1-1-2004

Hindsight, Regret, and Safe Harbors in Rule 11 Litigation

Charles Yablon

HINDSIGHT, REGRET, AND SAFE HARBORS IN RULE 11 LITIGATION

Charles Yablon*

Regrets, I've had a few, but then again, too few to mention.
Frank Sinatra, *My Way* (1968)[1]

Never mind
Emily Litella, (as played by Gilda Radner) *Saturday Night Live*

I. INTRODUCTION

A frequent theme of law review literature is the danger and futility of trying to improve things by tinkering with legal rules.[2] Legal scholars, often but not invariably of the neo-classical economic or public choice persuasion, delight in pointing out how rules designed to increase the amount of *X* in the world have actually created a serious *X* shortage, while rules designed to prevent *Y* from occurring have led to a veritable orgy of *Y*.[3] Accordingly, we are told that criminal liability for corporate entities will lead to greater

* Professor of Law and Director, Samuel and Ronnie Heyman Center on Corporate Governance. Benjamin N. Cardozo School of Law, Yeshiva University. I would like to thank Georgene Vairo for inviting me to participate in this symposium, and Matt Maron, Diana Rocco, and the editors of the Loyola of Los Angeles Law Review for able research assistance.

1. FRANK SINATRA, *My Way*, *on* MY WAY (Warner Bros. 1969). No, Frank didn't actually write the song. The English lyric was written by (of all people) Paul Anka. But Paul wrote it for Frank, from a 1967 French song, Comme d'Habitude, by Claude François, Jacques Revaux, and Gilles Thibault. THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrews et al. eds., 1996), *available at* http://www.bartleby.com/66/3/54203.html. Although it is apparently one of the ten most popular karaoke songs, the sentiment it expresses is still pure Sinatra.

2. *See, e.g.*, James M. Buchanan, *Public Choice: Politics Without Romance*, POL'Y, Spring 2003, at 13 (explaining how "public choice theory demonstrates why looking to government to fix things often leads to more harm than good").

3. *See infra* notes 4–6 and accompanying text.

criminal misconduct by corporate agents,[4] offering countries incentives not to engage in environmentally damaging activities will encourage greater pollution[5] and providing greater protections to defendants through changes in criminal procedure may lead to "underfunding, overcriminalization, and oversentencing" in the criminal justice system.[6]

Accordingly, it is refreshing to report that the 1993 revisions to Rule 11 of the Federal Rules of Civil Procedure, which the Advisory Committee believed "should reduce the number of motions for sanctions presented to the court,"[7] appear to have done precisely that. Judges, commentators, and my own quick and dirty empirical research all support the conclusion that Rule 11 motions have indeed decreased significantly since 1993. What remains considerably less clear is precisely why this has occurred. Are the numbers of frivolous filings themselves down, or is the diminution occurring only in the motions directed to those filings? At first glance, the former possibility appears to be quite unlikely. There is a general consensus that the 1993 amendments to Rule 11 reduced both the likelihood that monetary sanctions will be imposed on lawyers and parties for making frivolous filings as well as the severity of those sanctions.[8] It is a basic principle of economic reasoning (so basic that even I believe it), that if you reduce the penalties (i.e. costs) of something that people are otherwise inclined to do, they will do relatively more of it.[9] It would be strange if this principle did not apply to frivolous filings by lawyers. Yet if this principle is

4. *See* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

5. Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2154–56 (1995).

6. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997).

7. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

8. *See* Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1574 (2001); Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 44 (1993); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 206–07 (1994).

9. *See* GARY S. BECKER, ECONOMIC THEORY 11–14 (1971) (explaining theory of demand elasticity).

applicable, the 1993 amendments should have resulted in more, not fewer, frivolous lawsuits.

This brings us to the second possibility: that frivolous filings have not been decreased by the 1993 amendments, but simply that lawyers are less inclined to seek sanctions against them under Rule 11. Here at least the incentives seem to run in the right direction. The 1993 amendments clearly lowered the probability that a severe monetary sanction would be imposed for violation of Rule 11.[10] Accordingly, the financial incentives for lawyers and clients to bring Rule 11 motions have indeed been reduced. But my experience in this area of litigation indicates that money is not everything. Litigators tend to be rather competitive, aggressive individuals, who often develop at least a strong rivalry, if not an actual dislike of their adversaries, and whose favorite part of the litigation process tends to be beating the other side.[11]

Ordinary winning is nice, but in-your-face, complete, and utter devastation of your opponent is even nicer (and might even justify a premium to the client's bill). Winning a Rule 11 motion is like running up the score in a lopsided football game. It is an unambiguous, judicially certified expression of the fact that you have not merely won, but that your opponents are a bunch of losers. It is hard to imagine most litigators giving up the opportunity to gain such a judicially-sanctioned certification of total victory simply because it might no longer come with an additional monetary award. In this regard it should be noted that the 1993 amendments did not appear to substantially change the actual legal standards for determining whether a filing violated Rule 11.[12] The primary change is in the sanctions, which are no longer mandatory, and which must be designed to deter rather than punish the Rule 11 violator.[13] It is hard

10. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

11. *See* Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1629 (1996). Of course, this is in no way meant to impugn the character and integrity of most litigators, who tend to be lovely people to have a drink with after they get through bashing each other in court.

12. *See* Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 166 (2d Cir. 1999); Sussman v. Bank of Isr., 56 F.3d 450, 456 (2d Cir. 1995).

13. FED. R. CIV. P. 11; *see also infra* Part II (describing a few ways the world has improved since 1993).

to imagine that an aggressive litigator, not to mention her client, aggrieved and angered by frivolous litigation directed at them by opposing counsel, would forego a chance to sanction such activity merely because the sanction might be mild and only designed to deter. After all, deterrence itself is in the interest of lawyers and clients who believe themselves to be potential targets of frivolous litigation, and even the mere declaration by a court that the lawsuit before it was utterly without basis in law or fact is presumably of substantial value to the party who has been the subject of such a lawsuit. Accordingly, the notion that by merely reducing the severity of the sanctions available under Rule 11, the 1993 amendments caused a substantial drop in well-founded motions directed at frivolous filings seems, if not doubtful, at least incomplete as an account of the impact of the 1993 amendments to Rule 11.

This brings us to a third possibility. Perhaps the diminution in Rule 11 motions after the 1993 amendments was not primarily in well-founded motions directed at filings that indeed were, or at least likely were in violation of Rule 11. Perhaps most of the diminution has been in questionable Rule 11 motions directed at weak but potentially meritorious filings that were not the intended targets of Rule 11. In the pre-1993 period, opponents of the then current version of Rule 11 frequently worried about the *in terrorem* effect of Rule 11 motions and about the possibility that lawyers might use the threat of severe sanctions under Rule 11 to deter the filing of potentially meritorious claims, particularly in, but not limited to, the civil rights area.[14] The argument is that before 1993, the danger of Rule 11 sanctions was so serious and severe that opposing lawyers could deter even potentially meritorious claims by threatening the lawyers who brought them with Rule 11 sanctions in the event that they lost.[15] This threat of not just losing, but of then being sanctioned under Rule 11, with potentially severe financial

14. *See* Marc P. Goodman, Note, *A Uniform Methodology For Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public and Private Legal Resources*, 63 S. CAL. L. REV. 1855, 1857–58 (1990); Carl Tobias, *Civil Rights Conundrum*, 26 GA. L. REV. 901, 906–07 (1992); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. REV. 65, 84–91 (1996).

15. *See* Goodman, *supra* note 14, at 1893 (discussing the concern that meritorious civil rights claims may be "chilled"); Tobias, *supra* note 14, at 906–07.

consequences, was sufficiently great that it could cause lawyers to drop their claims or settle for nominal amounts. It is argued that the threat of such *in terrorem* effects has been substantially reduced post-1993.[16]

In a later part of this Article, I will argue that this explanation makes a considerable amount of sense, and that a substantial aspect of the success of the post-1993 amendments has been in reducing lawyers' incentives to bring weak or non-meritorious Rule 11 motions.[17] Before I do that, however, let me raise the bar for myself by pointing out the difficulty with this argument, which is the same difficulty we noted previously with respect to potentially meritorious Rule 11 motions – that the 1993 amendments did not appear substantially to change the standards for determining whether a filing violated Rule 11. Although there were some subtle changes in wording, essentially the same conduct prohibited prior to 1993 is prohibited by the post-1993 version of Rule 11.[18] Moreover, although sanctions are no longer mandatory, a judge who feels that the standards of reasonable litigation conduct have been violated still has wide discretion to make things difficult for a lawyer who she believes has abused the process. Accordingly, it is not immediately clear why the *in terrorem* effect of a Rule 11 motion directed at a potentially meritorious filing has diminished so much in the post-1993 period. It is true that under the "safe harbor" provision of post-1993 Rule 11[19] (about which we will speak much more subsequently), there is a right to avoid sanctions by withdrawing the potentially offending document, but that is not a particularly attractive option with respect to *potentially meritorious* pleadings or motions. If that is what is occurring, then the *in terrorem* and chilling effects are still at work, although they are now flying under the radar screen of effective judicial oversight.

Yet credible observers tell us that this is not the case; what has largely been reduced post-1993 are the tactical motions and satellite

16. *See, e.g.*, Laura Duncan, *Sanctions Litigation Declining*, A.B.A. J., March 1995, at 12.

17. *See infra* Part II.

18. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (explaining that the intent of the revision was to "broaden the scope of [a litigant's] obligation").

19. FED. R. CIV. P. 11 (c)(1)(A).

litigation that were the bane of Rule 11 practice in the pre-1993 era.[20] This would make more sense if, in addition to the change in sanctions, there has been a reduction in the likelihood that pleadings or motions viewed as potentially meritorious by their proponents will be found to have violated Rule 11. If courts are now less likely to find Rule 11 violations in close cases, it reduces the *in terrorem* effect of making such motions as well as the incentive for making them.

I believe (and this Article will attempt to show) that the 1993 amendments did, in fact, significantly raise the standard for finding a violation of Rule 11, thereby reducing the *in terrorem* effect as well as the incentive to make weak or tactical motions against potentially meritorious filings. It did this, however, not primarily by changing the express legal standards that courts were to apply to such motions, but by changing the *time* at which such motions were required to be made. A significant, but under-appreciated, effect of the safe harbor provisions of post-1993 Rule 11 has been to prohibit making such motions after the merits of the underlying claims have been adjudicated.[21] This has deprived movants of the powerful "hindsight effect" under which judges, having just dismissed or having decided to dismiss a case as non-meritorious, are then asked whether the claim lacked such a basis in law or fact that it should never have been brought in the first place.[22] There is substantial evidence from behavioral theory[23] that when people are asked to judge the *ex ante* probability of an event they know has occurred, they will assign a substantially higher likelihood to its occurrence than they will in situations where they do not know the outcome. It has also been established that, for purposes of behavioral theory, judges are people.[24] Accordingly, a judge is more likely to find a violation of

20. *See* Duncan, *supra* note 16; Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 643 (1998).

21. *See* Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 151–53 (4th Cir. 2002) (discussing the timeliness of filing Rule 11 motions); *see also* Barber v. Miller, 146 F.3d 707, 710–11 (9th Cir. 1998) (holding that a party cannot wait until after summary judgment to make a Rule 11 motion).

22. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 800 (2001).

23. *See infra* notes 98–132 and accompanying text.

24. *See generally* Guthrie et al., *supra* note 22 (presenting study of 167 federal judges, which revealed that judges' judgment can be affected by

Rule 11 (which is, after all, a finding that a case or claim had a very low probability of success) when that judge already knows that the claim has been dismissed on the merits. By substantially reducing that possibility of hindsight bias, the post-1993 amendments, in effect, significantly raised the threshold for finding a violation of Rule 11. I believe the subsequent diminution in questionable Rule 11 motions is, to a considerable degree, a reflection and result of that change in timing.

Most credible observers, moreover, believe that the 1993 revisions of Rule 11 have had a substantial impact not just in reducing Rule 11 motions and satellite litigation, but have actually diminished, or at least prevented any rise, in the numbers of baseless or frivolous claims being pursued in the federal courts.[25] The legal vehicle generally cited as responsible for achieving this diminution in frivolous claims is, once again, the safe harbor provision introduced into Rule 11 by the 1993 amendments.[26] Pursuant to this provision, parties alleged to have made a filing in violation of Rule 11 must be given twenty-one days to withdraw the offending filing before a Rule 11 motion can be filed against them in federal court.[27] Withdrawal of the filing within that period protects the party from a Rule 11 motion made by the opposing party.[28] There is considerable consensus that this provision is working as intended; that is, that a significant number of filings that would otherwise be properly sanctionable under Rule 11 are being voluntarily withdrawn by the parties who filed them, without any need for adjudication or other intervention by the court.[29]

Once again, I think this description of the effect of Rule 11's safe harbor provision is substantially accurate, but if true, the description requires a much clearer and more complete account of

---

"cognitive illusions").

25. *See* John Shapard et al., Federal Judicial Center, *Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure* (1995), *reprinted in* 1 CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS C–4 (Sol Schreiber et al. eds., 7th ed. 1996) [hereinafter *FJC 1995 Report*].

26. FED. R. CIV. P. 11 (c)(1)(A).

27. *Id.*

28. *Id.* Withdrawal does not, under the language of the Rule, protect against a later motion for sanctions made on the court's own initiative. *Id.* 11(c)(1)(B).

29. *See* Duncan, *supra* note 16.

the operation of the safe harbor provision than has heretofore been provided. The basic question is: Why would litigants who obviously thought enough of these claims to file them in the first place be willing to withdraw them at a later date, before there has been any formal adjudication that they are baseless or completely lacking in merit? Or, to put it another way, what kind of litigant (and litigant's lawyer) is dumb enough to file frivolous claims in the first place, yet smart enough to regret having filed them and to be willing to withdraw them to forestall a Rule 11 motion? Moreover, is there any kind of litigant for whom the existence of this withdrawal right actually confers an advantage?

I believe there are such litigants, but to describe them requires a more detailed consideration of the kinds of people who are likely to bring frivolous litigation and their reasons for doing so. The question of why people bring frivolous litigation is one that has been considered frequently in the last two decades, since it is undoubtedly at the heart of the Rule 11 debate, and because filing baseless lawsuits would not appear, on its face, to be a very sensible thing to do.[30] Broadly speaking, however, scholars have come up with four basic categories of litigants who might have reasons to bring frivolous claims. In this Article, I have chosen to describe and categorize them as: (1) "tricksters," who know their claims have no merit, but who think they can hide that fact from the other side while

30. *See* Lucian Ayre Bebchuk, *Suits with Negative Expected Value*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 551 (Peter Newman ed., 1998) (discussing the "existing theories as to why (and when) plaintiffs with negative-expected-value suits can extract a positive settlement from the defendant"); Robert D. Cooter & Daniel L. Rubinfield, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1083–84 (1989) (discussing the role of cost asymmetries in nuisance suits by applying the Nash bargaining solution); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 163 n.1 (2000) (discussing widespread concern with frivolous litigation); Keith N. Hylton, *Costly Litigation and Legal Error Under Negligence*, 6 J. ECON. & ORG. 433, 441 (1990) (discussing the role of legal error in promulgating nuisance suits for negligence claims in a society where all the actors obey the due-care standard); Eric B. Rasmusen, *Nuisance Suits*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 690 (Peter Newman ed., 1998) (explaining the use of nuisance suits and the various incentives of litigants); *see also* HERBERT GINTIS, GAME THEORY EVOLVING: A PROBLEM-CENTERED INTRODUCTION TO MODELING STRATEGIC INTERACTION 100–02 (2000) (discussing a game theory approach to evaluating nuisance suits).

they run up litigation costs, making it more attractive for the other side to settle than to litigate;[31] (2) "Don Quixotes," who may include idealistic litigants who wish to maintain some ideological or expressive position on an issue irrespective of the viability of that position under current law,[32] as well as people who are simply nuts; (3) "slackers," those lawyers and/or litigants who simply neglect or do not feel like making a reasonable investigation of the law and facts prior to filing their claims[33] (this is perhaps irrational, but there are a few in every law school class); and (4) "gamblers," those who are uncertain about the actual probability of success of their claims but who believe, on the basis of the limited information available to them, that the claims may have merit, and are willing to file such "longshots."[34] Although the incentives and concerns of these various

31. *See* Lucian Ayre Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996) (analyzing the role that divisibility of the litigation process plays in negative-expected-value suits and "the conditions under which a plaintiff with a [negative-expected-value] suit will have a credible threat and succeed in extracting a settlement"); Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 118–26 (1993) (presenting a "model of litigation with Rule 11 sanctions"); THOMAS J. MICELI, ECONOMICS OF THE LAW: TORTS, CONTRACTS, PROPERTY, LITIGATION 181–200 (1997) (explaining the success of frivolous suits and suggesting some remedies for this problem by providing a survey of various economic models of frivolous litigation); D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 4–9 (1985) (providing a model of nuisance suits where plaintiff's cost of filing is less than defendant's cost of defense and defendant knows plaintiff's claim is without merit); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (criticizing certain aspects of these models).

32. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); *see also* Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3 (1990) (providing a model that explains nuisance suits as a result of defendant uncertainty regarding the merits of plaintiff's claim where plaintiff believes with some reason that the law entitles him to recovery).

33. *See generally* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 533–77 (1997) (describing a model which explains why plaintiffs might not investigate before filing even when investigation is feasible); *see also* Vairo, *supra* note 20 (discussing Rule 11 as a tool for curbing unprofessional conduct, including the failure to make a reasonable pre-filing investigation).

34. *See* Yablon, *supra* note 14; *see also* Charles M. Yablon, *A Dangerous*

groups will be analyzed in detail later in this Article, it is worth noting for now that only the last two groups, the slackers and the gamblers, are likely to experience regret as evidence develops during the litigation process concerning the weakness of their claims, and therefore be willing to voluntarily withdraw them. Furthermore, it is only the gamblers who derive a concrete benefit from the safe harbor provision, since it enables them to file a number of longshot claims, and then withdraw without penalty those that, after some discovery and further litigation, do not appear to have serious merit. Accordingly, if a substantial number of claims are being voluntarily withdrawn pursuant to the safe harbor provisions of current Rule 11, it is likely that a large number of those claims were either negligently filed by slackers or gamblers' longshot claims that did not pan out. The safe harbor provisions of post-1993 Rule 11 have now effectively removed these claims from judicial sanction and scrutiny.

The methodology of this Article is somewhat different from that of the average law review article. Most law review articles begin by analyzing some legal problem and then go on to either explain why current law is inadequate to deal with it and/or propose some other legal solution to the problem. This Article begins by surveying the evidence that the 1993 amendments have been successful in substantially reducing both frivolous litigation and abusive Rule 11 motions, and tries to analyze the nature of Rule 11 litigation in light of that success. I conclude that considerations of hindsight and regret have played a major role in the success of the current version of Rule 11. It is largely by decreasing the likelihood of hindsight bias and increasing the possibility of litigants acting on their feelings of regret over filing baseless or frivolous claims, that the 1993 amendments, and particularly the safe harbor provision, have improved the efficacy of Rule 11 and have diminished the threat of coercive or improper Rule 11 motions while avoiding any increase in frivolous filings and facilitating the withdrawal of non-meritorious claims from the litigation system.

To be sure, some may still complain about the 1993 amendments, particularly those who feel that the appropriate role of Rule 11 is to eliminate, as much as possible, the filing of baseless

---

Supplement? Longshot Claims and Private Securities Litigation, 94 NW. U. L. REV. 567, 568 (2000) (asserting that many securities class action claims that are condemned as frivolous are very likely longshot claims).

claims in federal courts. As we will see, the 1993 amendments do, in effect, make it less likely that judges will find claims to violate Rule 11, as well as reduce the severity of sanctions for such violations. As I have argued elsewhere, any given standard of frivolousness will permit the filing of some baseless claims while chilling some potentially meritorious ones.[35] Yet the 1993 amendments reduce the likelihood of a Rule 11 violation in a particularly subtle and salutary way, not by a controversial change in legal standards, but by a change in timing and therefore in the judicial perception of the merits of the claim itself. Moreover, by permitting the relatively painless withdrawal of claims that no longer appear to have any chance of success, the 1993 amendments streamline the litigation process while avoiding the worst of the chilling effect on long-shot claims that may turn out to have merit.

This Article is divided into three parts (in addition to this rather long introduction and a short conclusion). The first section, Part II, takes a quick look at the 1993 amendments to Rule 11, particularly the safe harbor provision, and a slightly longer look at the evidence that those amendments have had a substantial and generally beneficial impact on the conduct of litigation in the federal courts, both by reducing Rule 11 litigation and reducing (or at least not increasing) the number of frivolous filings. The next two sections consider how those beneficial effects have been obtained by providing accounts of the way Rule 11 actually operates and how it has changed since the 1993 amendments. Part III looks primarily at the timing changes in Rule 11 motions and the impact of those timing changes in reducing hindsight bias in the adjudication of Rule 11 motions. Part IV looks primarily at the safe harbor provision and the incentives various types of litigants have to make use of them.

II. A FEW WAYS THE WORLD HAS IMPROVED SINCE 1993

The safe harbor provision of Rule 11(c)(1)(A) of the Federal Rules of Civil Procedure is a bit of a misnomer.[36] It should probably be called the "safe exit" or "safe escape" or even "safe surrender" clause instead. Whereas true safe harbors enable a party to take

35. Yablon, *supra* note 14, at 96–99.
36. FED. R. CIV. P. 11 (c)(1)(A).

some desired action without risk of incurring legal liability,[37] Rule 11(c)(1)(A) provides a relatively safe way of avoiding Rule 11 liability, but only by taking a presumably *undesired* action, namely, withdrawal or correction of the "challenged paper, claim, defense, contention, allegation, or denial."[38] What the Rule seems to actually provide is a "last clear chance" to renounce the challenged statement. Yet the Advisory Committee's Note makes the interesting observation that former Rule 11 might have actually prevented people who *wanted* to withdraw or correct such statements from doing so, since under old Rule 11, "parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11."[39] Accordingly, the safe harbor provision appears designed, in substantial part, to accommodate litigants' regret over having made baseless filings.

Implicit in this right to withdraw or correct is both (1) a right to formal notice of the allegedly violative statement and (2) a right to twenty-one days to think about the issue and in which to take effective action. The formal notice right is safeguarded by Rule 11(c)(1)(A)'s insistence that the party must receive a separate, formal Rule 11 motion served pursuant to Rule 5, but not filed with the Court, in order to commence running of the twenty-one day withdrawal period. Although the Advisory Committee opined that "[i]n most cases, however, counsel should be expected to give informal notice to the other party,"[40] federal courts have refused to count such informal notice as effective in invoking the twenty-one day withdrawal period,[41] and have refused to impose sanctions where the movant has failed to serve a separate formal motion as required by the Rule.

In order to safeguard the right to an effective twenty-one day withdrawal period, amended Rule 11 effectively removes the opportunity to move for sanctions after the court has adjudicated the case or claim. This timing limitation is explicitly noted in the

37. *See, e.g.*, 15 U.S.C. § 78u–5(c)(1) (2000) (providing safe harbor under the securities laws for forward-looking statements by issuers).

38. FED. R. CIV. P. 11 (c)(1)(A).

39. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

40. *Id.* 11(c)(1)(A).

41. *E.g.*, Barber v. Miller, 146 F.3d 707, 710 (9th Cir. 1998); *see also* Elliott v. Tilton, 64 F.3d 213, 216 (5th Cir. 1995).

Advisory Committee's Note, which states: "Given the 'safe harbor' provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)."[42] Cases subsequent to the 1993 amendments have also held that the safe harbor provisions effectively prohibit Rule 11 motions made after the end of the case.[43]

The other major changes effected by the 1993 amendments are presumably familiar to any student of Rule 11: the abolition of mandatory sanctions, the emphasis on deterrence over punishment, and the express provision for pleading on information and belief. There is no doubt that Rule 11 got some of its teeth pulled in 1993, and there were plenty of people at the time who feared what the consequences of that might be.[44] Justice Scalia, in his famous dissent to the transmittal of the rule change to Congress, argued that the creative dentistry of the Judicial Conference had rendered the new Rule 11 "toothless," and he feared that the new provisions, particularly the safe harbor, would permit unscrupulous litigants to "file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose. . . ."[45] These feelings were sufficiently strong that attempts were made in Congress, as part of the "Common Sense Legal Reforms Act of 1995" to legislatively abolish the safe harbor provisions and essentially restore Rule 11 to its pre-1993 form.[46] These efforts were ultimately unsuccessful.[47]

Ten years later, these debates and concerns no longer seem nearly as urgent as they once did. In part, this is just the sobering recognition that we, as a nation, currently have more serious problems to contend with than frivolous litigation. Yet even among

---

42. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

43. *Barber*, 146 F.3d at 710–11; *see* Ridder v. City of Springfield, 109 F.3d 288, 295 (6th Cir. 1997). *See generally In re* Pennie & Edmonds LLP, 323 F.3d 86, 89 (2d Cir. 2003) (barring award of sanctions when defendant did not comply with safe harbor provision).

44. *See Barber*, 146 F.3d at 710–11.

45. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 507–08 (1993) (Scalia, J., dissenting).

46. H.R. 10, 104th Cong. § 205 (1995).

47. Congress did succeed in passing a version of mandatory sanctions with no safe harbor legislation, but it was applicable solely to securities litigation as part of the Private Securities Litigation Reform Act of 1995. Pub. L. No. 104–67, § 21D(c)(2), 109 Stat. 737, 747 (codified as amended at 15 U.S.C. § 78u–4 (2000)).

those who remain concerned about the proper functioning of the federal courts and the civil justice system, Rule 11 no longer comes close to the top of the list of pressing problems. A simple recitation of recent changes to the Federal Rules tells some of the story. Since 1993 there have been substantial revisions to both the discovery rules and rules governing class actions,[48] while Rule 11 has remained unchanged.

We have more direct evidence, however, that the changes made in 1993 appear to have satisfied many of the major participants in the system by engendering a decline both in sanctions motions and in frivolous filings. An article in the March 1995 American Bar Association Journal, focusing primarily on the Northern District of Illinois,[49] declared that "sanctions litigation" (i.e. motions pursuant to Rule 11) was "dying."[50] One Northern District of Illinois judge, who said she used to hear "dozens" of Rule 11 cases annually, had not received one sanctions motion since the 1993 amendments took effect.[51] Research by Jenner & Block, a major Chicago-based defense firm, found a thirty-four percent drop in sanctions motions in the first year after the 1993 amendments took effect.[52]

While the evidence of a drop in sanctions motions was clear and direct, the evidence of a decrease in frivolous filings was not. Some advocates continued to argue, like Justice Scalia, for a return to the old, stricter Rule 11.[53] Yet there were some encouraging signs here as well. Attorneys began using the safe harbor provision. Judge Conlon of the Northern District of Illinois saw more attorneys withdrawing lawsuits, apparently as a result of the safe harbor rules.[54] Another hopeful observation was that since the 1993 amendments took effect, there seemed to be less name-calling,

48. *See* FED. R. CIV. P. 23, 26, 30, 37 (Proposed Amendments March 27, 2003), *available at* http://www.supremecourtus.gov/orders/courtorders/frcv03p.pdf.

49. Duncan, *supra* note 16.

50. *Id.*

51. *Id.* (discussing U.S. District Court Judge Suzanne Conlon's comment made more than one year after the Rule 11 changes took effect).

52. *Id.*

53. *Id.* (statement of Paul Kamenar of the Washington Legal Foundation that "The relaxation [in Rule 11] basically gave the bar the impression they could go back to their old ways.").

54. *Id.*

shouting, and personal attacks on opposing counsel.[55] Such newfound amity among opposing counsel seems to contradict, at least to some degree, the prediction that the mellowing of Rule 11 would unleash a new wave of frivolous litigation.

Further support for the view that the effects of the 1993 amendments were salutary and mild was provided by a survey of federal judges and practitioners conducted by the Federal Judicial Center in the period following enactment of the 1993 amendments.[56] Some of the headlines from that study, the only major one that has been conducted in the post-1993 period, are that most judges and lawyers now strongly oppose any attempt to restore Rule 11 to its pre-1993 state,[57] (despite the fact that a 1991 study of federal judges had found that eighty percent wanted to retain Rule 11 in its then-present form),[58] and that most judges did not think that groundless litigation was any more of a problem post-1993 than it was prior to 1993[59] (although most judges did not think groundless litigation was much of a problem in 1991 either.)[60] Finally, there was general agreement that the post-1993 amendments had substantially reduced the problem of satellite litigation.[61]

All of the evidence concerning post-1993 Rule 11, in short, confirmed my general impression that it had been a major success. I was a little concerned, however, by the fact that all of my evidence dated from no later than 1995. Here we are, in 2003, having a symposium to discuss ten years of perspectives on the 1993 amendments to Rule 11, and my empirical research seems to be stuck somewhere in the George Stephanopoulos period of the Clinton administration.

Obviously there was a need for some more recent research on the effects of amended Rule 11 up to the present day. While I was

---

55. *Id.*

56. *FJC 1995 Report*, *supra* note 25, at 1.

57. *Id.* at 2, 9–10.

58. Elizabeth C. Wiggins et al., Federal Judicial Center, *Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States* (1991) [hereinafter *FJC Final Report*].

59. *See FJC 1995 Report*, *supra* note 25, at 2–3.

60. *See generally FJC Final Report*, *supra* note 58 (indicating that three-quarters of the responding judges thought groundless litigation was only a small problem).

61. *See FJC 1995 Report*, *supra* note 25, at 2–3.

perfectly willing to engage in the complex number-crunching, statistically sophisticated data analysis that has become such an eye-glazing part of the current academic scene, I found that I lacked two basic resources. The first was the money to afford the graduate students needed to count data points, as well as the sophisticated software needed to analyze, undress and regress that data. The second thing I think I lacked was any idea how to do that stuff. Undeterred, however, I embarked on my own quick and dirty empirical research, armed with the only research tools I could afford, and with which I have a limited, if imperfect understanding, Lexis-Nexis and Google.

It seemed to me that the proper Lexis search should give me some insight into the state of sanctions litigation in the post-1993 decade. Had they dropped dramatically in 1994 and then leveled off? Continued to drop, or crept back up? Limiting myself to the federal district court cases (to minimize double counting of the same case), I tried to create a Lexis search request that would pick up only federal district court cases that actually granted or denied Rule 11 motions. I failed miserably.[62] I decided instead to try vastly overinclusive search terms. I knew that this would pick up not only cases that decided Rule 11 motions, but also cases that talked about prior Rule 11 motions, that distinguished the present motion from a Rule 11 motion, or that just expressed general views on Rule 11 motions. However, it seemed to me that this would be equally true in the pre- and post-1993 periods, so that a comparison of the number of cases picked up by the overinclusive search terms might still provide some useful information. Amazingly enough, I think it did. Listed on the following page are the number of cases containing the overinclusive search terms (sanctions w/10 Rule 11) and (Rule 11 w/3 motion) for every year from 1988 to 2002.

62. The search term I came up with was: (Rule 11 motion w/10 granted) or (Rule 11 motion w/10 denied). This turned out to be vastly underinclusive, picking up only 25 cases in 1988, 24 in 1989, and 12 each in 1990 and 1991. Obviously, courts were ruling on Rule 11 motions using lots of language that was not being picked up in my search terms. The number of cases picked up in each year since using that search term was as follows: 1992:18, 1993:14, 1994:17, 1995:13, 1996:7, 1997:20, 1998:9, 1999: 13, 2000:6, 2001:13, 2002:15. I decided that the cases identified by this kind of search term were just too small and random to provide any useful data.

YEAR	*"Sanctions w/10 Rule 11"*	*"Rule 11 w/3 motion"*
1988	505	214
1989	506	229
1990	546	240
1991	544	225
1992	547	262
1993	501	211
1994	387	165
1995	334	144
1996	306	129
1997	299	154
1998	286	130
1999	253	118
2000	241	125
2001	215	97
2002	251	119

This data, which is quite consistent for both search terms, appears to show a major reduction in sanctions cases with the introduction of the 1993 amendments,[63] with a gradual reduction in cases continuing since that time. In short, my quick and dirty empirical research appears to confirm the general impression of pretty much everybody else: that the 1993 amendments have succeeded in substantially reducing sanctions litigation under Rule 11.[64]

But with this diminution in sanctions motions, has there been an increase in frivolous filings? That, of course, was the great fear of Justice Scalia and others, and the data on Rule 11 motions alone cannot provide a definitive answer. On the one hand, the drop in sanctions motions under Rule 11 seems inconsistent with a substantial increase in Rule 11 violations. But perhaps Rule 11 has

63. The amendments became effective on December 1, 1993, so their effect is presumably seen in the 1994 data.

64. Because the 1993 amendments also removed discovery motions from the ambit of Rule 11 sanctions, placing them instead within the purview of Rule 26(g), I also searched (Rule 26(g) w/3 motion) to see whether a significant number of sanctions motions were now being pursued under that Rule. They aren't. My search turned up no more than two cases in any given year, and zero cases in most years.

truly been rendered so "toothless" that although there has been a big surge in the number of frivolous filings, lawyers are not bothering to seek sanctions against them, but are simply defeating them on the merits.[65] The 1995 Federal Judicial Center study indicated otherwise, but it was somewhat out of date and perhaps partially influenced by the general judicial view that groundless litigation was not much of a problem.[66]

It occurred to me, however, that if there has been such an increase in frivolous filings, there would likely be some lawyers complaining about it, and the lawyers most likely to be complaining about it would be those lawyers who were complaining about it back in 1993. Accordingly, I decided to examine the websites of the Manhattan Institute,[67] the Cato Institute,[68] and the Washington Legal Foundation,[69] three of the strongest advocates of litigation reform and critics of the contemporary civil justice system. I wanted to examine their current positions on legal reform, to see how large a role frivolous litigation and Rule 11 played in the contemporary concerns of these groups.

I came away with the strong impression that these groups are far more concerned these days with successful litigation by plaintiffs' lawyers, as embodied in cases like asbestos and tobacco, than they are with frivolous litigation by such plaintiffs' lawyers. The Manhattan Institute's legal policy reform website[70] is primarily concerned with curbing class action litigation in the mass tort area, particularly in such fields as asbestos and medical malpractice.[71] Their concern over "out of control tort awards" and asbestos suits that have "bankrupted over 60 companies" makes it clear that we are not talking about meritless litigation in the Rule 11 sense.[72] When I searched for "frivolous litigation" on their website, I found one article advocating that the United States adopt a more European

65. *FJC 1995 Report*, *supra* note 25, at 2–3.
66. *Id.*
67. Manhattan Inst., *at* http://www.manhattan-institute.org/html/clp.htm [hereinafter Manhattan Inst. Web site].
68. Cato Inst., *at* http://www.cato.org/ [hereinafter Cato Inst. Web site].
69. Washington Legal Foundation, *at* http://www.wlf.org.
70. Manhattan Inst. Web site, *supra* note 67.
71. *Id.*
72. *Id.*

approach to products liability.[73] When I searched for "Rule 11" I found nothing relevant. The Cato Institute website[74] told basically the same story. A search for "frivolous litigation" turned up five papers, one each on tobacco litigation, firearms, securities class actions, medical device litigation, and an attack on the jurisprudence of the California Supreme Court.[75] A search of the Washington Legal Foundation's website turned up a piece on employment dispute arbitration and some real articles on Rule 11 and frivolous litigation which dated back to the 1992-1993 period.[76]

In short, it appears quite clear that frivolous litigation in the Rule 11 sense—that is, cases that have no chance of winning—is not a primary focus of conservative law reform groups these days. They are understandably more exercised by cases brought by plaintiffs' lawyers (and increasingly by state attorneys general), which they are either winning or settling for large amounts. Frivolous litigation and Rule 11 reform, however, have pretty much dropped off their radar screen. Like Sherlock Holmes' dog that did not bark,[77] it is reasonable to conclude that ten years after the 1993 revisions to Rule 11, frivolous litigation (at least of the unsuccessful variety) no longer appears to be a major problem for corporate America.

The empirical evidence therefore confirms the general impression of success. The 1993 revisions did indeed reduce sanctions motions, satellite litigation, and the enmity among the

---

73. Stephen B. Presser, *How Should the Law of Products Liability Be Harmonized?: What Americans Can Learn From Europeans*, 2 GLOBAL LIABILITY ISSUES (Feb. 2002) *at* http://www.manhattan-institute.org/html/gli_2.htm.

74. Cato Inst. Web site, *supra* note 68.

75. That last article did indeed argue that frivolous lawsuits were far more common in California than in other states. Steven Hayward, *Golden Lawsuits in the Golden State*, Cato Inst., *at* http://www.cato.org/pubs/regulation/regv17n3/reg17n3-hayward.html.

76. Hank Brown, *Proposal To Weaken Rule 11's Attorney Sanction Provisions Could Stimulate Frivolous Litigation*, Counsel's Advisory, (Wash. Legal Found., Washington D.C.) (July 23, 1993); Honorable Malcolm J. Howard, *Rule 11—An Appropriate Way For Dealing With Frivolous Litigation*, Legal Opinion Letter, (Wash. Legal Found., Washington D.C.) (Mar. 6, 1992).

77. ARTHUR CONAN DOYLE, *Silver Blaze*, *in* MEMOIRS OF SHERLOCK HOLMES (1901), *available at* http://www.geocities.com/fa1931/british/conandoy/blaze.html. The story "Silver Blaze" whose copyright has apparently expired, is also available on a number of websites.

lawyers that it engendered, yet appear to have done so without encouraging a major resurgence of frivolous litigation. It succeeded where many predicted it would fail, and succeeded so well that Rule 11 has ceased to be a major law reform issue. Yet the precise method by which this success has been achieved remains unclear. Precisely how and why did the 1993 revisions reduce the need and incentives for lawyers to bring Rule 11 motions, and how did the revised Rule manage to reduce sanctions motions while also reducing, or at least not significantly increasing, frivolous filings? Those are the questions considered in the next two sections of this Article.

III. HINDSIGHT IN THE ADJUDICATION OF RULE 11 MOTIONS

There is considerable evidence that the 1993 amendments to Rule 11 brought about a relatively sharp and immediate reduction in the number of Rule 11 motions being made.[78] What is far less clear is why that occurred. Many commentators had predicted just the opposite result, that weakened sanctions would lead to more frivolous filings and therefore more Rule 11 motions.[79] Why that has not occurred requires further consideration of both the monetary and non-monetary incentives involved in filing frivolous litigation and in seeking sanctions against such filings.

Begin with the virtually universal agreement that the 1993 amendments substantially reduced sanctions litigation, that is, Rule 11 motions,[80] and in particular obviated the problem of *in terrorem* Rule 11 motions designed to chill or deter potentially meritorious claims. What distinguishes an *in terrorem* Rule 11 motion from a fine, upstanding motion? Presumably, the difference depends on what kind of filing the motion attacks. A proper Rule 11 motion attacks (and presumably only deters) filings that are truly baseless or frivolous.[81] In contrast, an *in terrorem* motion is aimed at (and potentially chills) relatively weak, but not frivolous claims, which

78. *See* Duncan, *supra* note 16.

79. *See, e.g.*, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 507–08 (1993) (Scalia, J., dissenting); Kobayashi & Parker, *supra* note 31.

80. *See generally* Duncan, *supra* note 16 (stating that declining sanctions litigation is attributable to Rule 11 amendments).

81. *See* FED. R. CIV. P. 11(b).

the claimant believes have a reasonable chance of success.[82] The willingness of defendants to make such motions, and plaintiffs' fear of being faced with, and sometimes losing them, allegedly deterred plaintiffs in the pre-1993 period from bringing claims they considered to have substantial merit, particularly civil rights actions.[83]

Yet it is hard to see how the explicit changes in Rule 11 deterred such motions or made them less worth bringing. It is true that the 1993 amendments reduced the availability of monetary sanctions, so that most successful Rule 11 motions would end in a less expensive, but still painful and embarrassing, sanction.[84] But, as noted previously, money is rarely the sole reason for bringing such motions.[85] For most defendants, an authoritative judicial finding that the case against the defendants was without legal or factual basis would seem, in itself, to be a result worth pursuing.[86] The possibility of an additional sanction or monetary award against the other side would be just icing on the cake, and it would constitute additional reasons to bring such motions. The safe harbor provision, far from

82. The notion that *in terrorem* Rule 11 motions are more coercive than others cannot withstand analysis. All Rule 11 motions are coercive in that they seek to prevent the filing of certain types of claims. Such deterrence is the very purpose of Rule 11. The only viable difference, it seems to me, is whether such coercive measures are directed at totally frivolous or baseless claims or against those which have some merit.

83. *See* Tobias, *supra* note 8, at 172. One of the most important and troubling findings of the studies of pre-1993 Rule 11 was the finding by the American Judicature Society that 19.3% of practicing lawyers said that Rule 11 had deterred them, in the past year, from filing claims or defenses they believed to be meritorious. Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 961–62 (1992).

84. *See* FED. R. CIV. P. 11 advisory committee's note to the 1993 amendment; *see also* Tobias, *supra* note 8, at 209 (stating that those in charge of revising Rule 11 in 1993 sought to limit pecuniary sanctions).

85. *See supra* notes 10–13 and accompanying text.

86. While there were indications in pre-1993 studies of Rule 11 that high monetary sanctions were primarily responsible for "satellite litigation" under Rule 11, this primarily was a finding that lawyers would appeal from or otherwise challenge large monetary sanctions imposed on them under Rule 11, while they would accept weaker or non-monetary sanctions without further litigation. THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS 3–5 (1988). There was no finding that lawyers were less willing to bring sanctions motions in low sanctioning districts than in high ones.

being a deterrent to *in terrorem* motions, would seem to be a help, since it gives frightened plaintiffs an easy and relatively painless way to surrender their problematic, although potentially meritorious, claims.

The deterrent effect of *in terrorem* motions, however, could have been relatively easily reduced simply by raising the standard of baselessness or frivolousness that must be shown to establish a violation of Rule 11.[87] If only the very weakest, most baseless or most frivolous claims were consistently subject to sanctions under Rule 11, then the threat of *in terrorem* motions against weak, but potentially meritorious cases, would largely disappear. Although defendants might still make *in terrorem* motions, the motions will most likely fail and thus would gradually cease to be a threat. The problem is that the 1993 amendments to Rule 11 do not, by their terms, change the standard for finding a violation of Rule 11.[88]

Although the language of Rule 11(b), which sets forth these standards, was substantially rewritten, the changes were primarily for clarity and organization, and did not appear significantly to change prior law.[89] Rule 11(b)(1)'s requirement that the filing was not presented "for any improper purpose" had long been a part of Rule 11.[90] Rule 11(b)(2) now required that the legal contentions be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law,"[91] while the old Rule had required that the legal contentions be "warranted by existing law or a good faith

87. I do not know whether this would be considered "raising" or "lowering" the standards for Rule 11 violations, but the basic idea is to make it harder to establish that a given filing violates the standards of Rule 11(b).

88. *Compare* FED. R. CIV. P. 11 *with* FED. R. CIV. P. 11 (1983) (amended 1993).

89. The 1993 Advisory Committee's Note to Rule 11(b) and (c) says that: "The subdivisions *restate* the provisions requiring attorneys . . . to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other [instruments]. The *revision in part expands the responsibilities of litigants to the court*, while providing greater constraints and flexibility in dealing with infractions of the rule." FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (emphasis added). It appears, therefore, that the drafters of the 1993 amendments saw these amendments as expanding potential liability under Rule 11 while allowing judges greater flexibility in sanctioning violations.

90. FED. R. CIV. P. 11 (1983) (amended 1993).

91. FED. R. CIV. P. 11.

argument for the extension, modification, or reversal of existing law."[92] Although the 1993 amendments substitute the objective standard of "nonfrivolous" argument for the arguably subjective standard of good faith, this would appear to make the standard stricter and thus the likelihood of finding a violation greater.[93] The standard for factual allegations under 11(b)(3) was changed from a requirement that they be "well grounded"[94] to a requirement that they "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[95] Yet even this change appears primarily to accommodate plaintiffs who wish to plead certain facts on information and belief. In short, solely by comparing the language of pre- and post-1993 versions of Rule 11, one cannot easily assert that the 1993 amendments made it significantly more difficult to win a Rule 11 motion or show that a claim violated Rule 11 requirements.

Yet, I believe the 1993 amendments had precisely the effect of making it significantly more difficult to win a Rule 11 motion. The amendments did so, however, not primarily by changing the substantive standard under Rule 11(b), but by changing the time at which such motions can be made pursuant to 11(c) and, in particular, by making it impossible for defendants to file such motions after the courts adjudicate the merits of the claim.[96] This has deprived both judges and litigants of the "hindsight perspective" on the merits of these claims, thereby making it significantly less likely that judges will find such claims to be violative of Rule 11.

The hindsight perspective, frequently called the "hindsight bias," is one of the most widespread and powerful of the behavioral

92. FED. R. CIV. P. 11 (1983) (amended 1993).

93. The change in 1983 from a purely subjective standard to an objective one was seen as the primary way to make the Rule more "stringent." *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment; *see also* Eastway Constr. Corp. v. New York, 762 F.2d 243, 253 (2d Cir. 1985) ("For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.").

94. FED. R. CIV. P. 11 (1983) (amended 1993).

95. FED. R. CIV. P. 11.

96. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

heuristics discovered by cognitive psychologists studying behavioral theory.[97] Knowledge and understanding of these heuristics is slowly making its way into the legal academy.[98] The hindsight perspective, broadly speaking, is the tendency of most people to view past events as more probable than they really were.[99] While the concept that "hindsight is 20/20" may have been part of conventional folk wisdom for many years,[100] the first empirical demonstrations of the hindsight bias were described by Baruch Fischhoff in 1975.[101] Fischhoff's seminal experiment involved describing a little known war between the British and Nepalese Gurkhas to a group of experimental subjects, a war that was variously described as having four different outcomes.[102] Four groups of subjects were each told

97. A basic source for much of this work is Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 335–51 (Daniel Kahneman et al. eds., 1982) [hereinafter *Heuristics and Biases in Hindsight*]. Fischhoff's initial work on the hindsight bias actually appears in some earlier pieces. *See, e.g.*, Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288 (1975) [hereinafter Fischhoff, *Hindsight ≠ Foresight*].

98. *See* Guthrie, *supra* note 30, at 185–95; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 225–55 (2000); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1085 (2000); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 735–46 (1999); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997); Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)). For a critique and analysis of much of this work, see Charles M. Yablon, *The Meaning of Probability Judgments: An Essay on the Use and Misuse of Behavioral Economics*, 2004 U. ILL. L. REV. (forthcoming Aug. 2004).

99. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 576 (1998).

100. *Id.* at 571.

101. *See* Fischhoff, *Hindsight ≠ Foresight*, *supra* note 97, at 289. For other discussions of research on hindsight bias, see Jay J. J. Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: A Meta-analysis*, 48 ORG. BEHAV. & HUM. DECISION PROCESSES 147 (1991); Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311 (1990).

102. Those outcomes were: (1) British win; (2) Gurkha win; (3) stalemate

that a different one of the four outcomes had actually occurred. They were then asked to estimate the "probability of occurrence" of each of the four outcomes.[103] A fifth group of subjects was asked the same question, but was not told which outcome had actually occurred.[104] Subjects who believed that one outcome had occurred tended to assign much higher *ex ante* probabilities to that outcome, relative to the subjects who were not told which outcome occurred.[105] Through this and other studies, Fischhoff concluded that the increase in probability estimates that result from knowing that an event actually occurred is between 6.3 and 44 percentage points.[106]

The causes of the hindsight bias remain unclear and controversial, but the strongest contending explanation is based on a cognitive theory that Fischhoff called "creeping determinism."[107] The concept should be familiar to anyone who has ever watched a close football game, decided, perhaps, by a long field goal in the last minute of play. The teams may have seemed evenly matched throughout the game, with the lead shifting back and forth during the game, and the outcome impossible to predict. Yet, as soon as the winner is known, the game analysts begin to point out all the things the winning team did right (e.g., better pass protection, more first downs), and all the things the losing team did wrong (e.g., inadequate running game), until the winner's victory begins to look inevitable, and everybody pretty much forgets that the game was won by a lucky kick. In a similar vein, Fischhoff found that the more information he provided about the causes of the outcome that was said to have occurred, the more probable that outcome seemed to his subjects.[108]

---

with peace agreement; and (4) stalemate with no peace agreement. Fischhoff, *Hindsight ≠ Foresight*, *supra* note 97, at 289.

103. *Id.*

104. *Id.*

105. *Id.* at 290–93.

106. *Id.* at 290. Rachlinski also estimated that the hindsight bias "gives an average of a 15 percent 'boost' to the assessed probability" of negligence in most tort cases. Rachlinski, *supra* note 99, at 606.

107. Fischhoff, *Hindsight ≠ Foresight*, *supra* note 97, at 288.

108. Careful theorists also distinguish "hindsight bias" from "outcome bias." Hindsight bias, as we have seen, affects a subject's supposed *ex ante* judgment of the probability of a given event. Outcome bias occurs when knowledge of a bad outcome causes people, in hindsight, to judge more harshly the action

Rachlinski cites other findings of the empirical studies of hindsight bias that provide support for the "creeping determinism" theory. He states:

> Materials that directly attribute the outcome to an occurrence unrelated to any of the antecedents do not produce a hindsight bias. For example, subjects reading the British-Gurkha conflict who were told that the Nepalese won due to a freak snow storm did not rate a Nepalese victory as more likely than subjects who were not told the outcome of the conflict. Creeping determinism also explains why adding more information increases the size of the bias; the more antecedent facts that can be integrated into an explanation for the outcome, the more inevitable it will seem. This theory also accounts for the finding that materials describing the occurrence of an event produce a larger hindsight bias than materials stating that an event did not occur; occurrences are generally easier to explain than nonoccurrences. More so than any of the motivational theories, Fischhoff's original hypothesis seems to account for the pattern of data in the literature on the hindsight bias.[109]

Although there are some indications that judges exhibit a smaller amount of hindsight bias than lay jurors,[110] there is no doubt that judges are subject to hindsight bias.[111]

It is easy to see the potential implications of these findings for

---

which led to that bad outcome. As Philip Peters notes, "When people know that things turned out badly, they are more likely to believe that someone was careless." Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1282 (1999). Yet, the two heuristics clearly work together to affect a subject's evaluation of prior decisions, and theorists have not been able to measure the independent effect of each bias where they both occur. For the purposes of considering the effect of knowledge of outcomes on a judge's determination of whether a Rule 11 violation occurred, we can lump them together as part of the same hindsight perspective that increases the likelihood that the initial filing will be viewed as having had no chance of success.

109. Rachlinski, *supra* note 99, at 585–86.

110. Reid Hastie & W. Kip Viscusi, *Juries, Hindsight, and Punitive Damages Awards: Reply to Richard Lempert*, 51 DEPAUL L. REV. 987, 989 (2002).

111. *See* Guthrie et al., *supra* note 22, at 799–805.

issues of law and litigation, but before discussing that, let us consider the precise implications of a word frequently used in the behavioral literature, but one freighted with content for lawyers—the description of this perspective as a "bias." First of all, it should be noted that "bias," as the cognitive psychologists use it, does not mean "bias" in the legal sense of partiality or inability to adjudicate fairly. Rather, it is a term that describes cognitive shortcuts (also sometimes called "heuristics") that frequently lead to errors.[112] For example, most people, if asked whether there are more English words beginning with the letter *R* than there are English words with *R* in the third position, will erroneously state that there are more words that begin with *R*.[113] That error is probably due to the "availability bias," the tendency to judge the frequency of something by the ease with which it can be recalled.[114] Since most people can more easily recall words beginning with *R* than words that have *R* in the third position, they erroneously conclude that more such words exist in the English language.[115]

We can say this is an error, however, because we can actually count the number of words with *R* in either the first or third position in the English language. There is an objective right answer to that question. When it comes to probability judgments concerning individual events, however, there is no objectively ascertainable right answer. How likely was it that the Union would win the American Civil War? The question is unanswerable. Although historians can debate whether, if events had taken place slightly differently, the outcome of the Civil War might have been different, there is no way to determine the true likelihood of any singular event which has occurred, or even any accepted method for doing so. It is, however, possible to ask questions about an individual's state of mind, and to ask what a reasonably informed observer would have believed the chances were for a Northern victory as of, say, 1860. This question at least has a potential answer. However, it is not based on objective facts about the situation in 1860, but on determining the subjective

112. *See Heuristics and Biases in Hindsight*, *supra* note 97.

113. *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, 166–68 (Daniel Kahneman et al. eds., 1982).

114. *See id.* at 166.

115. *See id.*

beliefs of an informed and impartial observer at that time.[116]

Accordingly, the "bias" described by "hindsight bias" is not partiality, and not even a cognitive heuristic that frequently leads to error. Rather, it is the consistent tendency of people who know that certain events occurred to view those events as more probable than other people making the same probability assessments who do not know whether the events actually did or did not occur. Much of the literature on hindsight bias assumes that the "unbiased" judgments of those who do not know outcomes are "better" or more accurate than those of people who know the outcome, but this is only true in a very limited sense.[117] It is true only insofar as there are legal or other normative grounds for seeking to ascertain what an impartial and informed person would have judged the probability of the event to be *before the outcome was known.*[118]

Tort doctrine and much tort theory says that determinations of a defendant's negligence should be made by evaluating the riskiness of the activity as of the time the defendant engaged in that risky activity, not after the consequences of the activity have already occurred.[119] Making similar determinations of liability in other areas of law, like applications of the prudent investor rule, may require a similar *ex ante* perspective.[120] For our purposes, however, the most

116. Because it is based on subjective belief and not objective fact, it is possible for two informed and impartial observers to disagree about the likelihood of an uncertain future event. Fc example, at the beginning of the game, one Mets fan may believe the team had a fifty percent chance of winning. The other may think the Mets' chances were no better than twenty-five percent. There is no fact in the world, (including the Mets' subsequent loss) which would enable anyone to demonstrate which of those two probability estimates was more correct.

117. *See, e.g.*, Rachlinski, *supra* note 99, at 573–74.

118. As a general matter in learning about the world, most of us would rather know more than less. Knowing outcomes supplies us with additional information, and enables us to learn from experience. The person who says, "If I had known then what I know now . . . [I would have acted differently]" is not making an error, but simply reflecting the change in judgment based on additional knowledge. It is only because we believe, in many legal and some other circumstances, that it is normatively appropriate to judge people by what they reasonably knew at a prior time (even if subsequent events would have provided a better perspective) that we care so much about hindsight bias.

119. *See* Peters, *supra* note 108, at 1284.

120. *See* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 74–75 (2000).

important point is that Rule 11 determinations also require such an *ex ante* perspective. The Rule clearly contemplates that the determination of the reasonableness of the litigants' certification of the evidentiary basis and nonfrivolousness of their claims must be made as of the time of filing.[121]

Purely coincidentally, a recent study of the hindsight bias in federal magistrate judges utilized a hypothetical involving (of all things) Rule 11.[122] A group of 167 federal magistrate judges were involved in a test not unlike Fischhoff's original studies of the hindsight bias.[123] They were given a description of a pro se section 1983 action by a prisoner in a state correctional facility, based on the allegation that he had received "negligent medical treatment" at the prison.[124] They were then informed that the district court had dismissed the complaint, holding that negligent medical care did not give rise to a section 1983 claim, and that plaintiff knew this because the court had dismissed similar claims brought by him a few years previously.[125] They were also informed that the judge had sanctioned plaintiff under Rule 11, requiring that he get permission of the Chief Judge of the district court before filing any more claims, and that plaintiff had appealed.[126] Three different groups were then told three different outcomes of the appeal: "Affirmed," "Lesser Sanction" (the appeals court imposed a less onerous sanction on plaintiff), or "Vacated" (the appeals court found an abuse of discretion).[127] The subjects were then asked which of the three results had, in their judgment, been most likely.[128] As in the Fischoff experiments, 81.5 percent of the magistrate judges who were told the case had been affirmed also viewed that as the most likely result.[129]

---

121. *See, e.g.*, CTC Imports and Exports v. Nigerian Petroleum Corp., 951 F.2d 573, 578 (3d Cir. 1991) (court "is expected to avoid the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." (quoting FED. R. CIV. P. 11 advisory committee's note to the 1983 amendment)).

122. *See* Guthrie et al., *supra* note 22.

123. *Id.* at 778.

124. *Id.* at 801.

125. *Id.*

126. *Id.* at 801–02.

127. *Id.* at 802.

128. *Id.*

129. *Id.*

Less than half of the judges in the other two groups, who believed the case had been vacated or modified, viewed affirmance as the most likely result.[130] In short, real judges, in a hypothetical based on Rule 11, gave strong indications that they were influenced by the hindsight bias.[131]

In the real litigation world, however, the problem of hindsight bias in Rule 11 is not primarily about influence on district courts by appellate court decisions, but about hindsight bias on district court judges based on their own prior adjudication of the merits. The first commentator, to my knowledge, to raise the possibility of hindsight bias in the adjudication of Rule 11 motions was Thomas Willging, in his influential and important study of the functioning of Rule 11 in the post-1983, pre-1993 period.[132] Noting that many requests for Rule 11 sanctions in that period were made without formal motions, "perhaps in the prayer for relief at the end of a motion to dismiss," Willging comments that "[i]n this scenario, there may be a tendency to merge the sanctions issue with the merits," and further notes, "[c]ommon sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions."[133]

The second commentator, to my knowledge, to raise the possibility of hindsight bias in the adjudication of Rule 11 motions was me. Describing the common pre-1993 scenario in which the Rule 11 motion was being considered by the court after the judge had decided the merits of the case,[134] I described a scenario not so

130. Guthrie noted: "[O]nly 27.8% of those told [that] the court of appeals had vacated, and only 40.4% of those told [that] the court of appeals had remanded for imposition of a lesser sanction, indicated that an affirmance was the most likely outcome." *Id.*

131. *Id.* at 802–03. I do not want to seem too much like a nit-picky Civil Procedure teacher here, but the hypothetical was a little vague on some critical procedural points. It sounded like the case was dismissed and then the Rule 11 motion was made and decided. This would be a violation of current Rule 11(c)(1)(A), unless the Rule 11 motion was made on the court's initiative under Rule 11(c)(1)(B), which would then raise the issue recently decided by the Second Circuit in *In re Pennie & Edmonds, L.L.P.*, 323 F.3d 86 (2d Cir. 2003), concerning the proper mens rea standard to apply in such motions. Alternatively, the magistrate judges might have assumed that the Rule 11 motion was properly made before the dismissal, and simply was being described later.

132. WILLGING, *supra* note 86.

133. *Id.* at 87–88.

134. In Willging's study of the procedural stage at which a sample of

different from the "creeping determinism" of Fischhoff:

> A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive. Like a reader who already knows how the mystery turns out, she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling.
>
> This hindsight can affect a judge's view of what constitutes "reasonable inquiry."[135]

In most other areas of the law, eliminating hindsight bias is an extremely difficult thing to do. Various theorists have proposed bifurcating liability from damages in many tort trials (to avoid focusing the jury on grisly outcomes),[136] expanded note taking and questioning by jurors,[137] or closing arguments specifically designed to debias jurors.[138] The drafters of the 1993 amendments to Rule 11, however, had a much more elegant and effective solution. They simply changed the timing rules for making these motions so that such motions are now rarely adjudicated after the judge has decided

---

sanctions opinions were issued, he found forty percent issued with the decision on a motion to dismiss, twelve percent after dismissal by the court, twenty-seven percent during or after summary judgment, twelve percent after a court trial, and only five percent each after a jury trial or settlement. *Id.* at 77. Accordingly, it seems fairly clear that the large majority of pre-1993 sanctions motions were decided by judges either simultaneously with or quite soon after they had ruled on the merits of the underlying action.

135. Yablon, *supra* note 14, at 78.

136. *See* Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 633 (1994); David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAV. SCI. & L. 485, 503 (1989).

137. *See* Peters, *supra* note 108, at 1308–09.

138. *See* Merrie Jo Stallard & Debra L. Worthington, *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments*, 22 LAW & HUM. BEHAV. 671, 682 (1998).

the merits.[139]

Under the 1993 version of Rule 11, and the subsequent case law, parties cannot make Rule 11 motions after the merits of the case have been decided, since that would deprive the opposing party of their safe harbor withdrawal rights under Rule 11(c)(1)(A).[140] According to Willging's 1988 study, approximately fifty percent of all Rule 11 motions in the pre-1993 period occurred either after dismissal by the court, after trial by the court, or during or after summary judgment.[141] While it is still theoretically possible to time a Rule 11 motion so that it comes before the court for adjudication at the same time as a dispositive motion, this is difficult to do and not entirely within the moving party's control. First, the Advisory Committee's Note envisions that motions under current Rule 11 should ordinarily "be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely."[142] Second, if a party serves the sanctions motion on the opposing party, hoping to wait out the twenty-one days and then file the Rule 11 motion together with, say, a potentially dispositive motion to dismiss, he will likely run afoul of the time limits for making such motions.[143] Further, the opposing party can always put a crimp in the timing by modifying the challenged document, and thereby start the running of a new twenty-one-day period. Third, at the very worst, the district judge will have the Rule 11 motion before her at the same time she is considering a ruling on the merits, not after she has made that determination.[144]

Accordingly, under the current version of Rule 11, no lawyer, and relatively few judges, will know the outcome of the case when considering the validity or likelihood of success of a Rule 11 motion. By removing this substantial amount of hindsight bias from the

139. *See supra* Part III.

140. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment; *see also supra* note 42–43 and accompanying text.

141. WILLGING, *supra* note 86, at 77 (noting that another forty percent were made with a motion to dismiss).

142. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

143. *See* FED. R. CIV. P. 12(a)–(b) (motion to dismiss for failure to state a claim must be made within twenty days of service of the summons and complaint, unless extended).

144. The one exception to this analysis, of course, may be motions made on the court's initiative.

decision-making process, the Rule achieves the same effect as if it had significantly raised the standard for finding a Rule 11 violation.

The effect on judges is to remove that extra six, or fifteen or forty percent likelihood of failure that they would ascribe to a claim that they already knew had been, or would be, dismissed. By considering most Rule 11 motions at a time when the outcome of the case is not known, judges come closer to the *ex ante* perspective of lawyers when they make their initial inquiry under Rule 11. Thus, such judges are less likely to exhibit hindsight bias in evaluating the lawyers' evaluation of the probability of success of their claims. While it is true that the judge might form a strong opinion on the merits of the case prior to the formal determination, virtually every aspect of judicial process and training points the other way, instilling in judges the need not to prejudge cases, and to remain open to persuasion by evidence and legal authorities. Accordingly, it is likely the judge will not have a strong view of the outcome of the case when the Rule 11 motion comes before the judge. Thus, cases that are weak, but potentially meritorious, are likely to be viewed as precisely that, rather than seen, through the perspective of the hindsight bias, as cases that had no chance from the beginning. The *in terrorem* threat of Rule 11 motions directed at potentially meritorious claims is therefore substantially reduced.

However, the hindsight bias does not work only on judges, but on lawyers as well. In the pre-1993 period, a victorious lawyer, having just won dismissal of a case, was likely to conclude, *after* reading the judge's opinion, that his opponent really had no case at all, and that the opposing lawyers should be sanctioned for having the temerity to argue such a weak case. Such motions might well have looked like vindictive, *in terrorem* litigation to the opponents. Under current Rule 11 timing requirements, such a scenario simply cannot occur. A lawyer or litigant can only bring a Rule 11 motion before the outcome of the case is known.[145]

These timing requirements not only affect the judge's perspective on the merits of the Rule 11 motion but the perception of the likelihood of success of a potential Rule 11 motion on the lawyers who are considering whether to bring it. Cases that pose some actual litigation threat will not appear to such lawyers to be

145. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

completely frivolous or baseless, nor to be the likely subjects of winning Rule 11 motions. The effect of all of this, of course, is to make it significantly less likely that litigants will make or win Rule 11 motions against claims with some potential merit, thereby reducing the number of Rule 11 motions made and their *in terrorem* threat to potentially meritorious claims.

We can see then that the 1993 amendments did, in fact, make it significantly harder to win Rule 11 motions against marginal filings and claims, but it did so in a particularly subtle (and perhaps unexpected) way. By changing the time at which most Rule 11 motions must be made, the new Rule insures that hindsight bias will not be a factor in most judicial determinations of whether or not a claim is frivolous or baseless. Accordingly, not-yet-adjudicated claims are substantially less likely to be found to have no chance of success than the same claims viewed under a hindsight perspective. The effect is the same as that which would have been achieved if the standard for proving Rule 11 violations had been substantially raised, and it is the one noted in Part II of this article—a substantial reduction in the amount of reported Rule 11 litigation.

IV. REGRET AND THE RULE 11 SAFE HARBOR

Reducing Rule 11 motions, particularly *in terrorem* Rule 11 motions, may well be a worthwhile achievement. However, to do so without substantially increasing the number of frivolous filings is an even happier and far more surprising result, a bit like discovering that you have fewer bugs in your garden when you stop spraying it with insecticide.[146] Yet reliable accounts of the effect of the 1993 amendments tell us that such happy results have indeed been achieved and that the decrease in Rule 11 motions has not engendered any increase in frivolous filings.[147] The purpose of this section is to try to figure out why that might be so. The answer, I

146. Unfortunately, this does not happen. The converse however, lots of bug spray leading to lots of spray-resistant bugs, is a serious concern. William J. Broad, *In War Against Mosquito, Man Is Losing Ground*, N.Y. TIMES, July 24, 1984, at C-1.

147. *See FJC 1995 Report*, *supra* note 25, at 2 ("A very large majority of respondents agree that some form of Rule 11 is needed, suggesting that those who regard the problem with groundless litigation as small believe Rule 11 keeps it from being a larger problem.").

submit, lies in the fact that most people who make frivolous filings never intended to make such filings in the first place, and therefore have little incentive, even with a reduced likelihood of sanctions, to file any more of them.

Why lawyers and litigants make frivolous filings is itself a complex and somewhat puzzling question. Unlike other violations of legal rules, like theft or income tax evasion, it is far from clear what benefit, if any, a person who engages in frivolous litigation derives from such activity. With much work and many assumptions, certain legal theorists have been able to develop models under which it would sometimes be in the best interests of unscrupulous litigants to bring lawsuits that they know have no basis in law or fact. These models rely on assumed information and litigation cost asymmetries between plaintiffs and defendants. The basic notion is that the party (or lawyer) filing the claim knows that it is without merit, but also knows that it will be costly for the opposing party, through discovery or otherwise, to acquire the relevant information and use it to get the case dismissed.[148] If the defendants are "rational" in an economic sense, (i.e. inclined to take the least costly course of action), they will settle such claims for any amount less than the risk-adjusted cost of litigating them.[149]

There are, of course, some questions that can be raised concerning this model. Is it really in the interests of defendants and defense counsel to settle questionable claims solely to avoid greater litigation costs? Is not the reputational value of winning, as opposed to merely settling, worth something more to defendants, particularly where the claims brought by the plaintiff seem questionable and defendants have a good chance of winning? Defendant's lawyers (who are presumably advising Defendant on whether to settle or litigate) are also likely to prefer winning to settling a weak case. They may even view defendant's litigation costs (most of which, after all, go into their pockets as attorneys' fees) less as unnecessary

148. *See* Kobayashi & Parker, *supra* note 31, at 119 ("A key assumption motivating the analysis is the existence of 'asymmetric information'—meaning that, until the court's decision after stage *E* [when the court decides the Rule 11 motion], the plaintiff has more information about the frivolousness or nonfrivolousness of its own complaint than does the defendant."); *see also* Bebchuk, *supra* note 31; Rosenberg & Shavell, *supra* note 31.

149. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 511–23 (3d ed. 1986).

transactions costs and more like money well spent.

The makers of models can always respond that these concerns may reflect the cost-benefit analysis in particular cases, but not the validity of the overall model. That is true enough, but doubt about the real world likelihood of defendants being willing to settle weak cases just to avoid litigation costs does raise the question of how many real life frivolous filings are brought for the reasons suggested by these informationally asymmetric models. Let us assume for now, however, that it is some number greater than one. Accordingly, some number of frivolous filings are brought by people who know their claims are frivolous (or at least very weak) but are trying to prevent the other side from finding that out. Since these litigants' motivation depends on misleading the opposing parties, we can label this category of frivolous filers "tricksters."

Another category of litigants who have a motivation to make frivolous filings is that comprised of those who do not care whether they win or lose. This is perhaps a larger category than one might think. Theoreticians sometimes talk about the expressive function of law and litigation, as well as the more mundane compensatory, remedial, deterrent, and punitive ones.[150] Courts, after all, are one of the few places in modern American society where a single individual can raise challenges and objections to perceived wrongs before a government official authorized to hear and rule in a fair and judicious manner. "Having one's day in court" does not imply litigation success, or even a reasonable chance of success, but rather only a right to have one's claims heard and decided in accordance with due process. Accordingly, the person who wants to argue that there is a constitutional right to affordable housing, that discrimination against blondes is covered by the Americans with Disabilities Act,[151] or that the federal income tax is unconstitutional,[152] may very well seek to do so, even while recognizing that their claims are objectively frivolous. We can categorize these people as "Don Quixotes"[153] after that great tilter at

150. *See* Sunstein, *supra* note 32.

151. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12–112 (1990).

152. Orndoff v. Internal Revenue Serv., No. 93-15804, 1994 U.S. App. LEXIS 14865, at *1 (9th Cir. May 24, 1994).

153. MIGUEL DE CERVANTES SAAVEDRA, THE INGENIOUS HIDALGO DON QUIXOTE DE LA MANCHA (John Rutherford trans., Penguin Books 2001).

windmills, recognizing that they represent a continuum from principled practitioners of civil disobedience who seek to violate the law[154] to spread awareness of societal inequities, to cranks and cults with powerful views of what the law should be, to vexatious litigators who just refuse to take no for an answer. What unites them all is an awareness (which may be rather dim in the consciousness of some) that their claims are objectively frivolous under the current state of the law and the fact that they do not care whether or not that is so.[155]

Unlike the tricksters and the Don Quixotes, the third category of people who might bring frivolous claims do not do so intentionally, but, in essence, negligently. These are the sloppy, busy, lazy, or harassed practitioners, who for one reason or other have not taken the trouble to conduct a reasonable inquiry into the case to determine whether it is well grounded in fact and warranted by existing law. Unlike the tricksters and Don Quixotes, they do not know that their claims are frivolous, but with additional time and effort they could have found out. Much contemporary commentary assumes that many frivolous filings are the result of bad or sloppy lawyering by this category of lawyers, whom we can label the "slackers." Indeed, Rule 11 was often conceived of as a tool to educate, cajole, or frighten less conscientious practitioners into acting in accordance with their professional responsibilities. As Professor Vairo notes, "these [Rule 11] motions often targeted what many in the bench and bar believe to be unprofessional or incompetent conduct that previously had been ignored by organized bar discipline. Indeed, there can be no argument that Rule 11 has changed lawyer conduct in some significantly positive ways."[156] Because Rule 11 embodies an objective standard, this category of "slacker" includes not only those

154. Knowingly filing a claim in violation of Rule 11 is, after all, a form of law breaking, albeit a fairly benign one.

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

156. Vairo, *supra* note 20, at 590.

lawyers too lazy to conduct a reasonable investigation, but also those who are too inexperienced or lack the ability to do so, or those who just made an honest mistake after a hard night of partying.[157] What unites the people in this category is their lack of an intention to make a frivolous filing, and accordingly, their presumed willingness to reconsider the filing when given further information about its frivolousness.

A fourth and final category of potential filers of frivolous claims are those who bring claims where the factual basis for liability is quite weak or at least substantially unclear, but there is no way (at least no relatively inexpensive and effective way) to get a better assessment of the merits of the claim prior to filing it. Unlike the slackers, these lawyers have investigated all the facts readily ascertainable about the merits of their claim, and while there are no facts clearly showing the claim to be baseless, there is also little or no factual basis to support plaintiff's theory of liability. The case is a questionable one, on the borderline of pleading, even on information and belief. Yet, there is also the possibility, small but real, that plaintiff's attorney might turn up facts, in discovery or otherwise, to support the theory of liability. Such claims are worth bringing, in terms of their economic rationality, because they usually involve substantial damages, even if liability is questionable. Accordingly, the case has a positive expected value,[158] and some lawyers will be inclined to bring it irrespective of the risks involved. We can place such lawyers in the category of "gamblers"[159]—lawyers who bring claims that, based on presently available information, are "longshots," low probability claims with positive expected returns, but which might turn out after further discovery and other litigation,

157. *See id.* at 610–15; *see also* WILLGING, *supra* note 86, at 143–47 (finding that most attorneys sanctioned under the Rule were experienced and had reputations at or above average in their communities).

158. That is, the (probability of success times the expected payout) minus (litigation costs plus the probability of a sanction times the sanction amount) is a positive number. *See* Yablon, *supra* note 14, at 85 n.50.

159. Chris Guthrie argues that some lawyers and plaintiffs may bring frivolous claims because they systematically overestimate the probability of success of the weak claim due to a number of cognitive biases. *See* Guthrie et al., *supra* note 22, at 165–69. These litigants should also be categorized as "gamblers" (although perhaps not very good ones) because they have taken the calculated risk of filing low probability claims.

to have either considerable merit or, more likely, to have no substantial basis in law or fact.

These four categories seem pretty much to cover the kinds of circumstances where lawyers and litigants might bring frivolous litigation. They describe a number of quite different motivations, dispositions, and states of mind. Note, for example, that the first two categories, tricksters and Don Quixotes, intentionally bring cases they know to be frivolous. The latter two categories, on the other hand, the slackers and gamblers, do not know their claims are frivolous when brought, and indeed bring them in the hope they will have merit. With regard to susceptibility to large monetary sanctions, it should be noted that only the tricksters and gamblers are pursuing strategies that, if successful, will earn them positive monetary rewards. The trickster hopes to generate a positive monetary settlement by making it costly for opposing counsel to determine and prove that his claim is baseless. The gambler hopes to file a portfolio of low probability claims, then pursue only those that appear to have substantial merit, while abandoning or limiting costs on the others. The Don Quixote, in contrast, is not seeking monetary rewards, but ideological and expressive satisfaction. The slacker is not seeking much of anything. He did not know the filing he was making was frivolous, and is presumably chagrined by his mistake.

Consider now the likely effect on these different categories of frivolous litigants to an increase or decrease in either the amount or probability of sanctions for frivolous filings. The trickster and gambler are directly and strongly affected by any increase in sanctions. They are both pursuing diversification strategies in which the positive returns from the successful claims (those which produce a settlement for the trickster and those which turn out to have merit for the gambler) outweigh the costs from the unsuccessful ones. An increase in probability or amount of sanctions represents a direct increase in the costs of pursuing a gambler or trickster strategy. It means the trickster will pay more for every frivolous claim that is discovered and proven in litigation rather than settled. The gambler will pay more for each low probability claim that turns out to be baseless. If the sanctions costs are set high enough, both these strategies may no longer be worth pursuing. Conversely, if the probability or amount of sanctions for frivolous filings is reduced, it will directly increase the returns from the trickster and gambler

strategies and therefore lead to more such filings.

The effect on Don Quixotes and slackers is much less clear and direct. Since Don Quixotes are not pursuing their strategy for financial reward, they always expect to incur some costs in exercising their expressive rights in a federal court. An increase in sanctions means those costs will go up, but this will not necessarily change the litigation strategies of the Don Quixotes, many of whom are likely to be judgment-proof. It is even less likely that a reduction in sanctions will engender a substantial increase in such filings, which are more likely to be a product of passion than cost-benefit calculation. The effect on slackers is even more problematic. Since they get no positive benefit from frivolous filings in the first place, it is hard to imagine that increased sanctions will have more than marginal effects on their already self-defeating behavior. Indeed, it seems likely that for the inexperienced or easily distracted practitioner, frequent reminders about Rule 11 may be a more effective deterrent than increased sanctions.[160] Conversely, it is hard to imagine that a decrease in Rule 11 sanctions will cause large numbers of lawyers who now conduct reasonable inquiries into the facts and law surrounding their claims to give up doing so.

This is not to deny that, *at the margin*, (that favorite location of economic theory), increasing costs of frivolous litigation will result in some reduction in such lawsuits (even among slackers and Don Quixotes), while decreasing the likelihood or amount of sanctions will (marginally) encourage frivolous suits. Rather, the point is that the alacrity and the extent of the change in litigation behavior which is brought about by these changes in monetary incentives will vary greatly for different classes of litigants. One way to put it is that the utility function for marginal changes in sanctions costs varies much more for litigants in the trickster and gambler categories than for the slackers and Don Quixotes. Since the former are, in effect, "in it for the money," they are more likely to change their behavior significantly in response to relatively small changes in the cost of sanctions. Slackers and Don Quixotes, in contrast, are much less likely to respond to a decrease in sanctions by increasing the number of their frivolous filings. Accordingly, if all the 1993 changes to

160. This was presumably the implication of the comment by one federal judge that it was the existence of Rule 11, not the sanctions, that was beneficial in influencing lawyer conduct. *See FJC Final Report*, *supra* note 58, at 20.

Rule 11 had done was decrease the amount and likelihood of monetary sanctions for frivolous filings, the absence of a major upsurge in frivolous filings post-1993 would suggest that most of the litigants involved in Rule 11 litigation are not strongly responsive to monetary incentives, that they are predominantly slackers and Don Quixotes rather than tricksters and gamblers.

However, we know that the 1993 revisions did not only reduce the amount and probability of sanctions for frivolous litigation. They also created a new safe harbor for withdrawing frivolous filings. Accordingly, we must extend our analysis to consider how this new provision affected the various categories of litigants who may be involved in Rule 11 motions. The key point to recognize about the safe harbor provision of Rule 11 is its temporal dimension. It presumes that there are some litigants who, while happy (or at least willing) to initiate a frivolous claim or filing at time t (the date of filing), are also happy (or at least willing) to abandon that claim or filing at a later time t_1 (the day after a Rule 11 motion is made challenging the filing). In short, these are litigants who, at least from the later perspective of a Rule 11 motion, can be said to regret having made the frivolous filing. Such feelings of regret are also implicitly assumed by the Advisory Committee's comment acknowledging litigants who wanted to voluntarily withdraw their filings, but were prevented from doing so by the threat of a subsequent Rule 11 motion.[161]

What is the likely cause of such feelings of regret? Obviously, developments in the litigation that have occurred between the filing of the claim and the Rule 11 motion are the most likely cause. It is very possible that the litigants will learn new facts about their claim, either through discovery, defendant's motions, or the statements or rulings of the trial judge, which, if they had been known at time t would have dissuaded them from bringing the claim.

The litigants most likely to experience such feelings of regret are the slackers and the gamblers, since they are the ones who did not know at the time of original filing that their claims were frivolous. For the slackers, learning facts which indicate that the claim has no basis shows that they have made a "mistake," one that they presumably regret and are more than happy to correct by

161. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

withdrawing the claim. For the gamblers, learning that their claim has no basis is like learning that they did not win the lottery, disappointing but not truly surprising. Once that fact has been learned, however, the gamblers are also more than willing to use the safe harbor to discontinue their claims, writing them off as longshots that did not pan out.

Don Quixotes and tricksters, however, will not be surprised by a litigation process that shows their claims to be baseless. They knew their claims were baseless when they started. For Don Quixotes, the safe harbor provision should hold little attraction, since what they want is the right to have their claim heard and adjudicated in a court of law, presumably with the right to appeal to an even more prestigious and powerful court.

The tricksters' incentives are the most complex. Tricksters know their claims are baseless, but rely on the hope that the other side does not have the same knowledge. The filing of a Rule 11 motion challenging their claim, however, is a pretty good indication that the other side has, or believes it has, sufficient evidence to demonstrate that the tricksters' claim is baseless. At this point tricksters have the same regret as the gamblers and the slackers, and the same incentive to withdraw the claim.

There is, however, a significant difference, in that the filing of a meritorious Rule 11 motion against the tricksters' filing represents a failure of their strategy in a way that similar filings against slackers or gamblers do not. The tricksters' strategy was to settle baseless claims by convincing opponents that the cost of litigating was greater than the cost of settling. An opponent who has made a Rule 11 motion has litigated sufficiently to make a strong showing that the case is baseless, and therefore represents a failure of the tricksters' strategy.[162] The failure may be a result of the tricksters' overestimation of the informational asymmetry between the two sides or underestimating the amount their opponent was willing to spend in litigation costs. Once the opponent has sufficient information to make a potentially meritorious Rule 11 claim, that opponent is highly unlikely to settle.[163]

---

162. This is presumably even more true in the post-1993 period, where a stronger showing of frivolousness or baselessness must be made. *See supra* Part III.

163. It is theoretically possible that an opponent might make a weak or

Accordingly, a Rule 11 motion has a different effect on tricksters than it does on gamblers and slackers. For the gambler, such a motion provides information about the merits of his claim, which may well cause him to regret having filed it. For the trickster, however, it provides information about his opponent's state of knowledge. While this may also lead to regret and the use of the safe harbor provision, the trickster, unlike the slacker and gambler, is not voluntarily withdrawing from a claim he no longer wishes to pursue. The slacker and gambler can use the safe harbor provision to cut their losses and move on to other cases with better prospects of success. For the trickster, a Rule 11 motion is simply a sign that his bluff has not worked.[164]

With all these considerations in mind, we are now in a position to answer one deep and puzzling question concerning the 1993 changes and their effects. If Rule 11 motions are down, frivolous filings have not substantially increased, and the safe harbor provision is being used, what does this tell us about the kinds of litigants that are predominantly involved in Rule 11 litigation?

With the confidence of one who has a great deal of theory and a few facts to work with, I conclude that the post-1993 experience with Rule 11 litigation supports the view that most Rule 11 litigation

---

speculative Rule 11 claim, solely for the *in terrorem* effect it might have on the trickster, but this would be an extremely rare occurrence. In the first place, weak Rule 11 motions are extremely unlikely to win, particularly under the post-1993 rule. *See supra* Part III. Second, Rule 11 motions filed with little or no support would not cause the trickster to drop the claim, since they would signal to the trickster that the informational asymmetry remained, and that the trickster's bluff was still working. While it might be possible to use Rule 11 to force the other side to reveal the evidentiary basis for its case, discovery devices such as interrogatories or a summary judgment motion like that envisioned in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), are much more accepted and convenient vehicles to achieve the same effect.

164. One could argue that the trickster is like the gambler, only instead of betting on the uncertain merits of a diverse portfolio of cases, like the gambler does, the trickster bets on the uncertain risk preferences of a diverse portfolio of defendants. Rule 11 motions then function for him as they do for the gambler, allowing him to cut his losses on the more resistant defendants. The important difference, however, is that the gambler's chance of success on his remaining claims is not affected by his withdrawal from the baseless ones, while the trickster's strategy is severely weakened if he withdraws from too many cases. The trickster, unlike the gambler, is *always* bluffing. Accordingly, acquiring a reputation as a bluffer essentially puts an end to the strategy.

involves slackers and gamblers (in that order) with Don Quixotes and tricksters comprising a relatively small part of the mix. Note that only the slackers, in our model, respond appropriately to both major changes in Rule 11. They make use of the safe harbor provision to withdraw from lawsuits they have come to regret bringing. Yet, the decreasing number and lowered likelihood of sanctions are unlikely to encourage a major increase in negligent or mistaken filings. Accordingly, the success of the 1993 amendments indicates that slackers were a major if not the predominant group of litigants involved in Rule 11 litigation.

Gamblers, however, may form a significant category of litigants as well. Gamblers clearly benefit from and make use of the safe harbor provisions. Indeed, as we have seen, it substantially enhances their strategy of pursuing a portfolio of weak and uncertain claims and then dropping the ones that turn out to be losers. The puzzling question is why the easing of sanctions under Rule 11 has not encouraged them to file more questionable (and therefore more frivolous) lawsuits. A number of possibilities suggest themselves. One is that the number of uncertain lawsuits filed by these lawyers is not a function of the level of sanctions, but of other constraints like lawyer time, money and opportunity costs. If so, the changes in Rule 11 may have subtly changed the kind of cases brought, but not their total numbers.[165]

---

165. For example, consider two potential claims that a plaintiff may bring. The first has a potential recovery of $12,000,000, has a 10% chance of success, and will cost $500,000 for plaintiff to litigate. Moreover, it will cost Defendant $1,500,000 to defend and, under pre-1993 Rule 11, there was a 50% chance those costs would be imposed as a sanction on plaintiff in the event of a loss. Such a case had a small positive expected value to plaintiff of ((12,000,000 x .10) - ((500,000) + (.45 x 1,500,000))) = $25,000. A case with a 20% chance of a $4,000,000 recovery, with the same litigation costs and only a 10% chance of sanctions in the event of a loss would be worth ((4,000,000 x .2) - ((500,000) + (.08 x 1,500,000))) = $180,000, clearly a more desirable case to bring.

Assume that under a post-1993 Rule 11, however, the chances of a sanction based on legal fees goes down to 10% in the first case in the event of a loss, and to 0% in the second. The first case now has a positive expected value of $625,000. The negative value of the sanction has been reduced to (.05 x 1,500,000 = $75,000. The second case's value has only increased to $300,000, making the first case now the more desirable one. Of course, since both cases now have fairly large positive expected values, one might argue that some will be willing to pursue them both.

Another possibility is that somewhat more cases are being brought by the gamblers, but are being voluntarily withdrawn under the safe harbor provision. Perhaps this is being done even without the need for a Rule 11 motion, so they are not perceived by opposing counsel as a substantial rise in frivolous filings. A third intriguing possibility is that with the change in the hindsight standard of Rule 11, the low probability cases the gamblers are inclined to bring are not only sanctioned less frequently, but are less frequently perceived as frivolous.

The other two categories of cases, however, probably did not figure prominently in the success of post-1993 Rule 11. The tricksters should have increased their filings as a result of lowered sanctions under Rule 11,[166] which would have reduced the costs of their bluffing strategy and should therefore have led to more frivolous filings. Unlike the gamblers and slackers, these litigants have no incentive to voluntarily withdraw cases under the safe harbor provisions, so an increase in their strategy would be perceived as an increase in frivolous filings.[167] Don Quixotes, while not likely to increase filings as a result of decreased sanctions, are also not likely to withdraw cases under the safe harbor provisions. Accordingly, the extensive use of the safe harbor provision and the lack of a substantial increase in frivolous filings, supports the view that the tricksters and Don Quixotes constitute, at most, only a small portion of those involved in Rule 11 litigation.

V. CONCLUSION

The 1993 amendments to Rule 11 appear to represent successful legal reform, perhaps even more successful than its drafters intended,

166. The notion that these lawyers can take on only a limited number of cases seems more dubious with respect to the tricksters than it does with respect to the gamblers. The gamblers need to engage in serious litigation, at least until they determine which of their cases has merit. The tricksters know that their cases have no merit, so if the risk of pursuing their bluff decreases, they should be willing and able to bring more such cases.

167. One might well ask, if the strategy succeeds and the cases settle, how do opponents know they are frivolous? In some cases, events subsequent to the settlement may reveal the truth (i.e., seriously injured plaintiff makes a spectacular recovery). More often, however, lawyers' suspicions and "situation sense" may give them a pretty strong sense that something is "fishy," even when the costs of proving that hunch are too high.

and perhaps for reasons its drafters did not fully anticipate. Nonetheless, it should give us all hope that even the most seemingly intractable litigation dilemma can be substantially improved, if not completely solved, with the right combination of study, skill, and luck. With that said, is anybody here ready to tackle asbestos?