4th Cir. 1987) (emphasizing that Rule 11 only addresses the moment of signing the pleading); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (Rule 11 deals exclusively with "the certification flowing from the signature to a pleading, motion, or other paper in a lawsuit"). District courts also have followed this interpretation. *See, e.g.*, Kendrick v. Zanides, 609 F. Supp. 1162, 1170 (N.D. Cal. 1985).

38. *See* Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805, 809 (2d Cir. 1987). For other courts that have echoed this view, see Hurd v. Ralphs Grocery Co., 824 F.2d 806, 808 (9th Cir. 1987) (courts cannot impose sanctions for filings in state court); Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1987) (same); Columbus, Cuneo, Cabrini Medical Center v. Holiday Inn, 111 F.R.D. 444, 447 (N.D. Ill. 1986) (imposing sanctions in a diversity case based on a state court complaint and a motion for voluntary dismissal "would be analogous to applying an ex post facto law").

39. Hilton Hotels Corp. v. Banov, 899 F.2d 40, 44-45 (D.C. Cir. 1990).

40. *Id.* at 45; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1990) (giving a lawyer wide discretion in determining whether to represent a client); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1990) (providing what permissible steps an attorney may take once litigation has begun).

41. *Banov*, 899 F.2d at 45. The court noted that if the attorney should have known that the case was without merit when commenced, sanctions can be imposed by virtue of continuing the suit. The court deemed this an adequate protection of a federal court's interest in minimizing abusive claims. *Id.* If the attorney should have known that a client's cause of action was without merit when the action commenced, the attorney is responsible for expenses incurred by virtue of continuing representation. *Id.* The *Banov* court emphasized that it is because an attorney may be held liable for expenses caused by

frivolous filings that the one-time interpretation of Rule 11 creates. For example, federal courts could use their "inherent powers"[42] to award reasonable attorney fees to the prevailing party when the losing party acted in bad faith or for purposes of harassment.[43] Alternatively, the courts could hold an attor-

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an unreasonable filing that the court need not determine whether the continuing representation influenced the size of the fee award. *Id.* at 45 n.8.

Nevertheless, the *Banov* court did not explicitly rule out the possibility of an ongoing obligation. In the *Banov* case, the district court imposed a $5000 sanction on Banov under Rule 11 after entering summary judgment for the defendant. *Id.* at 41. In defining the basis for these sanctions, however, the court found both that Banov failed to conduct a pre-filing inquiry and that he unreasonably continued the suit after learning that the suit was without merit. *Id.* The *Banov* court did not rely on the district court's second finding — that Banov unreasonably continued the case — because Banov did not raise or brief the issue of whether Rule 11 imposes a continuing obligation. *Id.* at 44. The court noted that Banov's failure to conduct a reasonable *pre-filing* inquiry was enough to impose sanctions. Once the district court made this determination, Banov's post-filing conduct became immaterial. *Id.* However, the court indicated in dicta that it felt constrained to follow the weight of authority supporting the one-time obligation position. *Id.* at 45. The court recognized, however, that unfettered attorney discretion regarding trial tactics could inhibit the court's interest and potentially violate professional responsibility rules. *Id.* The Rules of Professional Conduct do not allow an attorney total freedom to withdraw from representing a client or to settle a case against a client's wishes. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2(a), 1.16(b)-(c) (1983).

42. The term "inherent power" lacks a precise definition, but the Supreme Court once defined the term as the power "necessary to the exercise of all others" and "not immediately derived from statute." United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

43. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980). The "inherent power" of the court is a general exception to the American Rule, which does not allow the prevailing party to recover its attorney fees. *See* F.D. Rich Co., Inc. v. United States, 417 U.S. 116, 129 (1974). The court may make awards under the inherent power exception against the losing party or against the attorney for the losing party. *See, e.g.*, Dow Chem. Pac. Ltd. v. Rascator Maritime S.A., 782 F.2d 329, 344 (2d Cir. 1986) (award made against party); Weinberger v. Kendrick, 698 F.2d 61, 80-81 (2d Cir. 1982) (award made against attorney), *cert. denied*, 464 U.S. 818 (1983). In addition, the inherent power of a court necessarily includes the authority to impose reasonable and appropriate sanctions upon lawyers who act inappropriately. Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1209 (11th Cir. 1985). However, the inherent power of the court may not be invoked in the case of a settlement agreement that has not been submitted to the court. *See* Adduono v. World Hockey Ass'n, 824 F.2d 617, 622 (8th Cir. 1987).

This bad-faith exception permitting an award of attorney's fees is not restricted to cases where the action is filed in bad faith. The court may impose an inherent power award either for commencing or for continuing an action in bad faith, vexatiously, wantonly, or for oppressive reasons. *See* Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986); *see also* Hall v. Cole, 412 U.S. 1, 15 (1973) (" '[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."). Nevertheless, many cir-

ney liable for multiplying proceedings "unreasonably and vexatiously" under section 1927 of Title 28.[44]

To further support the idea that Rule 11 only relates to the time the initial pleading is signed, some one-time obligation

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cuits have interpreted this standard restrictively, thereby minimizing its practical effect. The Second Circuit, for example, has declined to uphold awards under the bad-faith exception absent both clear evidence that the actions have no basis as well as a high degree of specificity in the factual findings of the district court. *See Dow Chem. Pac. Ltd.*, 782 F.2d at 344.

44. 28 U.S.C. § 1927 (1988). This section provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Id.

Unlike Rule 11, however, § 1927 applies only when the attorney acts in subjective bad faith. Thus, while § 1927 authorizes sanctions when an attorney acts in bad faith to continue nonmeritorious litigation, see Fritz v. Honda Motor Co., Ltd., 818 F.2d 924, 925 (D.C. Cir. 1987) (per curiam), § 1927 presumably would not authorize sanctions against an attorney who merely accedes to his client's wishes to continue a nonmeritorious claim. *Cf. Oliveri*, 803 F.2d at 1276-79 (no sanctions under § 1927 for continuation of nonmeritorious civil rights claim).

For many years, § 1927 imposed a burden only for excess costs and expenses, which only rarely involved significant sums. As a result, the statute has generated very little litigation. *See Oliveri*, 803 F.2d at 1273; *Roadway Express, Inc.*, 447 U.S. at 759-64.

When Congress amended § 1927 in 1980 to include attorney fees among the category of expenses that a court might require an attorney to satisfy personally, it made clear that the purpose of the statute was to deter unnecessary delays in litigation. H.R. CONF. REP. NO. 1234, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS, 2716, 2782; *see* Cheng v. GAF Corp., 713 F.2d 886, 890 (2d Cir. 1983).

Like an award made pursuant to the court's inherent power, an award under § 1927 usually has required a showing of bad faith. *Oliveri*, 803 F.2d at 1273. Although precedents have not always made this bad-faith requirement clear, *see Cheng*, 713 F.2d at 891 n.3, courts usually have been unwilling to impose sanctions without a showing of bad faith. *See* Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1201 n.6 (7th Cir. 1990); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 870 n.3 (5th Cir. 1988); *Oliveri*, 803 F.2d at 1273; Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975).

In fact, some recent courts have interpreted this statute as also imposing an objective standard. In *Cheng*, 713 F.2d at 891 n.3, the court stated that it need not decide whether an award under § 1927 requires a finding of bad faith or merely "unreasonable conduct." In the 1990 bankruptcy case of *In re* Endrex Inv., Inc., 111 Bankr. 939, 947 (Bankr. D. Colo. 1990), the court said that "[i]t is now well-established that the standard for the award of sanctions under § 1927 is an objective, not a subjective one." A case from the Tenth Circuit also indicated that fees are imposable against an attorney "for conduct that, viewed objectively, manifests intentional or reckless disregard of the attorney's duties to the court." Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987).

courts point to the goals of enhancing judicial economy and protecting plaintiffs from harassment. These objectives are undermined if defendants remove cases to federal court merely to obtain sanctions on the plaintiff and plaintiff's counsel, rather than for any legitimate preference that a federal court hear the claim.[45] Further, if the plaintiff brings two or more claims in state court but the defendant removes only one of those claims to federal court and then seeks sanctions based on that one claim,[46] the removal essentially bifurcates litigation that should be resolved in a single proceeding.[47] Because Rule 11 is designed to effectuate the economic use of judicial resources, courts recognize that defendants should not be rewarded for creating an unnecessary second suit.[48] Thus, in order to achieve the primary goal of the drafters of Rule 11's 1983 amendment — decreasing frivolous claims in federal court — the one-time obligation courts assert that state court pleadings should be immune from Rule 11 review.[49]

2. Continuing Obligation

A few circuit courts of appeals focus on Rule 11's purpose of preventing litigation abuse. These courts, including the First and Sixth Circuits,[50] conclude that an attorney and litigant have a continuing obligation throughout the entire course of lit-

45. *See, e.g.*, Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987). The *Kirby* court emphasized that many states either lack a comparable rule or impose a much less stringent standard than Rule 11. *Id.* at 257. The court believed that the lenient state standards, combined with the opportunities for sanctions under Rule 11, would cause defendants to remove more cases to federal court to obtain the benefits of the rule. *Id.* This, in turn, could increase the number of frivolous claims in federal court, a result contrary to the purposes behind Rule 11. *Id.*

46. *See, e.g.*, Brown v. Capitol Air, Inc., 797 F.2d 106 (2d Cir. 1986). In that case, a passenger brought a state court action against an airline, alleging various causes of action arising out of forcible expulsion from the flight. *Id.* at 107. A second complaint alleged libel, slander, and various tort theories. *Id.* The defendant removed the second cause of action to federal court but left the first claim in state court. *Id.* at 108.

47. *Id.* at 108. The second cause of action only added slight variations on legal themes already pending in the state court, and therefore, when consolidated with the first claim, would not have taken much more additional time to litigate in state court. *Id.* In contrast, the removal of the single issue added costs for the federal courts as well as both parties. *Id.*

48. *See id.* The court recognized that the defendant had effectively raised costs for everyone involved in the trial. Therefore, imposing sanctions on the plaintiff would not serve Rule 11's purpose. *Id.*

49. *See, e.g.*, *Kirby*, 811 F.2d at 257.

50. Kale v. Combined Ins. Co., 861 F.2d 746 (1st Cir. 1988); Herron v. Jupiter Transp. Co., 858 F.2d 332 (6th Cir. 1988).

igation to review and reevaluate their pleadings, motions, and other papers.[51] Under this theory, if at any time the attorney or the client discovers that such papers are without merit, they must immediately dismiss the action or risk Rule 11 sanctions.[52]

This continuing obligation also governs removal cases. Under this theory, it makes no difference that the pleading or paper was originally filed in state court where Rule 11 does not apply. Once a case is removed to federal court, Rule 11 begins to apply, and the plaintiff has a continuing responsibility to review and reevaluate the pleadings and, where appropriate, to modify them to conform to Rule 11.[53] The Sixth Circuit is the leading proponent of this interpretation. In *Herron v. Jupiter Transp. Co.*,[54] the defendant removed a state action to federal court and made a motion to dismiss.[55] The complaint contained factual inaccuracies and was unwarranted by existing law; due to these deficiencies and plaintiffs' failure to respond to the court order to dismiss the action, the federal district court judge imposed Rule 11 sanctions.[56] The Sixth Circuit affirmed, stating that, in a removal case, Rule 11 imposes a continuing obligation on plaintiffs to monitor the pleadings.[57] In holding that

51. *Herron*, 858 F.2d at 336 (arguing that attorneys must constantly reevaluate their pleadings throughout the trial); *see also* Advo Sys., Inc. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986) (Rule 11 imposes an ongoing duty on attorneys to refrain from pursuing baseless litigation at any stage).

52. *See* Yonkers v. Otis Elevator Co., 844 F.2d 42, 49 (2d Cir. 1988) (failure to dismiss a claim once discovery disclosed that the claims were specious warranted sanctions for attorney fees incurred by defendant to pursue summary dismissal of the action); Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024, 1036 (7th Cir.) (upheld sanctions, under Rule 11's frivolousness clause, because once discovery was completed, plaintiff should have known that the facts and the law clearly established that the complaint was baseless), *cert. denied*, 488 U.S. 909 (1988). In *Flip Side*, the plaintiff's failure to dismiss the case upon discovering no basis for the claim provided justification for imposing sanctions. *Id.* at 1036-37; *see also* Schmitz v. Campbell-Mithun, Inc., 124 F.R.D. 189, 193 (N.D. Ill. 1989) (Rule 11 can punish parties for filing papers in federal district court for an improper purpose, or that lack an adequate factual or legal basis).

53. *Herron*, 858 F.2d at 335-36.

54. 858 F.2d 332 (6th Cir. 1988).

55. Because the plaintiffs' action involved § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988), removal was proper. *Herron*, 858 F.2d at 333. Once removed, the defendant noted that the complaint was baseless and sought to dismiss the action. *Id.*

56. The district court confirmed that plaintiffs' complaint was grounded neither on fact nor law and imposed sanctions. *Herron*, 858 F.2d at 334.

57. *Id.* at 335-36. The plaintiffs contended that the district court was without jurisdiction to impose sanctions under Federal Rule 11 because the action

Rule 11 applies immediately upon removal, the *Herron* court derived support from Rule 81(c),[58] which dictates that federal rules apply to all proceedings after a case is removed from state court.[59] Because Rule 11 applies immediately upon removal, the district court may impose sanctions if the plaintiff fails to conform the pleadings to federal standards.[60] Furthermore, the *Herron* court reasoned that the Rule 11 "reasonable inquiry" standard must be met throughout the litigation in order to accomplish Rule 11's goal of minimizing frivolous suits in federal court.[61] Thus, once a case is removed, federal rules apply, and the plaintiff continually must conform the pleadings to the requirements of the federal rules.[62]

3. Compromise Theory

In order to resolve the dilemma that the one-time versus

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was filed in state court and later removed. *Id.* at 334. Instead, they claimed that Ohio Rule of Civil Procedure 11 should govern, a rule that imposes merely a subjective test. *Id.* The Sixth Circuit disagreed, stating that, in a removal case, the plaintiff is impressed with a continuing obligation to reevaluate the pleadings to make them conform to federal rules. *Id.* at 335-36.

58. Rule 81(c) governs the procedure after removal, and the rule provides, in relevant part:

> (c) *Removed Actions.* These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after service on the party of the notice of filing the petition.

FED. R. CIV. P. 81(c).

59. *Herron*, 858 F.2d at 335. *See generally* Hanna v. Plumer, 380 U.S. 460 (1965) (discussing the power of the Supreme Court to prescribe Rules for governing practice and procedure for all federal court proceedings).

60. *See Herron*, 858 F.2d at 336.

61. *Id.* at 335-36. The court stated that any other interpretation would "undercut the full force intended by Rule 11." *Id.* at 336.

62. *Id.* The court believed that if a reasonably diligent inquiry would have disclosed the claim to be without merit, the action should not be continued. The court reasoned that Rule 11 was promulgated to deter the flow of frivolous claims into federal court. *Id.*; *see also* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 200 (1983); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985).

continuing obligation controversy poses, one panel of the Fifth Circuit offered a potential compromise theory.[63] Although it purported to uphold the one-time obligation position that a previous Fifth Circuit panel had adopted,[64] this court hinted at a compromise theory for removal cases.[65] Under this theory, the court stated that, upon removal of an action to federal court, a plaintiff is not subject to immediate sanctions for pleadings filed in state court that violate federal Rule 11.[66] Rather, if deficiencies in the pleadings are brought to the plaintiff's attention when the case is removed, the plaintiff's attorney must either modify them to conform with Rule 11 or risk Rule 11 sanctions.[67] Nevertheless, a more definite resolution of the debate is needed to guide federal courts toward a consistent application of Rule 11 upon removal from state to federal court.[68]

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63. *See* Foval v. First Nat'l Bank of Commerce, 841 F.2d 126, 130 (5th Cir. 1988). In *Foval*, a holder of a note given in exchange for the sale of the company brought a RICO action against the promisor and bank that had approved the purchase agreement. The case was removed to federal court, and even though the removal may have been improper, the federal court was allowed to decide the case because the plaintiff welcomed the return to the federal forum. *Id.* at 127-29.

64. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866 (5th Cir. 1988) (en banc). In that case, the court adopted a five-step analysis. First, Rule 11 issues are reviewed on appeal under an abuse of discretion standard. *Id.* at 871-73. Second, Rule 11 imposes certain obligations on litigants and attorneys. *Id.* at 873-76. Third, a district court must impose sanctions once it finds a Rule 11 violation, but the court retains significant discretion to tailor "appropriate" sanctions to the facts of a particular case. *Id.* at 876-79. Fourth, a party seeking sanctions must promptly notify the court and the offending party of the potential Rule 11 violation. *Id.* at 879-81. Fifth, a district court need not support its Rule 11 decision with specific findings of fact and conclusions of law in all cases, but if the justification underlying the decision is not readily apparent, a prompt remand for such conclusions will be made. *Id.* at 882-83.

65. The *Foval* court appeared to adopt the one-time obligation position of the Fifth Circuit when it observed that "Rule 11 should not countenance sanctions for pleadings filed in state court in a case later removed to federal court." *Foval*, 841 F.2d at 130. However, the court recognized the potential for imposing such sanctions when it added, "unless, their deficiency having been promptly brought to the attention of the pleader after removal, he (or she) refuses to modify them to conform to Rule 11." *Id.* The *Herron* court explicitly recognized the continuing obligation theory and stated that the litigant and the litigant's attorney are under a continuing obligation to examine the basis for their claim in order to satisfy Rule 11. *Herron*, 858 F.2d at 336.

66. *Foval*, 841 F.2d at 130.

67. *Id.* The *Foval* court added, however, that Rule 11 should not be applied to conduct that occurred in state court prior to removal. *Id.* Ultimately, the court remanded the case to the district court to reconsider the imposition of sanctions in light of *Thomas*, 836 F.2d 866. *Foval*, 841 F.2d at 130.

68. For a general discussion of this proposed new standard, see *infra* notes 128-61 and accompanying text.

II. THE DESIRABILITY OF IMPOSING A CONTINUING OBLIGATION

In fashioning a consistent approach to the removal issue, several factors indicate that the imposition of a continuing obligation best comports with the purposes behind the 1983 amendments to Rule 11. These factors include the language and purpose of the rule,[69] the inability of other sanctions to perform the same functions as Rule 11,[70] the achievement of judicial economy and prevention of litigant harassment,[71] and the possibility of permitting a plaintiff to amend the pleadings upon removal in order to avoid Rule 11 sanctions.[72]

A. SATISFYING THE UNDERLYING PURPOSE OF RULE 11

Although reliance on the "plain meaning" of the 1983 amendment to Rule 11 has a certain appeal due to its ease of application,[73] strict application of this plain meaning approach in the removal context undermines the policies supporting the 1983 amendment.[74] For example, in *Dahnke v. Teamsters Local 695*,[75] the federal appellate court allowed a blatantly frivolous claim to be litigated; although a reasonable inquiry would have disclosed that the plaintiff had no basis for a legitimate claim,[76] the *Dahnke* court nevertheless held that it could not impose sanctions because the pleadings were originally filed in a state agency where Rule 11 does not apply.[77] Withholding sanctions in such a frivolous case merely because the plaintiff originally

69. *See infra* notes 73-88.

70. *See infra* notes 89-110.

71. *See infra* notes 111-26 and accompanying text; *see also* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).

72. *See infra* notes 141-51 and accompanying text.

73. *See supra* notes 13-19 and accompanying text.

74. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).

75. 906 F.2d 1192 (7th Cir. 1990).

76. The court held that the plaintiff could not assert in good faith that an extension, modification, or reversal of existing law was warranted because the case law was clear with respect to the standard — "intentional misconduct" — for a violation of a union's duty of fair representation. *Id.* at 1201. In fact, the trial judge noted that "any reasonable person" should have known that the local union did not breach its duty of fair representation or commit intentional misconduct. *Id.*

77. *Id.* The court noted that the union's decision not to pursue Dahnke's grievance was well within its discretion, but because the plaintiff had not filed any frivolous pleadings in federal court, Rule 11 sanctions could not be imposed. If, however, the plaintiff had filed any frivolous pleadings *in federal court*, the federal district court could impose sanctions. *Id.*

filed the complaint in state court defeats Rule 11's underlying purpose of eliminating spurious claims.

In addition, the advisory committee notes and underlying purposes of the 1983 amendment indicate that the Supreme Court intended the Rule to impose some type of an ongoing obligation.[78] Although the rule focuses on the facts known at the time of filing,[79] it also requires an attorney to update the pleadings as new information arises or risk sanctions.[80]

An ongoing obligation is particularly critical for satisfying the goals of Rule 11 when a case is removed from state to federal court. Absent a continuing duty standard, a court may not be able to sanction an attorney or party for litigating a frivolous claim if the only pleadings were filed in state court or in a state administrative agency.[81] The Sixth Circuit faced this potential problem in *Herron v. Jupiter Transp. Co.*[82] In that case, the plaintiff filed a meritless state court complaint and did not file any papers after removal, despite a pending motion to dismiss.[83] Invoking the continuing obligation standard, the court imposed sanctions because the plaintiff failed to conduct a reasonable in-

78. As stated by the advisory committee, the function of the amended rule is to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).

79. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 199 (1983).

80. *See* Note, *Duty to Withdraw*, *supra* note 10, at 717. This standard still focuses on the attorney's knowledge at the time the additional information becomes available, but prevents an attorney from avoiding responsibility for an outdated pleading. *Id.*; *see also* Schwarzer I, *supra* note 10, at 200 ("A position that might be reasonable in a paper filed early in the action may become unreasonable or frivolous in the light of subsequent discovery."). Another commentator suggests that the certification requirement imposes a continuing duty. *See* Nelken, *supra* note 5, at 1331. Nelken suggests that this continuing obligation "properly requires the parties to use information gained in discovery to refine and narrow the issues and claims on which they intend to go forward. In addition, it discourages the use of litigation to coerce settlement for purely economic reasons." *Id.*

81. *See, e.g.*, Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990) ("federal rules do not govern practice in state courts"); *Dahnke*, 906 F.2d at 1199 (emphasizing that "[t]here seems to be little question that federal courts cannot impose Rule 11 sanctions on a party for actions taken in state court (or in state administrative proceedings)"). The *Dahnke* court observed that "a signer may not incur Rule 11 sanctions for actions he took in state proceedings before federal jurisdiction was invoked." *Id.* at 1201. Without specific *filings* in federal court advocating a frivolous position, courts may not impose sanctions on an attorney. *Id.*

82. 858 F.2d 332 (6th Cir. 1988).

83. *Id.* at 333-34.

quiry at the time federal jurisdiction was invoked.[84] To rule otherwise would increase the number of frivolous claims in federal court while simultaneously preventing these courts from sanctioning the offending litigants.[85]

Adopting an ongoing obligation should not, however, deter lawyers from accepting unconventional cases or novel claims.[86] Rule 11 explicitly allows an attorney to pursue a good faith extension, modification, or reversal of existing law.[87] Nevertheless, this broad latitude for attorneys should not permit clearly baseless claims to be brought in federal court.[88]

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84. *Id.* at 336.

85. *See* Note, *Duty to Withdraw*, *supra* note 10, at 719 (imposing an ongoing duty will force parties to abandon claims that pretrial discovery shows to be meritless, thereby fulfilling the goal of "streamlining" litigation); *see also* Advo Sys., Inc. v. Walters, 110 F.R.D. 426, 430 (E.D. Mich. 1986) (stating that as discovery proceeds and parties spend more time investigating the merits of a case, they have less justification for pursuing a baseless claim than when the litigation began); Nelken, *supra* note 5, at 1331 (emphasizing that courts should impose a continuing obligation in order to force parties to use information gained in discovery to focus the issues).

86. Some commentators have expressed fears that an overreaching Rule 11 could make it difficult for litigants with unusual cases to seek legal representation due to attorney concerns about Rule 11 sanctions. *See* Note, *Plausible Pleadings*, *supra* note 10, at 649.

87. *See supra* note 17 and accompanying text. A continuing obligation rule is also appropriate in those situations in which the plaintiff, with only good intentions, decides that because a claim is questionable it should be brought in state court. In such a situation, the plaintiff believes the claim is valid under state laws and rules, but does not want to risk subjecting the claim to Rule 11 scrutiny in federal court. Some argue that under these circumstances, the only motive a defendant has for removing the case is harassment, using Rule 11 as the tool to carry out this inappropriate objective. Rule 11, however, explicitly allows an attorney to pursue a good faith extension, modification, or reversal of existing law, and proper application of the rule should not bar unconventional or novel claims that have some meritorious foundation. The fact that the threat of sanctions for misuse may tend somewhat to inhibit attorneys is not equivalent to chilling vigorous advocacy. *See* Schwarzer I, *supra* note 10, at 184.

Despite the concern with minimizing frivolous claims, however, federal courts should not use Rule 11 as a basis for screening cases. One commentator has observed that courts should not interpret the advisory committee's reference to "streamlin[ing] the litigation" process as approval for using Rule 11 as a tool for case management. *See* Schwarzer II, *supra* note 10, at 1019. This case management goal is best accomplished through Federal Rule 16, which was substantially amended at the same time as Rule 11. *Id.*

88. Rule 11 requires the signing attorney or party to certify that the pleading has a "factual and legal basis and that it is not interposed for delay." *See* Schwarzer I, *supra* note 10, at 184. A lawyer therefore may be called on to explain the basis or purpose of a paper. "But vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate." *Id.* If, upon removal or at any other time during the litigation,

B. RECOGNIZING THE UNIQUE CONTRIBUTIONS OF RULE 11

The one-time obligation courts justify their unwillingness to impose sanctions for any pleadings filed in state court in part by pointing to the array of alternative sanctions available.[89] These other mechanisms, including the inherent power of the court[90] and 28 U.S.C. § 1927,[91] lack the diversity, breadth, and depth of Rule 11, thereby limiting their deterrent effect on the bringing of meritless claims.[92] The unique construction of Rule 11 enables it to address issues that other measures do not cover.[93]

Sanctions under the inherent power of the court and 28 U.S.C. § 1927,[94] unlike Rule 11, are limited to instances when a party or an attorney has acted in bad faith.[95] This restriction, in turn, limits their applicability to the very small number of cases in which a removing party can prove that the plaintiff or plaintiff's attorney intentionally filed a "bad" claim.

Furthermore, courts rarely invoke the "inherent power of the court."[96] Because this power is not subject to legislative

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a "good faith" standard cannot be met for the filing of a claim or papers, sanctions should be imposed. *See* Herron v. Jupiter Transp. Co., 858 F.2d 332, 335 (6th Cir. 1988); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985).

89. *See, e.g.*, Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875 (5th Cir. 1988) (en banc) (providing for regulation of discovery papers under Rule 26(g), affidavits accompanying motions for summary judgment under Rule 56(g), and persistent prosecution of a meritless claim under 28 U.S.C. § 1927); Gaiardo v. Ethyl Corp., 835 F.2d 479, 483-84 (3d Cir. 1987) (addressing the "American rule" and 28 U.S.C. § 1927); Hamer v. County of Lake, 819 F.2d 1362, 1370 n.15 (7th Cir. 1987) (defining the "inherent power" of the courts and 28 U.S.C. § 1927), *cert. denied*, 110 S. Ct. 146 (1989); Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) (discussing 28 U.S.C. § 1927 and its prohibition against dilatory litigation practices), *cert. denied*, 480 U.S. 918 (1987).

90. *See supra* notes 42-43 and accompanying text.

91. *See supra* note 44 and accompanying text.

92. *See* Note, *Duty to Withdraw*, *supra* note 10, at 709-10. The article demonstrates that although judges have the power to sanction post-filing conduct, the resulting decisions lack uniformity and consistency. Examination of the alternative mechanisms demonstrates that Rule 11 provides the best vehicle for deterring frivolous suits. *Id.*

93. *See infra* notes 94-103 and accompanying text.

94. *See supra* notes 42-44 and accompanying text. For cases describing these alternatives, see Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875-76 (5th Cir. 1988) (en banc); *In re* TCI, Ltd., 769 F.2d 441, 448 (7th Cir. 1985).

95. *See* Note, *Duty to Withdraw*, *supra* note 10, at 710-12; *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1087-88 (2d Cir. 1977) (all discussing sanctions under the inherent power of the court).

96. This power has been utilized "only in exceptional cases." *See* United

oversight, the Supreme Court defined it narrowly, thereby limiting its effectiveness as a deterrent to abusive litigation.[97] Likewise, section 1927 of Title 28 has similar limitations as a substitute for Rule 11 in the removal situation. Section 1927 sanctions are permissive; Rule 11 sanctions, however, are mandatory.[98] Facing only the possibility of discretionary sanctions for a bad faith claim, a risk-taking plaintiff with a potentially frivolous claim may weigh the risks of potential sanctions against the benefits of a successful suit and decide to file in state court to avoid Rule 11,[99] knowing that the defendant likely will remove the case to federal court.[100] Though a gamble, if the plaintiff can safely assume that the defendant will remove the case, the benefits of possibly succeeding on the claim may well outweigh the risks of originating the claim in state court. Applying Rule 11 immediately upon removal, however, would obviate such litigatory chicanery and support the goal of eliminating frivolous claims.

Additionally, section 1927 does not impose sanctions until a frivolous action "unreasonably and vexatiously" increases the time and cost of litigation.[101] This amorphous standard is both

States v. Standard Oil Co., 603 F.2d 100, 103 (9th Cir. 1979) (quoting 6 J. MOORE, FEDERAL PRACTICE § 54.77, at 1709-10 (2d ed. 1972)); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980); C. ELLINGTON, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE 102-03 (1979); Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 310-11 (1986).

97. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); *see also* Note, *Duty to Withdraw*, *supra* note 10, at 710-11.

98. The provision of mandatory sanctions also has been the aspect of Rule 11 that distinguishes it from the other available remedies and establishes it as a unique vehicle for streamlining the litigation process. Even the Fifth Circuit, which advocates the one-time obligation viewpoint, has noted that the mandatory language of the new Rule 11 does not afford district courts the discretion to conclude that sanctions are unwarranted and to deny them. *Thomas*, 836 F.2d at 876. In contrast, under 28 U.S.C. § 1927 and the court's inherent powers, the court enjoys such discretion. *Id.*; *see also supra* note 44 and accompanying text (noting that § 1927 applies only when the attorney acts in subjective bad faith).

99. *See* Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1199 (7th Cir. 1990) ("There seems to be little question that federal courts cannot impose Rule 11 sanctions on a party for actions taken in state court.").

100. For a similar argument, see Herron v. Jupiter Transp. Co., 858 F.2d 332 (6th Cir. 1988). As the *Herron* court pointed out, the plaintiff might calculate that the circumstances favor the defendant motioning to remove the case to federal court. *Id.* at 336. The plaintiff nevertheless still may file in state court in order to avoid federal Rule 11 sanctions. In the end, plaintiffs could invoke federal jurisdiction without complying with the reasonable pre-filing inquiry of federal Rule 11. *Id.*

101. *See supra* note 44 and accompanying text.

difficult to prove and to apply consistently, a problem that further minimizes the efficacy of section 1927. Finally, because section 1927 only provides for cost-shifting, including excess costs, expenses, and attorney fees "reasonably incurred because of such conduct,"[102] it may not deter plaintiffs from filing frivolous suits where such costs are likely to be low and the potential benefits of winning are great. Thus, the inherent limitations of section 1927 and other judicial tools for limiting the filing of frivolous claims and other papers supports the application of Rule 11 to all parties in the removal context as a more likely deterrent to meritless claims.[103]

State courts likewise are unable to adequately sanction parties for violations in the removal context. Although some states have amended their civil procedure rules to match the objective basis of Federal Rule 11,[104] other states either have no equivalent sanction rules or have retained the subjective standard of pre-1983 Federal Rule 11.[105] Consequently, most states apply a more lenient standard than the objective federal Rule 11, and state court review under this reduced standard is not equivalent to federal court review of the claims.[106]

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102. *Id.*

103. In addition to monetary sanctions, courts may impose warnings, reprimands in open court, or written admonitions. *See* Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987). One court ordered the attorneys who violated the rule to circulate the sanction opinion to other members of their law firm. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124, 129 (N.D. Cal. 1984), *rev'd on other grounds*, 801 F.2d 1531 (9th Cir. 1986).

104. A survey of other jurisdictions adopting a standard similar to Federal Rule of Civil Procedure 11 can be found in Note, *Divining an Approach*, *supra* note 10, at 705 n.19 (1987). These state statutes include: ARIZ. R. CIV. P. 11(a); COLO. R. CIV. P. 11; DEL. SUPER. CT. CIV. R. 11; D.C. SUPER. CT. CIV. R. 11; IDAHO R. CIV. P. 11(a)(1); IOWA R. CIV. P. 80; KY. R. CIV. P. 11; ME. R. CIV. P. 11; MICH. CT. R. 2.114(E); MINN. R. CIV. P. 11; MISS. R. CIV. P. 11(b); MONT. R. CIV. P. 11; NEV. R. CIV. P. 11; N.D. R. CIV. P. 11; S.D. R.P. CIR. CT. 15-6-11(b); VT. R. CIV. P. 11; WASH. SUPER. CT. R. 11; WYO. R. CIV. P. § 1-14-128. Another commentator has suggested that WIS. STAT. ANN. § 814.025 (West. Supp. 1985) adopts a similar standard. *See* Oliphant, *supra* note 4, at 739 n.45.

105. Because many states have no rule analogous to Rule 11, or have a rule that imposes a much less stringent standard, defendants would have an incentive to remove actions to federal court to obtain the benefits of Rule 11. *See* Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987).

106. In a removal case, state courts rarely review pleadings under their equivalent, if any, of Rule 11. For one reason, defendants must file motions for removal within 30 days, *see* 28 U.S.C. § 1446(b) (Supp. 1990), and courts rarely review the pleadings within this narrow window of opportunity. Also, at the moment the defendant files the removal petition, state court proceedings are stayed. *See* 28 U.S.C. § 1446(d) (Supp. 1990). Furthermore, a defendant may waive the right to remove by taking some substantial defensive action in the state court before petitioning for removal, *see* Texas Wool & Mohair

Furthermore, the process of removal[107] deprives state courts of the opportunity to impose sanctions under state rules prior to removal. Under the removal statute, after the defendant files a removal petition with the federal district court, the state courts cannot take any additional action "unless and until the case is remanded."[108] Thus, state courts cannot review pleadings once the removal petition has been filed. Further, federal courts may be unable to reach back to state court pleadings.[109] As a result, plaintiffs could be insulated from any federal court sanctions throughout the entire litigation if they refrain from filing any additional pleadings in federal court.[110]

Mktg. Ass'n v. Standard Accident Ins. Co., 175 F.2d 835, 838 (5th Cir. 1949), and courts, by themselves, rarely will impose sanctions prior to dismissing an action. *See generally* Dyer, *supra* note 10, at 412 (1989) (noting that Rule 11 and summary judgment Rule 56 authorize different standards for similar evaluations and arguing that the standards should be the same).

In contrast, however, at least one court has held that when a defendant is precluded from recovering Rule 11 sanctions in federal court because the suit had been improperly removed, the defendant still may receive state law sanctions. *See In re* Summers, 863 F.2d 20, 22 (6th Cir. 1988). Although it is theoretically possible, therefore, to apply state sanction rules after the defendant attempts to remove, few cases are likely to arise with this factual scenario of improper removal.

107. *See supra* notes 21-24 and accompanying text.

108. *Id.* In addition, the procedure for removal is set out in 28 U.S.C. § 1446. Part (d) of the statute provides as follows:

> Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. § 1446(d) (Supp. 1990). For a general discussion of removal jurisdiction and procedure, see 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3731 (2d ed. 1985).

109. *See* Dahnke v. Teamsters Local 695, 906 F.2d 1192, 1199 (7th Cir. 1990) (emphasizing that federal courts cannot impose sanctions for actions taken in state court); Schoenberger v. Oselka, 909 F.2d 1086, 1087 (7th Cir. 1990) ("federal rules do not govern practice in state courts"). The continuing obligation courts assert, however, that federal standards should apply immediately upon removal. *See* Herron v. Jupiter Transp. Co., 858 F.2d 332, 336 (6th Cir. 1988).

110. Note, however, that if plaintiffs oppose a motion to dismiss or a motion for summary judgment, or even if they move to remand the case, these filings would be subject to Federal Rule 11. *See, e.g.*, Willy v. Coastal Corp., 915 F.2d 965, 966-67 (5th Cir. 1990) *cert. granted*, 111 S. Ct. 2824 (1991). In addition, in Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), the Supreme Court held that Rule 11 jurisdiction is not dependent on subject matter jurisdiction because the imposition of a Rule 11 sanction is not a judgment on the merits, but rather is a collateral issue. *Id.* at 2456. Other circuits have followed the notion that a district court must possess the authority to impose sanctions irrespective of subject matter jurisdiction. *See, e.g.*, *Willy*, 915 F.2d

Adopting a continuing obligation, therefore, becomes critical in maintaining the federal courts' power to sanction such abuses of the removal process.

C. PREVENTING LITIGANT HARASSMENT

The debate between the one-time and continuing obligation theories also centers around fears of litigant harassment and related notions of judicial economy. The important distinction between the one-time and continuing obligation positions is that the former courts assume that defendants will remove cases for the purpose of securing Rule 11 sanctions,[111] while the latter courts believe that plaintiffs will initiate federal actions in state court for the sole purpose of skirting Rule 11.[112]

The Fourth Circuit, a one-time obligation court, theorized that defendants will use the threat of Rule 11 sanctions to harass plaintiffs.[113] The statutory provisions related to removal, however, define the circumstances under which a defendant may remove a case to federal court, necessarily limiting a defendant's ability to remove for specified permissible reasons.[114] Further, Rule 11 specifically applies to the defendant's motion for removal, placing additional guarantees that a defendant will not be able to remove a case to federal court for the sole purpose of harassing the plaintiff with threats of Rule 11 sanctions.[115] Finally, although defendants generally retain discretion on whether to initiate removal of a state claim to federal court, such a move should not surprise plaintiffs. Plaintiffs' counsel are aware of the conditions that merit removal,

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at 967; Wojan v. General Motors Corp., 851 F.2d 969, 972 (7th Cir. 1988); Orange Prod. Credit Ass'n v. Frontline Ventures, Ltd., 792 F.2d 797, 801 (9th Cir. 1986).

111. *See supra* notes 45-48 and accompanying text. The *Kirby* court believed that defendants would seek to take advantage of the sanctions and would remove an action solely for that purpose. Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987).

112. *See supra* notes 53-62 and accompanying text. The *Herron* court believed that plaintiffs would initiate an action in state court, knowing that defendants would remove it to federal court. However, under the one-time obligation theory, courts could not impose sanctions because the only pleading would be in state court. *Herron*, 858 F.2d at 336.

113. *See Kirby*, 811 F.2d at 257.

114. *See* 28 U.S.C. § 1441 (Supp. 1990); 28 U.S.C. § 1446 (Supp. 1990). These sections detail the substance and procedure for removing a case from state to federal court.

115. *See* 28 U.S.C. § 1446(a) (Supp. 1990) (specifically providing that a notice of removal is "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure").

including federal question and diversity jurisdiction,[116] and they should evaluate the merits of their claims and their trial tactics accordingly.[117] Removal of a state claim to federal court, when permitted, ensures that the defendant will have an opportunity to litigate the claim in a fair and impartial forum, a guarantee that provides an unlikely opportunity and motive for harassment.[118]

The one-time obligation theory also undermines Rule 11's goal of judicial economy.[119] The advisory committee noted that Rule 11 is designed to reduce spurious claims, discourage abusive tactics, and streamline the litigation process in the federal courts.[120] Allowing plaintiffs and their counsel to use trial tactics to gain federal court jurisdiction without the spectre of Rule 11 sanctions only adds to, rather than reduces, the number of frivolous claims in federal court.[121] A continuing ob-

116. *See* 28 U.S.C. § 1441 (Supp. 1990). This statute defines the types of actions that are removable. The two basic types of removable cases are those involving a federal question or diversity of citizenship. *Id.*

117. Application of an ongoing Rule 11 duty would force plaintiffs' attorneys to consider Rule 11 requirements during pre-filing strategy to determine whether to file a removable claim in state court. Plaintiffs' attorneys should know the factors necessary to remove a claim to federal court as well as the risks involved in filing a claim that may be removed to federal court. Furthermore, a plaintiff's attorney also can predict, or at least hypothesize, when a defendant will remove a state claim to federal court. It appears to be a specious claim that a plaintiff could be truly "surprised" by removal. As the *Herron* court observed, plaintiffs know or should know when a case could be removed to federal court. Herron v. Jupiter Transp. Co., 858 F.2d 332, 336 (6th Cir. 1988). Forcing attorneys to consider Rule 11 in filing any claim also furthers Rule 11's goal of filtering out frivolous claims and thereby enhancing judicial economy.

118. Critics of the ongoing obligation position ignore the purpose of allowing a defendant to remove a state claim filed in a state court or agency. Removal gives a defendant a more fair and impartial forum in which to conduct certain types of litigation. *See* 28 U.S.C. § 1446 (Supp. 1990). Absent an ongoing obligation, defendants who remove actions to federal court would be denied the protections of Rule 11 and could face the prospect of fighting off frivolous claims without providing the hope of recovery under Rule 11. An ongoing obligation thus promotes the policies underlying the removal process as well as clearing the federal docket of some frivolous claims, thereby streamlining the judicial process.

119. Rule 11 was promulgated to deter the flow of frivolous claims into federal court. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174 (D.C. Cir. 1985).

120. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).

121. *See Herron*, 858 F.2d at 336 (allowing plaintiffs to continue to litigate a frivolous claim in federal court after removal would undercut the purposes of Rule 11). Similarly, an ongoing obligation prevents a plaintiff from continuing

ligation, in contrast, would enable federal courts to eliminate meritless claims from court dockets, thereby reducing defense expenditures and use of court time while streamlining litigation.[122]

In only one instance does the one-time obligation theory enhance rather than hinder judicial economy — when the plaintiff brings two related causes of action in a state court, and the defendant removes, for example, the second claim to federal court only to obtain Rule 11 sanctions, but leaves the first claim in state court.[123] Under these facts, the defendant creates an unnecessary second suit.[124] Bifurcating an essentially unitary claim strains judicial resources, and some commentators argue that the defendant should not reap the benefits of Rule 11 sanctions for such dilatory tactics.[125] Nevertheless, assuming that the removal motion itself is not frivolous and does not subject the removing defendant to Rule 11 sanctions,[126] denying the defendant the benefits of Rule 11 sanctions in defending against a meritless claim under a continuing obligation theory, even if the defendant used the removal to gain the advantage of Rule 11 sanctions, is unfair. Defendants should not have to choose between removing to federal court and having no Rule 11 protections or allowing the claim to stay in state court, in a

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a case in order to coerce a defendant into a settlement and fulfills the Rule's interest in expeditious resolution. *See* Nelken, *supra* note 5, at 1331.

122. *See* Note, *Duty to Withdraw*, *supra* note 10, at 719 & n.166. Continuing obligation courts also could eliminate these specious claims at an early stage of the litigation and would not be forced to wait for the first federal court pleading before imposing sanctions. *Id.* at 722-23.

123. This situation could arise if one claim is wholly a state claim and the other contains some federal elements. If the defendant removes the claim containing some federal elements to federal court only to obtain Rule 11 sanctions while retaining the valid state cause of action in state court, she creates an unnecessary second suit. Similarly, if the plaintiff, as in Brown v. Capitol Air, Inc., 797 F.2d 106 (2d Cir. 1986), brings an initial cause of action and at a later time adds a second complaint as a separate action with a view to consolidation, defendants conceivably could remove the second claim but leave the first cause of action in state court. *Id.* at 107-08. In such an instance, even though the plaintiffs may not have fulfilled the "reasonable inquiry" obligation of Rule 11, the federal district court maintains the discretion to withhold sanctions if it views the defendants as having needlessly created a second suit. *Id.* at 108.

124. *See id.*

125. *See id.* The court emphasized, however, that defendants who remove actions generally are protected by the provisions of Rule 11; only in the unique circumstances of the particular case where removal effectively bifurcated what should have been a single proceeding was the withholding of Rule 11 sanctions justified. *Id.*

126. *See supra* notes 22-24 and accompanying text.

forum that may be unfair or inconvenient. Therefore, in order to further Rule 11's goals of enhancing judicial economy and reducing litigant harassment while preserving judicial fairness to both the plaintiff and defendant, federal courts should adopt a continuing obligation theory that also addresses plaintiff's concerns regarding harassment through removal.[127]

III. IMPOSING A CONTINUING OBLIGATION IN REMOVAL CASES UNDER RULE 11 — IMPLICATIONS FOR THE FUTURE

A. REQUIREMENTS FOR IMPOSING A FAIR AND REASONABLE ONGOING OBLIGATION STANDARD

If a defendant challenges the merits of a suit removed to federal court on the basis of Rule 11, federal courts should apply a three-step approach to determine whether the suit deserves consideration. This process will help prevent the litigation of frivolous claims yet effectively will create a balance between the rights of defendants to remove cases from state to federal court against the rights of plaintiffs to be free from unjust harassment. When a suit is challenged upon removal, courts should require the following steps: (1) the plaintiff and plaintiff's attorney must reevaluate the pleadings;[128] (2) the court or challenging party must bring pleading deficiencies to the attention of the pleader, who then must modify them to conform to Rule 11, dismiss the claim, or face sanctions;[129] and (3) the trial judge must maintain discretion to impose or withhold sanctions based on the exigencies of a particular case.[130]

127. Finally, the recognition of a continuing obligation would be consistent with the inherent power of the courts. The advisory committee's note emphasized that Rule 11 expands upon the courts' inherent power. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983). The inherent power doctrine requires parties and attorneys to refrain from dilatory practices throughout the course of the litigation, and the advisory committee's reference to it indicates that Rule 11 similarly should impose a continuing obligation. *See id.*; Note, *Duty to Withdraw*, *supra* note 10, at 718. Thus, the courts must adopt an ongoing obligation in order to comply with the purposes behind the 1983 amendment and keep frivolous claims out of federal court.

128. *See infra* notes 131-40 and accompanying text.

129. *See infra* notes 141-51 and accompanying text.

130. *See infra* notes 152-61 and accompanying text; FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 200 (1983).

B. IMPLEMENTATION OF THE ONGOING OBLIGATION PRINCIPLE

1. Ongoing Obligation for Removal Cases

An ongoing obligation requirement best satisfies the goals that the drafters of the 1983 amendment to Rule 11 established and maintains the integrity of the legal process.[131] The Advisory Committee emphasized that the Supreme Court promulgated the new Rule 11 in order to accomplish two primary goals — to discourage both the plaintiff's and defendant's abusive litigation tactics while streamlining the judicial process.[132] The ongoing obligation position best fulfills these dual purposes, particularly in the removal context. Removal provides a better forum — federal courts are better-suited to interpret federal law or provide a neutral forum for interpreting state law between citizens of different states — in which to litigate certain suits.[133] An ongoing obligation also provides fairness to both litigants.[134] A defendant who successfully removes a case to the federal forum should have the full benefit of its rules and procedures immediately upon removal,[135] and forcing the plaintiff to consider Rule 11 in filing a claim furthers the goal of filtering out frivolous claims before they are filed, thereby

131. *See supra* notes 13-19 and accompanying text; *see also* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983) (stating that courts should pay increased attention to abuses in order to streamline the litigation process).

132. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983). The advisory committee noted that Rule 11 was designed to discourage dilatory tactics while streamlining the litigation process, and the Supreme Court amended Rule 11 in 1983 to accomplish these objectives.

133. Note, however, that defendants can only remove a state-filed claim that is based at least in part on federal law or diversity of citizenship. *See* 28 U.S.C. § 1441 (Supp. 1990); *see also supra* notes 21-24 and accompanying text.

134. *See* Note, *Duty to Withdraw*, *supra* note 10, at 707. As this Note discusses, because courts already require defendants to mitigate, "fairness seems to require that they also impose on proponents of claims an affirmative duty to prevent damage in the form of a continuing obligation to withdraw a claim if it becomes baseless." *Id.* at 706-07.

135. Continuing obligation courts interpret Rule 81(c) to indicate that the Federal Rules of Civil Procedure should apply to any action *at the instant* that federal jurisdiction is invoked. At least one court has recognized that the Federal Rules should apply to the entire proceedings of a federal claim initiated in state court that is subsequently removed to federal court, *see* Cannon v. Kroger Co., 832 F.2d 303, 305-06 (4th Cir. 1987), and the Sixth Circuit has explicitly stated that Rule 11 applies at the instant federal jurisdiction is invoked, *see* Herron v. Jupiter Transp. Co., 858 F.2d 332, 335 (6th Cir. 1988). Therefore, Rule 11 should apply immediately upon removal in order to facilitate uniformity throughout the court system and provide a common standard between state and federal courts.

streamlining the litigation process in federal courts.[136]

To further meet the goals of enhancing judicial economy and preventing litigant harassment, however, federal courts should apply the proposed three-part process outlined above. Circuits that adhere to the ongoing obligation theory already apply the first step.[137] These courts find that Rule 11 requires a plaintiff and plaintiff's attorney to reevaluate the pleadings upon removal.[138] This one step is not, however, enough to satisfy Rule 11's goals in the removal context.[139] Thus, federal courts should also adopt the second and third steps in the proposed process. This modified continuing obligation theory provides the most effective vehicle for accomplishing Rule 11's dual objectives.[140]

2. Opportunity to Amend Pleading or Dismiss the Case

Under the proposed three-step process, Rule 11 applies to a case immediately upon removal. Unlike the ongoing obligation procedure that the majority of continuing obligation courts currently employ, however, the proposed compromise ongoing obligation standard would not allow immediate imposition of Rule 11 sanctions on a plaintiff for pleadings that fail to satisfy Federal Rule 11. Instead, upon removal to a federal district court, if a defendant raises Rule 11 problems and the court rules for the defendant on this issue, the defendant or the court must notify the plaintiff that the pleadings are deficient. The courts then must instruct the plaintiff as to what parts of the plead-

136. *See supra* notes 82-85 and accompanying text.

137. *See Herron*, 858 F.2d at 336 (upon removal, the litigant and the litigant's attorney face an ongoing obligation to "conduct a reasonable inquiry into the pleaded facts and law of the action to satisfy the requirements" of Rule 11); Kale v. Combined Ins. Co. of America, 861 F.2d 746, 758 (1st Cir. 1988) (the "new Rule 11 imposes a duty on counsel to investigate their clients' claims before making any filings and to reassess them throughout the litigation").

138. *Id.*

139. The additional steps are necessary in order to place a burden on defendants as well as on plaintiffs to minimize the number and duration of frivolous cases in federal court. *See supra* notes 123-25 and accompanying text. Under the current continuing obligation theory, plaintiffs conceivably could face sanctions *immediately* upon removal; instead, under the proposed process, plaintiffs would be able to amend the pleadings to make them non-frivolous or else could dismiss the case, thereby minimizing federal court time spent on baseless claims. *See infra* notes 141-51 and accompanying text. The trial court would retain the ultimate discretion to tailor appropriate sanctions so as to prevent either party from using Rule 11 as a tool for harassment. *See infra* notes 152-61 and accompanying text.

140. *See infra* notes 141-61 and accompanying text.

ings lack proper justification. The plaintiff would have an opportunity to modify the pleadings either to satisfy the court, to withdraw the pleading, or to face sanctions.[141] Although the Supreme Court ruled that a voluntary dismissal of a claim filed initially in federal court does not insulate a plaintiff from Rule 11 sanctions,[142] voluntary dismissal without sanctions should be permissible in the removal context. In the removal situation, plaintiff files in state court under the state's pleading and sanctions rules. Upon removal, the continuing obligation theory asserts that federal rules control.[143] Consequently, the plaintiff's complaint may not meet federal standards, and the federal courts should permit immediate dismissal without the threat of sanctions. If, however, the plaintiff delays in voluntarily dismissing the claim, the federal district court should impose sanctions.[144] Nevertheless, permitting plaintiffs to voluntarily dismiss claims that do not meet federal standards saves significant court time and results in a just and equitable result for all parties involved.[145]

This step helps to balance the goals and concerns of the one-time and continuing obligation positions. The plaintiffs may amend complaints that the federal courts find frivolous,

141. *See* Foval v. First Nat'l Bank of Commerce, 841 F.2d 126, 130 (5th Cir. 1988) ("Rule 11 should not countenance sanctions for pleadings filed in state court in a case later removed to federal court unless, their deficiency having been promptly brought to the attention of the pleader after removal, he (or she) refuses to modify them to conform with Rule 11."). To hold otherwise would defeat the letter and spirit of amended Rule 11. *See also Herron*, 858 F.2d at 336 (stating that the absence of a continuing obligation "would undercut the full force intended by Rule 11").

142. In Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), the Supreme Court held that plaintiff's voluntary dismissal under Rule 41(a) does not deprive the district court of the ability to impose sanctions. *Id.* at 2455. "Rule 41(a) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has not previously dismissed an action 'based on or including the same claim.' " *Id.* The Court derived support for its position by noting that the " 'violation of Rule 11 is complete when the paper is filed' " and, therefore, a voluntary dismissal does not eliminate the power of the court to impose Rule 11 sanctions. *Id.* (quoting Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988)).

143. *See supra* notes 58-59 and accompanying text.

144. *See, e.g.*, *Herron*, 858 F.2d 332. In that case, the plaintiff orally agreed to dismiss the case but failed to do so for several months. *Id.* at 333-34. The district court imposed sanctions for this egregious conduct and for the time and expense the court and opposing counsel endured, *id.* at 334, and the Sixth Circuit affirmed, *id.* at 335-37.

145. *See supra* notes 66-67, 141 and accompanying text.

using court instructions that specify which parts of the complaint do not meet Rule 11 standards.[146] If the plaintiff cannot properly amend the complaint, withdrawal without penalty is permitted, satisfying the one-time proponents' fear that defendants will use removal solely for harassment.[147] This process permits the defendant only one motive for raising a Rule 11 claim: accurate and substantiated pleadings.[148] The federal court would impose sanctions only when the plaintiff, after a warning, is unable to provide valid pleadings and fails to withdraw the complaint.[149] Proponents of the continuing obligation theory likewise would be satisfied[150] because only meritorious

146. Placing the burden on the moving party to demonstrate which pleadings are frivolous forces the moving party to specifically identify the basis for a Rule 11 motion. This prevents courts from applying such sanctions indiscriminately. *See, e.g.*, Hilton Hotels Corp. v. Banov, 899 F.2d 40, 45 (D.C. Cir. 1990) ("the burden specifically to articulate *which* submissions are defective and *why* does provide some check against the unwarranted exercise of the trial court's sanction powers") (emphasis in original); F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1268 (2d Cir. 1987).

147. *See, e.g.*, Foval v. First Nat'l Bank of Commerce, 841 F.2d 126, 130 (5th Cir. 1988) (discussing the fact that the federal court should not impose sanctions unless "their deficiency having been promptly brought to the attention of the pleader after removal, he (or she) refuses to modify them to conform to Rule 11").

148. Note that defendant's removal petition also is subject to Rule 11 sanctions. Section 1446 of Title 28 provides that the defendant must sign a notice of removal "pursuant to Rule 11 of the Federal Rules of Civil Procedure." 28 U.S.C. § 1446(a) (Supp. 1990).

149. In *Herron*, the court noted that the plaintiff failed to execute court-ordered documents, and the trial judge delayed ruling on the motion for attorneys' fees for more than five months while waiting for plaintiff's response. Herron v. Jupiter Transp. Co., 858 F.2d 332, 333-34 (6th Cir. 1988). Because the plaintiff's complaint was neither anchored in fact nor law, and because the plaintiff ignored the requests of the court and counsel to comply with Rule 11 requirements, sanctions indeed were justified. *Id.* at 337.

In addition, Rule 11 explicitly provides that its sanctions apply to "[e]very pleading, motion, and other paper." FED. R. CIV. P. 11 (1990). Thus, any specifically identified paper, including a motion by the defendant asking for Rule 11 sanctions against the plaintiff, would itself be subject to Rule 11. *See Hilton Hotels Corp.*, 899 F.2d at 43-45; *F.H. Krear & Co.*, 810 F.2d at 1268. As the courts have noted, in some instances there may be very little practical difference between requiring an attorney to dismiss a suit or forcing that attorney to continue the suit without any additional filings. *See Hilton Hotels Corp.*, 899 F.2d at 45.

150. Thus, this standard effectively would prevent either side from abusing the court system. The defendant is protected because the plaintiff would lose any incentive to file every questionable paper initially in state court in an effort to avoid Rule 11 sanctions. *See supra* notes 121-22 and accompanying text. The plaintiff therefore would have to satisfy the reasonable inquiry requirement of Rule 11 and could not continue an action in federal court until he modified the pleadings to conform with Rule 11. *See Herron*, 858 F.2d at 335-

claims would proceed to full trial.[151]

3. Trial Court Discretion

Finally, the trial court judge should retain limited discretion to tailor or withhold Rule 11 sanctions depending on the circumstances of a particular case.[152] Although Rule 11 mandates sanctions whenever a violation is found, the federal district court should determine what constitutes an appropriate sanction.[153] For purposes of Rule 11 in a removal case, an ap-

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36. If the plaintiff failed to conform the pleadings to Rule 11 standards, the court could impose sanctions if the reasonable inquiry standard were not met. *Id.* at 336.

151. Although all parties would have invested time and money to reach this stage, the court and defendant at least would both be spared the expenditure of even greater amounts of time and resources required to fully litigate frivolous claims. The ever-increasing costs of federal court litigation demand that an attorney conduct a searching inquiry into the facts and law throughout a lawsuit. A 1985 study indicated that a single hour spent by a federal judge in a case costs the taxpayer up to $600, and the recent explosion of federal court cases has undoubtedly escalated this estimate. *See* Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 226-27 (1985). Multiplying this $600 per hour cost by the hours spent on frivolous claims can create a severe financial drain upon the court system and the taxpayers. The cost to the public of failing to do so should not be ignored. *See* Advo Sys., Inc. v. Walters, 110 F.R.D. 426, 433 (E.D. Mich. 1986). In *Walters*, the court discounted the sanction by one-half since the parties were unaware of such a possibility of potential sanctions. Nevertheless, the court explicitly gave notice to future litigants that such costs could be passed on to them for frivolous claims instead of being passed on to the taxpayers. *Id.*

152. Commentators and courts alike have noted that district courts maintain the authority to make the final calculation as to the extent of reasonable expenses within the context of Rule 11. This discretion enables judges to tailor sanctions that will achieve the necessary balance among Rule 11's goals of deterrence, punishment, and compensation. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 876-78 (5th Cir. 1988) (en banc) (discussing the discretion the district court possesses in tailoring sanctions). Judge Schwarzer added to this analysis by emphasizing the following:

> Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is intended to eliminate. It also undermines the mitigation principle which should apply in the imposition of sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper.

Schwarzer I, *supra* note 10, at 198. The courts should focus not on what the parties are doing to each other, but on whether the lawyers are abusing the legal process. *See* Schwarzer II, *supra* note 10, at 1024-25. By doing so, Rule 11 enforcement will move from private compensation to serving the larger interest of the judicial process. *Id.*

153. The rule expressly provides that attorney fees and reasonable expenses are appropriate sanctions, but the court possesses the ultimate author-

propriate sanction may be no sanction at all in some limited circumstances.[154] For example, where a plaintiff files a state court action that contains two separate causes of action, only one of which the defendant removes to federal court, the federal district court may determine that the defendant effectively harassed the plaintiff by unnecessarily bifurcating the litigation.[155] In such a case, the federal district court may withhold sanctions on the claim — even if the claim would have been subject to Rule 11 sanctions had the plaintiff originally filed it in federal court.[156] Similarly, both one-time and continuing ob-

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ity to tailor sanctions to the particular facts of a case. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 200 (1983). A commentator noted the following: "Once a violation of Rule 11 has been found, sanctions are mandatory. Judges, however, have broad discretion in choosing the appropriate penalty." Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 500-01 (1986). The discretion that the rule's drafters gave district courts in determining sanctions suggests that the drafters intended judicial discretion to operate as a "safety valve" to reduce the pressure of mandatory sanctions. *Thomas*, 836 F.2d at 877. What is "appropriate" may be a warm, friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances. Whatever the ultimate sanction imposed, the district court should utilize the sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such purpose. *Id* at 877-78.

In addition, the courts must be restrained from using Rule 11 as a panacea for all litigation abuses or use it as a docket-clearing mechanism. *See* Schwarzer II, *supra* note 10, at 1019. As the distinction between dealing with the merits of litigation and dealing with lawyer misconduct is obscured, a risk arises that courts will do neither effectively. *Id.* The proper role of Rule 11, however, is not to provide fee-shifting; it is to deter litigation abuse. *See* Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co., 112 F.R.D. 355, 357 (S.D.N.Y. 1986), *quoted in* Schwarzer II, *supra* note 10, at 1020 n.29.

154. Because the amended Rule 11 makes sanctions mandatory, some revision of the Rule might be necessary to accommodate this limited exception. This exception could say, for example: "In the case of removal, the district court may withhold sanctions if the plaintiff immediately and voluntarily dismisses a frivolous claim." Discussion of a specific provision to deal with such exceptions, however, is beyond the scope of this Note.

Nevertheless, the discretionary power of the trial court to withhold or tailor sanctions to meet the particular facts of a case should be narrowly construed to prevent inconsistency among courts in imposing sanctions. Unlimited discretion may lead to discriminatory application of sanctions, which amended Rule 11 is designed to eradicate. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 199-200 (1983).

155. *See* Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir. 1986).

156. As a practical matter, however, this exception is quite narrow due to the nature of the removal statute and the infrequency with which defendants are likely to remove only a single claim of a multi-claim case to federal court. Under the removal statute, § 1441(c) provides that when a removable claim is combined with an otherwise non-removable claim, the federal district court

ligation circuits have held that a voluntary dismissal following removal insulates a plaintiff from sanctions.[157]

These limited exceptions to the mandatory sanctions of Rule 11 are consistent with its goal of minimizing federal court time on baseless claims.[158] Bifurcating litigation increases the costs for all parties, and even though removal of such cases may be technically proper, defendants should not profit from this trial tactic.[159] In addition, this limited discretion to withhold or to narrowly tailor sanctions so as to protect plaintiffs from un-

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may remove the entire case to the district court. 28 U.S.C. § 1441(c) (Supp. 1990). Similarly, the district court may remand all matters not within its original jurisdiction. *Id.* Most of these cases will be handled in a single proceeding. Furthermore, the defendant's removal petition is subject to Rule 11, and if the defendant fails to satisfy Rule 11's standards in seeking removal, the district court may sanction the defendant for a frivolous removal. *See* 28 U.S.C. § 1446(a) (Supp. 1990). Thus, in most instances, federal courts either will dispose of the claim in a single proceeding or impose sanctions on defendants for frivolous removal petitions.

157. The Fifth Circuit, which supports the one-time obligation position, adopted the notion that plaintiffs should not be sanctioned upon removal unless they fail to correct any pleading deficiencies enumerated by the district court. *See* Foval v. First Nat'l Bank of Commerce, 841 F.2d 126, 130 (5th Cir. 1988). Likewise, the Sixth Circuit, which supports the continuing obligation position, noted that sanctions only could be imposed if the plaintiff "took some action *after* the case was removed to federal court to further prolong the litigation." *In re* Summers, 863 F.2d 20, 22 (6th Cir. 1988) (emphasis in original). In the *Summers* case, the plaintiff filed a voluntary dismissal immediately after the defendant filed a motion to dismiss. *Id.* at 21. For a contrary holding regarding voluntary dismissal when all action, including the initial complaint, is filed in federal court, see *supra* note 142 and accompanying text.

158. *See supra* notes 123-25 and accompanying text.

159. *See Brown*, 797 F.2d at 108. Although exercise of such discretion in a bifurcated case may keep a claim that does not satisfy Rule 11 on the federal docket, cases falling into this category are likely to be few in number and, therefore, they will not significantly crowd the docket. In addition, placing some discretion in the hands of the trial judge also may encourage mitigation of fees and expenses. *See, e.g.*, Schwarzer I, *supra* note 10, at 202. Schwarzer noted that an obligation to mitigate is implicit in the rule and has been recognized by the courts. The court may "take into account whether the same result could have been accomplished more expeditiously and whether the charges appear disproportionate, keeping in mind, however, the rule's penal and deterrent purpose." *Id.* The court's power to reduce sanction awards provides an incentive for the claiming party to bring a potential Rule 11 violation to the opponent's attention as soon as possible. Prompt notice of Rule 11 violations conserves judicial time, energy, and resources while simultaneously deterring future violations. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 879 (5th Cir. 1988) (en banc). "In assessing the damage done, the court should consider the extent to which it is self-inflicted due to the failure to mitigate. . . . The rule's purpose would be frustrated if it encouraged the offended party to play the very game at which it is aimed." Schwarzer I, *supra* note 10, at 200-01.

due harm will alleviate the concerns that the one-time obligation courts raise about harassment.[160] Similarly, a plaintiff's voluntary dismissal upon removal results in immediate elimination of a frivolous claim from the federal courts, thereby achieving Rule 11's ultimate goal.[161]

CONCLUSION

The 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure increased judicial efficiency and minimized abusive litigation practices in the federal court system. The new Rule 11 imposes a duty on attorneys to certify that they conducted a reasonable inquiry and determined that any papers filed with the court are well-grounded in fact, legally tenable, and not interposed for any improper purpose. The drafters of the 1983 amendment, however, did not speak about the issue of whether this duty to conduct a reasonable inquiry is a one-time or ongoing obligation, thereby raising the question of whether a court may impose sanctions for an action removed from state to federal court.

In defining a solution for this issue in the removal context, the principles behind the 1983 amendment — to deter baseless filings in district court and to streamline the administration and procedure in the federal courts — should guide the courts. A compromise between the ongoing and one-time Rule 11 obligation standards, one that addresses the underlying concerns of both positions, best accomplishes Rule 11's goals. When a defendant removes a case to federal court and raises valid Rule 11 concerns, courts should impose Rule 11 sanctions only if the plaintiff fails to amend the deficient pleading or refuses to withdraw the frivolous claim. By applying this three-part test, courts can enable Rule 11 to become a shield against, rather than a source of, abuse against frivolous litigation in the removal context.

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160. *See supra* notes 46-48 and accompanying text.

161. *See* FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 (1983).