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Liability for Proceeding with Unfounded Litigation

John R. Jones, Jr.

NOTE

Liability for Proceeding with Unfounded Litigation

I. INTRODUCTION

The current concern about groundless litigation[1] has antecedents stretching from the jurisprudence of ancient Mesopotamia[2] through the biblical admonition not to bear false witness against one's neighbor[3] to the draconian solution of removing the frivolous complainant's tongue resorted to on occasion by the Anglo-Saxons.[4] In the United States several techniques purport to help control spurious litigation. Chief among these are the common-law tort of malicious prosecution,[5] Federal Rule of Civil Procedure 11,[6] and the inherent disciplinary powers of the courts.[7] Other vehicles,

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1. *See* Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977); Gold, *Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority*, 9 OTTAWA L. REV. 44 (1977); Levi, *The Business of Courts: A Summary and a Sense of Perspective*, 70 F.R.D. 212 (1976); Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976); Wills, *Assault with a Deadly Lawsuit: A Wrong in Search of a Remedy*, 51 L.A. B.J. 499 (1976); Note, *Habitual Plaintiffs in Federal Court and the Surrogate Pleader Approach*, 45 U. CIN. L. REV. 577 (1976); Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 U. CIN. L. REV. 604 (1976) [hereinafter cited as Note, *Physician Countersuits*]; Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979) [hereinafter cited as Note, *Groundless Litigation*].

2. Note, *Groundless Litigation*, *supra* note 1, at 1218 n.1.

3. *Exodus* 20:16 (Revised Standard Version).

4. Note, *Groundless Litigation*, *supra* note 1, at 1221 n.26. The author observes that the offender could be required to compensate his opponent in lieu of losing his tongue if the latter option "proved distasteful." *Id.* at 1221 n.27. Distasteful to whom, one is not told.

5. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 119-120 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 674-681 (1977). Both Prosser and the Restatement refer to the malicious prosecution action as one for "wrongful use of civil proceedings" when the action complained of is civil.

6. The rule reads in pertinent part:

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

FED. R. CIV. P. 11.

7. *See generally* Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977).

with marginal relevance to the problem of groundless suit, include the judicially created federal bad faith exception to the rule against recovery of attorneys' fees,[8] the federal statutory sanctions for the attorney "who so multiples the proceedings . . . as to increase costs unreasonably and vexatiously,"[9] and special statutory provisions such as section 9(e) of the Securities Exchange Act of 1934.[10]

Because these methods of deterring groundless litigation and affording a remedy to those injured thereby have widely disparate historical backgrounds, the common tendency, both scholarly[11] and judicial,[12] is to consider them in isolation from one another. Hence, there is no uniformity as to the appropriate standard of culpability or the appropriate punitive and compensatory measures; all depends on whether the particular court views the problem through the lens of malicious prosecution, the lens of Federal Rule of Civil Procedure 11, or some other lens. Moreover, the fact that some of the approaches, by their nature, are available only at the state level and others only at the federal level compounds this problem of nonuniformity.

A recent federal decision, *Nemeroff v. Abelson,*[13] suggests that the standards embodied in Rule 11, the malicious prosecution action, the federal bad faith exception, and the court's inherent equitable power are closely akin.[14] This assertion, however, is more an aspiration than a description of reality. Nonetheless, this Note maintains that such a unitary view of the problem of curtailing groundless litigation is sorely needed. This Note first describes and evaluates the primary tools now used to deter meritless suits and sometimes compensate their victims. The Note then proposes a unified procedural approach to groundless litigation that allows for different grades of culpability.

Three notes of caution are in order as a preliminary matter. First, once a decision has been reached to impose liability for groundless suit, there remains the question of whether the frivolous

8. *See, e.g.,* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1087-88 (2d Cir. 1977); Note, *Attorney's Fees and the Federal Bad Faith Exception,* 29 HASTINGS L.J. 319 (1977).

9. 28 U.S.C. § 1927 (1976).

10. 15 U.S.C. § 78i(e) (1976) (authorizing court to assess "reasonable costs," including "reasonable attorneys' fees," against either party in certain securities-related litigation).

11. *See* note 1 *supra.*

12. Cases taking a synoptic view of the techniques of controlling meritless litigation are more the exception than the rule. For one of the exceptions, see Nemeroff v. Abelson, 469 F. Supp. 630 (S.D.N.Y. 1979).

13. *Id.*

14. *Id.* at 640.

claimant, or his attorney, or both should bear such liability. Second, meritless plaintiffs are not the only culprits; groundless and dilatory motions by defense counsel may be a problem of equal magnitude.[15] Although this Note focuses on plaintiffs at the trial level,[16] analogous considerations apply to defendants at the trial level and to both parties at the appellate level.[17] Last, and most important, any system for discouraging meritless litigation should take into account society's interest in having legitimate grievances disclosed, aggressively advocated, and, to the extent possible, remedied. It is a truism that legal doctrine changes. Efforts to curb unfounded litigation must not chill the processes by which new legal theories evolve.[18] As one scholar has written:

> Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then accepted as theoretically tenable (though not the law), then accepted as the law. . . . How might the law have developed if, prior to 1954, an attorney might have been [disciplined] for asserting, contrary to settled Supreme Court case law, that separate but equal was not equal?[19]

It is clear that "groundlessness" must not be defined so broadly or punished so harshly as to destroy our legal system's capacity for innovation or to discourage the airing of just grievances.

II. The Tort of Malicious Prosecution

A. *Background and Applications*

After the Norman Conquest a system known as amercement developed in England[20] under which most losing plaintiffs were required to pay or find pledges who would pay the court[21] a penalty graded according to the magnitude of the injury done.[22] Wronged

15. *See* Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 Fordham L. Rev. 1069 (1976).

16. The scope of this Note is also limited to civil litigation.

17. *See* Note, *Disincentives to Frivolous Appeals: An Evaluation of an ABA Task Force Proposal*, 64 Va. L. Rev. 605 (1978).

18. *See* Risinger, *supra* note 1, at 57.

19. *Id.*

20. Note, *Groundless Litigation*, *supra* note 1, at 1222.

21. *Id.*

22. *Id.* at 1223. By contrast, the old Anglo-Saxon monetary penalty of *wer*, which could be imposed on a groundless complainant in lieu of loss of tongue, *see* note 4 *supra*, was graded according to that complainant's status. *Id.* at 1221. It is important to remember that in the early medieval view God was the ultimate judge and an unsuccessful suit was necessarily a false one. *Id.* at 1222; 2 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I, at 539, 598-602 (2d ed. 1898). In light of this heritage, it is not surprising that the early English law was insensitive to the position of the honest but unsuccessful litigant.

defendants, however, received no compensation.[23] In 1293 the Statute of Champerty[24] established the writ of conspiracy, which enabled injured defendants to sue those who maliciously brought meritless actions through straw claimants.[25] The gradual decline of amercement[26] led by Tudor-Stuart times to a new round of statutory activity.[27] Cost statutes developed that expanded defendants' ability to recover their litigation expenses from meritless claimants.[28] In the seventeenth century the action on the case[29] was held to lie for "manifest vexation" stemming from groundless suits.[30] It was from these antecedents that the tort of malicious prosecution as defined today in Britain and about a third of the states developed.[31]

Under this English Rule, five elements must be proved: initiation or continuation of a prior suit, lack of probable cause for the prior action, malice in instituting or continuing the prior suit, termination of the prior action in favor of the original defendant, and some form of damage to the original defendant beyond that normally inflicted by similar litigation.[32] The fifth element, commonly known as the special damage requirement, is discarded by the Restatement Rule, which requires only that the wronged party show "either material harm or the violation of a legal right that is in itself sufficient to support an action for damages."[33] Under both rules, damages can be recovered for all expenses and injury occasioned by the wrongful suit. Punitive damages are also permitted under both approaches.[34]

The first element of the tort, the prior suit requirement, has generated relatively little controversy. A minority of courts has

23. 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 536 (1924).

24. The statute has been recorded erroneously as 33 Edw. 1, Stat. 3 (1305). The correct date is 21 Edw. 1 (1293). See Note, *Groundless Litigation, supra* note 1, at 1224 nn.52 & 53.

25. *Id.* at 1225 n.56.

26. *Id.* at 1226 n.63.

27. *Id.* at 1226 n.64.

28. *Id.* at 1226-27. Recovery under these costs statutes generally did not extend to consequential damages such as those resulting from attachment of property. *Id.* at 1227 n.65.

29. English courts of this period often resorted to the action on the case when they wished to fashion a cause of action that fell outside the ambit of the existing writs. *See generally* C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 66-92 (1949).

30. Savile v. Roberts, 91 Eng. Rep. 1147, 1151 (1698). The case involved a false criminal indictment, but the court stated in dictum that similar principles would apply when the action complained of was civil. *Id.*

31. *See* O'Toole v. Franklin, 279 Or. 513, 518 n.3, 569 P.2d 561, 564 n.3 (1977).

32. *See generally* W. PROSSER, *supra* note 5, at § 120.

33. RESTATEMENT (SECOND) OF TORTS § 674, Comment e (1977).

34. Note, *Groundless Litigation, supra* note 1, at 1220 nn.15 & 16.

held that no liability for malicious prosecution can arise out of a civil proceeding unless there has been interference with the original defendant's person or property.[35] This view is so closely akin to the special damage requirement that the two will be discussed together later.

Definitions of probable cause vary.[36] A common denominator of the numerous formulae seems to be a requirement that a reasonable or cautious person,[37] in light of facts known or ascertainable by reasonable inquiry,[38] would have believed he had a cause of action.[39] Courts seldom make clear, however, whether they are applying in this connection the reasonable prudent person standard[40] found in the negligence field. The occasional use of words such as "cautious"[41] suggests a more stringent criterion, but this may simply be abuse of the terminology. The cases are agreed that the original plaintiff need not have been positive of the legal outcome in order for probable cause to be found; a reasonably sustainable interpretation is sufficient.[42] According to some decisions, dismissal of the underlying action by the party who brought it is prima facie evidence of lack of probable cause.[43] Otherwise, termination of the underlying action in favor of the original defendant generally raises no inference that probable cause was absent in the institution of that suit.[44]

The requirement of malice has also engendered definitional problems. According to one common formulation, malice exists when an action is brought primarily for a purpose other than the adjudication of the merits.[45] Filing of a suit for settlement value or for delay would fit this definition; personal animosity—"malice" in the vernacular sense—is not required. Some decisions have at-

35. *E.g.*, Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 490, 56 N.E. 198, 199 (1900).

36. *See* Note, *Groundless Litigation*, *supra* note 1, at 1234 n.113.

37. *See, e.g.*, Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973); Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 335, 326 P.2d 918, 926 (1958).

38. *See, e.g.*, Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973). The scope of the duty of inquiry is unclear and might vary depending on the nature of the litigation. *See* Note, *Physician Countersuits*, *supra* note 1, at 609-10.

39. *See* note 37 *supra*.

40. *See generally* C. MORRIS, TORTS 53-56 (1953); W. PROSSER, *supra* note 5, at §§ 32-33.

41. *See, e.g.*, Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973).

42. *E.g.*, Bill Dreiling Motor Co. v. Herlein, 543 P.2d 1283, 1285 (Col. App. 1975).

43. *E.g.*, Kolka v. Jones, 6 N.D. 461, 474, 71 N.W. 558, 563 (1897). *Contra*, Warner v. Gulf Oil Corp., 178 F. Supp. 481, 483 (M.D.N.C. 1959).

44. *E.g.*, Barton v. Woodward, 32 Idaho 375, 379, 182 P. 916, 917 (1919); Milner v. Hare, 125 Me. 460, 462, 134 A. 628, 629 (1926).

45. RESTATEMENT (SECOND) OF TORTS § 676 (1977).

tached importance to the presence of ill will in the institution of the underlying suit, but this seems to be viewed as a particular form of malice rather than as an essential element of it.[46] Other cases have defined malice in terms of reckless disregard of the original defendant's rights.[47] Absence of probable cause may raise an inference of malice,[48] but the two standards are fundamentally different: the probable cause criterion is an objective standard, whereas the malice requirement addresses the original plaintiff's motivation.

The requirement of termination of the underlying action in favor of the original defendant has not provoked much debate. A judgment in favor of the defendant would of course meet the definition. So would voluntary dismissal by the original plaintiff.[49] Termination by way of settlement, however, would not.[50] An exception to this requirement is sometimes made when the proceeding complained of was ancillary in character, as in the case of attachment or arrests under civil process.[51]

Most controversial is the special damage requirement. Seventeen states follow the English Rule requiring the original defendant to show some injury beyond the damage ordinarily resulting from similar litigation.[52] Interference with the person, such as arrest

46. *See* W. PROSSER, *supra* note 5, § 120, at 855 nn.53 & 54.

47. *See, e.g.*, Yelk v. Seefeldt, 35 Wis. 2d 271, 278, 151 N.W.2d 4, 8 (1967). "While . . . wilful and wanton disregard for the fact may be the basis for malice, such wanton and willful conduct must be of such a nature and character as to evince a hostile or vindictive motive." *Id.*

48. *See, e.g.*, Crouter v. United Adjusters, Inc., 266 Or. 6, 8-10, 510 P.2d 1328, 1329-30 (1973).

49. *E.g.*, Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); RESTATEMENT (SECOND) OF TORTS § 674, Comment j (1977).

50. *E.g.*, Nolan v. Allstate Home Equip. Co., 149 A.2d 426, 429 (D.C. Mun. Ct. App. 1959); Fenton Storage Co. v. Feinstein, 129 Pa. Super. Ct. 125, 133-34, 195 A. 176, 179-80 (1937).

51. *See* W. PROSSER, *supra* note 5, § 120, at 853-54. The exception is sometimes said to embrace all ex parte proceedings. *See* RESTATEMENT (SECOND) OF TORTS § 674, Comment k (1977).

52. Ammerman v. Newman, 384 A.2d 637, 641 (D.C. Ct. App. 1978); Pair v. Southern Bell Tel. & Tel. Co., 149 Ga. App. 149, 150, 253 S.E.2d 828, 829-30 (1979) (refers to malicious prosecution in civil context as "malicious use of process"); Petrick v. Kaminski, 68 Ill. App. 3d 649, 650, 386 N.E.2d 636, 637 (1979); Aalfs v. Aalfs, 246 Iowa 158, 166-61, 66 N.W.2d 121, 123 (1954); Harter v. Lewis Stores, Inc., 240 S.W.2d 86, 87 (Ky. 1951); Krashes v. White, 275 Md. 549, 554-55, 341 A.2d 789, 801 (1975) ("malicious use of civil process"); Penwag Property Co. v. Landau, 148 N.J. Super. 493, 500-01, 372 A.2d 1162, 1165-66 (1977); Farmers Gin Co. v. Ward, 73 N.M. 405, 409, 389 P.2d 9, 12 (1964); Williams v. Williams, 23 N.Y.2d 592, 596 n.2, 246 N.E.2d 333, 335 n.2, 298 N.Y.S.2d 473, 477 n.2 (1969); Stanback v. Stanback, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979); Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 490, 56 N.E. 198, 199 (1900); O'Toole v. Franklin, 279 Or. 513, 519, 569 P.2d 561, 564 (1977); Garcia v. Wall & Ochs, Inc., 256 Pa. Super. Ct. 74, 76-80, 389 A.2d 607, 608-10 (1978); Ring v. Ring, 102 R.I. 112, 114-15, 228 A.2d 582, 584 (1967); Louis v.

under civil process[53] or commitment under lunacy proceedings,[54] is special damage. Courts have also found certain interferences with property to be special damage.[55] Twenty-three states have either dispensed with the special damage requirement or never imposed it.[56] The Restatement (Second) of Torts does not include this requirement.[57]

Adherents of the English Rule stress the danger, inherent in the malicious prosecution action, of discouraging some honest litigants from pressing their claims.[58] According to these authorities, the special damage requirement mitigates that danger by reducing the number of malicious prosecution actions that can prevail.[59] Some courts argue that the English Rule's restrictive requirements promote judicial economy by preventing an interminable crossfire of suit and countersuit.[60] It has been asserted that an award of costs generally provides adequate compensation for the victim of a

Blalock, 543 S.W.2d 715, 718-19 (Tex. Civ. App. 1976); Petrich v. McDonald, 44 Wash. 2d 211, 215-16, 266 P.2d 1047, 1050 (1954); Schier v. Denny, 9 Wis. 2d 340, 344-45, 101 N.W.2d 35, 37-38 (1960). *See also* Bickel v. Mackie, 447 F. Supp. 1376, 1380-81 (N.D. Iowa 1978).

53. *See, e.g.*, Woodley v. Coker, 119 Ga. 226, 228, 46 S.E. 89, 90 (1903) (refers to malicious prosecution in civil context as "malicious use of legal process").

54. *See, e.g.*, Yelk v. Seefeldt, 35 Wis. 2d 271, 277-78, 151 N.W.2d 4, 7 (1967).

55. *See, e.g.*, Alvarez v. Retail Credit Ass'n, 234 Or. 255, 259, 381 P.2d 499, 501 (1963) (garnishment).

56. Turner v. J. Blach & Sons, 242 Ala. 127, 128, 5 So. 2d 93, 94 (1941); Ackerman v. Kaufman, 41 Ariz. 110, 112-14, 15 P.2d 966, 967 (1932); Leek v. Brasfield, 226 Ark. 316, 318-19, 290 S.W.2d 632, 633 (1956); Eastin v. Bank of Stockton, 66 Cal. 123, 126-27, 4 P. 1106, 1108-09 (1884); Slee v. Simpson, 91 Colo. 461, 464-65, 15 P.2d 1084, 1085 (1932); Calvo v. Bartolotta, 112 Conn. 396, 397, 152 A. 311, 311 (1930); Burchell v. Bechert, 356 So. 2d 377, 378-79 (Fla. Ct. App. 1978); McCardle v. McGinley, 86 Ind. 538, 540-41 (1882); Carhondale Inv. Co. v. Burdick, 67 Kan. 329, 336, 72 P. 781, 784 (1903); Graffagnini v. Shnaider, 164 La. 1108, 1111, 115 So. 287, 288 (1927); Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 261, 178 N.E.2d 485, 487 (1961); Brand v. Hinchman, 68 Mich. 590, 596-98, 36 N.W. 664, 667-68 (1888); O'Neill v. Johnson, 53 Minn. 439, 441, 55 N.W. 601, 601 (1893); Harvill v. Tabor, 240 Miss. 750, 753-54, 128 So. 2d 863, 864 (1961); Young v. Jack Boring's, Inc., 540 S.W.2d 887, 895 (Mo. Ct. App. 1976); McCormick Harvesting Mach. Co. v. Willan, 63 Neb. 391, 392-94, 88 N.W. 497, 497-98 (1901); Kolka v. Jones, 6 N.D. 461, 464-70, 71 N.W. 558, 559-61 (1897); Johnson v. Moser, 181 Okla. 75, 76, 72 P.2d 715, 716 (1937) (example of injury to "credit and reputation"); Cissons v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, 43, 186 S.E.2d 822, 825 (1972); Teesdale v. Liebschwager, 42 S.D. 323, 324-25, 174 N.W. 620, 621 (1919); Buda v. Cassel Bros., 568 S.W.2d 628, 631 (Tenn. Ct. App. 1978); Closson v. Staples, 42 Vt. 209, 214-22 (1869); Van Hunter v. Beckley Newspapers Corp., 129 W. Va. 302, 309-11, 40 S.E.2d 332, 336-37 (1946).

57. RESTATEMENT (SECOND) OF TORTS § 674, Comment e (1977) (wronged party must show material harm or violation of a legal right that would itself support action for damages).

58. *E.g.*, O'Toole v. Franklin, 279 Or. 513, 519, 569 P.2d 561, 564 (1977) (although the court expressed some doubt about the utility of the special damage requirement and intimated that it might not impose it if the case were one of first impression).

59. *See, e.g.*, Perry v. Arsham, 101 Ohio App. 285, 287, 136 N.E.2d 141, 143 (1956).

60. *See, e.g., id.*

groundless suit, so that he is not justified in seeking additional relief unless he has sustained some extraordinary injury.[61]

Proponents of the Restatement Rule, although conceding that courts should be open to all who have legitimate grievances, point out that there are also important interests in deterring meritless suits[62] and compensating those injured by them.[63] Under this view, the malicious prosecution plaintiff's burden of showing malice and lack of probable cause provides adequate protection for honest litigants.[64] The risk of a protracted exchange of suits and countersuits is minimized, it is argued, by the difficulty of proving the basic elements of the tort; such additional impediments as the special damage requirement are not needed.[65] Moreover, the interest in judicial economy—invoked by some English Rule supporters to justify restrictions on countersuits[66]—is equally good ammunition for Restatement Rule advocates, who emphasize deterrence of groundless suits as a vital policy consideration.[67] Finally, authorities that espouse the Restatement Rule reject the assertion that the award of costs ordinarily provides sufficient redress for one subjected to a groundless suit. They note that costs, as defined for most purposes in the United States,[68] are relatively trivial in comparison with the total expense of defending a suit.[69]

Even when the elements of malicious prosecution have been proved, the advice-of-counsel defense may bar recovery. This defense[70] consists of a showing that the malicious prosecution defendant,[71] in instituting the original suit, followed the advice of apparently competent counsel who acted in a professional capacity and to whom the defendant[72] presented the facts accurately and completely.[73] Under these circumstances, courts have often stated, the

61. *See, e.g., id.*

62. *See, e.g.*, Norton v. Hines, 49 Cal. App. 3d 917, 922, 123 Cal. Rptr. 237, 240 (1975).

63. *See, e.g.*, Closson v. Staples, 42 Vt. 209, 215-22 (1869).

64. *See, e.g.*, W. PROSSER, *supra* note 5, § 120, at 851.

65. *See, e.g.*, Note, *Physician Countersuits*, *supra* note 1, at 608.

66. *See* text accompanying note 60 *supra.*

67. *See* text accompanying note 62 *supra.*

68. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966). *See also* text accompanying notes 207-15 *infra.*

69. *See, e.g.*, W. PROSSER, *supra* note 5, § 120, at 851.

70. The term "defense," though frequently used in the literature, may be too strong. Some courts prefer to regard advice of counsel simply as evidence on the question of probable cause. The practical result is often the same. *See, e.g.*, Warner v. Gulf Oil Corp., 178 F. Supp. 481, 482 (M.D.N.C. 1959) (advice of competent counsel after full disclosure of facts held conclusive on issue of probable cause).

71. The plaintiff in the underlying suit.

72. *See* note 71 *supra.*

73. *See, e.g.*, Alexander v. Alexander, 229 F.2d 111, 117 (4th Cir. 1956); Johnson v.

client will not be held liable for the attorney's derelictions.[74] Nevertheless, a lawyer against whom the elements of the malicious prosecution action are proved can be held liable as a joint tortfeasor with his client.[75] Lack of malice does not always insulate the attorney from liability. If he has no reasonable basis for thinking that there is probable cause to bring suit and is cognizant of his client's malicious motives in instituting the proceeding, the attorney may be held liable even though malice on his part has not been demonstrated.[76] Unfortunately, few courts have addressed this question.[77]

B. Some Variants: Abuse of Process and the Proposed Counterclaim for Groundless Suit

An action for abuse of process lies against one who makes use of process for an improper purpose,[78] causing damage to another.[79] Lack of probable cause need not be shown; nor is it necessary that the underlying action end in favor of the original defendant.[80] Despite these salient differences between abuse of process and malicious prosecution, courts occasionally state erroneously that there is no distinction between the two.[81] There is controversy over

Moser, 181 Okla. 75, 76, 72 P.2d 715, 716-17 (1937).

74. *E.g.*, Weidlich v. Weidlich, 177 Misc. 246, 252, 30 N.Y.S.2d 326, 332 (Sup. Ct. 1941).

75. *E.g.*, Munson v. Linnick, 255 Cal. App. 2d 589, 595-96, 63 Cal. Rptr. 340, 344 (1967) (attorney brought suit for exaggerated sales price, knowing the claim's falsity, in effort to make purchaser pay that amount).

76. *E.g.*, Hoppe v. Klapperich, 224 Minn. 224, 241-42, 28 N.W.2d 780, 792 (1947).

77. Courts have not been receptive to the argument that liability of an attorney to an opposing party can be predicated on a simple negligence standard. In Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978), the court stated:

> Plaintiff correctly notes . . . the general trend toward relaxation of privity requirements where third parties rely to their detriment on the conduct of a professional. . . . However, in the present case there is no question of reliance of third parties who are adversaries in judicial proceedings. The attorney owes his primary and paramount duty to his client. The very nature of the adversary process precludes reliance by opposing parties. While it is true that the attorney owes a general duty to the judicial system, it is not the type of duty which translates into liability for negligence to an opposing party where there is no foreseeable reliance by that party on the attorney's conduct.

Id. at 1381. *See also* O'Toole v. Franklin, 279 Or. 513, 524, 569 P.2d 561, 567 (1977) (leaving open the possibility of an injured opposing party's action against a negligent attorney, but holding that any such action could only reach injuries already covered by the malicious prosecution tort).

78. The claim on which the process is based may be legitimate. Baird v. Aluminum Seal Co., 250 F.2d 595, 600 (3d Cir. 1957). Some courts have defined abuse of process as the use of justified process for an unjustifiable purpose. *See, e.g., id.*

79. *See generally* W. PROSSER, *supra* note 5, at § 121.

80. *See id.* at p. 856.

81. *E.g.*, Delk v. Colonial Fin. Co., 118 Ohio App. 451, 454, 194 N.E.2d 885, 887 (1963).

whether injuries to business and reputation are compensable under abuse of process, as they generally are in a malicious prosecution action,[82] or whether recovery is limited to damage to person and property.[83] Advice of counsel is not a defense to an action for abuse of process.[84] An attorney who encourages or collaborates with others in an abuse of process, knowing of the improper purpose, may be held liable as a joint tortfeasor.[85]

A valuable student Note has called for the supersession of the malicious prosecution action by a compulsory counterclaim[86] for groundless suit.[87] The author observes that in England costs, because they encompass attorney's fees,[88] constitute a much more potent deterrent to wrongful suit than they do in the United States.[89] Subsequent actions of malicious prosecution were developed in England only for those special cases in which the normal internal sanction of costs would be inadequate.[90] In this country, by contrast, the atrophy of the costs sanction[91] has forced the malicious prosecution action to carry a disproportionate share of the burden of deterring false suits and compensating their victims.[92]

The student author criticizes this heavy reliance on subsequent litigation, pointing out that the person subjected to groundless litigation may lack the resources to prosecute a countersuit.[93] In addition, the expenses of the countersuit are normally not recoverable.[94] The meritless claimant, whether he wins or loses the countersuit, has tied up the opponent in litigation for a substantial period and may consider that delay to be worth the risk of incurring liability for malicious prosecution.[95] Honest original claimants are potentially harassed by meritless countersuits. Determination on the groundlessness issue within the underlying action, however,

82. *See* note 34 *supra* and accompanying text.

83. *See* Note, *Physician Countersuits, supra* note 1, at 620-21.

84. This result follows from the fact that probable cause is not relevant to the question whether there has been an abuse of process. *See* W. PROSSER, *supra* note 5, § 121, at 856.

85. Note, *Physician Countersuits, supra* note 1, at 621.

86. The counterclaim would be like those envisaged by FED. R. CIV. P. 13(a). If the defendant refrained from bringing the counterclaim at the outset, he would be barred from raising the claim in a subsequent suit.

87. Note, *Groundless Litigation, supra* note 1, at 1234 n.110.

88. *See generally* Gold, *supra* note 1.

89. Note, *Groundless Litigation, supra* note 1, at 1229.

90. *Id.*

91. *See id.* at 1229 n.79.

92. *Id.* at 1229-30.

93. *Id.* at 1230-31.

94. *Id.* at 1220 n.15.

95. *Id.* at 1231.

would at least shorten the period of exposure to potential countersuit and attendant uncertainty.[96] Finally, reliance on subsequent actions results in wasteful relitigation of identical or nearly identical facts.[97]

For these reasons, the student author concludes, the internal sanction of a compulsory counterclaim for groundless suit would be preferable to the present approach.[98] Proof of the counterclaim would require a showing that the original claimant lacked probable cause for suit; resolution of this issue would largely coincide with the case on the merits so that duplication of proof would be minimized.[99] The original defendant would have the burden of showing such a paucity of reasonably reliable evidence that no reasonable person could have believed the action might prevail.[100] The judge's decision on the question of probable cause would follow the decision on the merits of the underlying suit.[101] Compensatory damages would be awarded for any injury caused by the unfounded suit.[102] Malice would be an aggravating circumstance possibly justifying punitive damages.[103] The author suggests that if the counterclaim fails, the original plaintiff should have a similar cause of action for groundless defense, subject to the burden of showing lack of probable cause for the counterclaim.[104]

C. Critique

The action for malicious prosecution, whether defined according to the English or the Restatement Rule, is both an unsatisfactory means of discouraging unfounded litigation and an inadequate compensatory device. The plaintiff in a malicious prosecution suit bears a heavy burden of proof.[105] This fact is not in itself objectionable because there is an important policy interest in protecting honest litigants. Even if the plaintiff sustains his burden, however, there has been considerable redundancy of proof,[106] and the plaintiff has suffered delay and expense that could have been avoided by a

96. *Id.*
97. *Id.* at 1232.
98. *Id.* at 1234.
99. *Id.*
100. *Id.* at 1234-35 n.115.
101. *Id.* at 1235.
102. *Id.*
103. *Id.* at 1235 n.120.
104. *Id.* at 1237 n.130.
105. *See* text accompanying notes 31-57 *supra.*
106. *See* text accompanying note 97 *supra.*

system of sanctions internal to the underlying suit.[107] The action for abuse of process is subject to the same criticisms.

The arguments for the proposed counterclaim for groundless suit[108] are cogent. One drawback of such an approach is the potential for confusion that results from the fact that although proof of the case on the merits and proof on the issue of probable cause would largely coincide, the original defendant would have to meet a stricter standard to show lack of probable cause than to prevail on the merits.[109] The risk of confusion is reduced, however, by the requirement that probable cause be an issue for the judge, as is almost always the case in the traditional malicious prosecution action.[110] A greater problem is presented in the following hypothetical situation: Defendant brings an unsuccessful counterclaim for groundless suit; plaintiff then files an unsuccessful claim for groundless defense; defendant then counterclaims alleging the groundlessness of the groundless defense claim; and so on *ad infinitum*. Since it is less time-consuming and expensive to bring a claim within an existing action than to bring a new suit, the disincentives to a duel of claim and counterclaim would be less than the disincentives under the present system to a duel of suit and countersuit. The trial judge would have to be allowed considerable discretion to call a halt to the skirmish in such a situation.

These reservations notwithstanding, the balance of the arguments weighs in favor of the proposed counterclaim or a similar vehicle. The exponent of that approach, however, confined his attention to the field of malicious prosecution. This Note will seek to draw upon the lessons learned in other procedural contexts, but will draw upon the proposed counterclaim as an integral part of a unified system.

III. FEDERAL RULE OF CIVIL PROCEDURE 11

A. Background and Applications

Federal Rule of Civil Procedure 11 provides in part that an attorney's signature on a pleading[111] "constitutes a certificate by

107. *See* text accompanying notes 93-95 *supra*.

108. *See* text accompanying notes 93-103 *supra*.

109. *See* Note, *Groundless Litigation*, *supra* note 1, at 1234-35.

110. *Id.* at 1235 n.116.

111. The rule requires that at least one attorney of record sign every pleading of a party represented by counsel. A party who proceeds *pro se* must sign his own pleading. Except as otherwise mandated, for example, by FED. R. CIV. P. 23.1 relating to derivative actions by shareholders, pleadings need not be verified or accompanied by affidavits. FED. R. CIV. P. 11.

him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."[112] An unsigned pleading, or one signed with intent to defeat the purpose of Rule 11, "may be stricken as sham and false."[113] In such a case the action "may proceed as though the pleading had not been served."[114] An attorney who willfully violates the rule is subject to "appropriate disciplinary action."[115]

The important issues for this Note are the meaning of "good ground" and the nature of the sanctions available in a given case. One can conceive of many ways in which a pleading could lack good ground. At one extreme, the attorney might know that the facts alleged were untrue.[116] Alternatively, the facts alleged, though not positively known to be untrue, might be based solely on speculation—as when the plaintiff, unsure who assaulted him, picked a name from the telephone directory on a hunch and sued that person.[117] Between these egregious cases and the case in which the allegations have good ground by almost any definition lie innumerable gradations; at some point along this spectrum, the line of demarcation between lacking good ground and having good ground must be drawn. A separate but related question arises when the facts alleged, though not false or purely speculative, do not by any reasonable inference support the legal proposition on behalf of which they are offered.[118]

It is also appropriate to consider some of the effects Rule 11 does *not* have, though an overly literal reading might suggest that it does. The right to make alternative and inconsistent allegations, at least when a genuine uncertainty exists,[119] is assured elsewhere in the Federal Rules of Civil Procedure;[120] hence, a pleading will not be held to lack good ground solely because it contains such allegations. Rule 11 provides that the attorney's signature consti-

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *See, e.g., In re* Lavine, 126 F. Supp. 39 (S.D. Cal.), *rev'd on other grounds sub nom. In re* Los Angeles County Pioneer Soc'y, 217 F.2d 190 (9th Cir. 1954).
117. Risinger, *supra* note 1, at 54. *Cf.* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973).
118. An action may be dismissed under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The question for our purpose is whether it is possible to advance a legal position so frivolous as to warrant disciplinary action under Rule 11.
119. *See, e.g.*, City of Kingsport v. Steel & Roof Structure, Inc., 500 F.2d 617 (6th Cir. 1974).
120. FED. R. CIV. P. 8(e)(2).

tutes a certificate by him that the pleading is "not interposed for delay."[121] As a practical matter, this provision should probably be read "not interposed *solely or primarily* for delay."[122] It is most unlikely that the sanctions of Rule 11 would be imposed by the court simply because tactical considerations figured peripherally in the filing of an otherwise meritorious pleading.[123] Such a literalistic approach is especially unlikely in view of the comparative reluctance of courts to resort to Rule 11 at all.[124] Of course, if the strictures against pleadings interposed for delay are given the modified interpretation suggested above, this portion of the rule is largely superfluous because a pleading filed solely for delay is groundless by almost any definition and can be dealt with under the good ground requirement.[125]

In relatively few cases, however, has Rule 11 figured prominently[126] and in even fewer have violations been found.[127] It is probably futile to attempt to elucidate a general definition of the phrase "good ground" on the basis of such meager decisional tradition. Instead, several representative cases will be discussed to illustrate fact patterns that may lead to a finding of lack of good ground and also to exemplify the sanctions that may be imposed.

The earliest reported decision finding a Rule 11 violation is *American Automobile Association v. Rothman.*[128] Plaintiffs AAA and

121. FED. R. CIV. P. 11.

122. *See* Risinger, *supra* note 1, at 8.

123. *See id.*

124. *See id.* at 34-35.

125. Risinger cites this redundancy as an example of what he euphemistically terms the "less than careful draftsmanship" of Rule 11. *Id.* at 8 n.20.

126. The number cannot be stated with any exactitude because it is often very difficult to determine whether Rule 11 is one of the grounds for a given decision or whether the reference to the rule is merely precatory. *See, e.g.*, Misegades, Douglas, & Levy v. Sonnenberg, 76 F.R.D. 384, 385-86 (E.D. Va. 1976).

127. This author has found only fifteen cases that have held a pleading to violate Rule 11: Incomco v. Southern Bell Tel. & Tel. Co., 558 F.2d 751 (5th Cir. 1977); Bertucelli v. Carreras, 467 F.2d 214 (9th Cir. 1972); Nemeroff v. Ahelson, 469 F. Supp. 630 (S.D.N.Y. 1979); Ferrer Delgado v. Sylvia de Jesus, 440 F. Supp. 979 (D.P.R. 1976); Misegades, Douglas, & Levy v. Sonnenberg, 76 F.R.D. 384 (E.D. Va. 1976) (*but see* note 126 *supra*); Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975 (E.D. Pa. 1973); Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc., 61 F.R.D. 8 (D.V.I. 1973), *rev'd on other grounds*, 499 F.2d 1391 (3d Cir. 1974); Heart Disease Research Foundation v. General Motors Corp., 15 Fed. R. Serv. 2d 1517 (S.D.N.Y.), *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972); Lewis v. Wells, 325 F. Supp. 382 (S.D.N.Y. 1971); Gulf Oil Corp. v. Bill's Farm Center, Inc., 52 F.R.D. 114 (W.D. Mo. 1970), *aff'd per curiam*, 449 F.2d 778 (8th Cir. 1971); Spencer v. Dixon, 290 F. Supp. 531 (W.D. La. 1968); Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961); Nichols v. Alker, 126 F. Supp. 679 (E.D.N.Y. 1954), *aff'd*, 231 F.2d 68 (2d Cir. 1956); *In re* Lavine, 126 F. Supp. 39 (S.D. Cal.), *rev'd on other grounds sub nom. In re* Los Angeles County Pioneer Soc'y, 217 F.2d 190 (9th Cir. 1954); American Auto. Ass'n v. Rothman, 104 F. Supp. 665 (E.D.N.Y. 1952), *modifying* 101 F. Supp. 193 (E.D.N.Y. 1951).

128. 104 F. Supp. 655 (E.D.N.Y. 1952), *modifying* 101 F. Supp. 193 (E.D.N.Y. 1951).

Automobile Club of New York sued a filling station operator for trademark infringement and unfair competition.[129] Defendant pled as a defense plaintiffs' alleged violation of the Fair Trade Act of New York, but when questioned on deposition stated that she "wouldn't know anything" about plaintiffs' violation of the Act or any injury plaintiffs were inflicting upon her business.[130] Defendant also filed a counterclaim alleging that plaintiffs abrogated a contract for the display of their insignia at her filling station and for rebates by her to AAA and Club members.[131] At the time the answer and counterclaim were filed, defendant's attorney had not seen any such contract running to defendant.[132] About six months later, and roughly two months prior to the adjudication of plaintiffs' motions for summary judgment and dismissal of the counterclaim, defendant's attorney definitely ascertained that the alleged contract never existed, but took no steps to withdraw the counterclaim.[133] The court granted plaintiffs' motion for judgment, dismissed the counterclaim, and then undertook to determine whether defendant's attorney had violated Rule 11.[134] The attorney was first afforded an opportunity to submit an explanatory statement to the court. When his statement "proved unsatisfactory in form and substance,"[135] he was invited to, and did, appear in person and make a statement for the record.[136] As to the inconsistency between the allegation that plaintiffs had violated the Fair Trade Act and defendant's ignorance of any such interference with her business, defendant's attorney referred to "trade confusion" and asserted that he had really meant to rely on a different statute.[137] The court, though unimpressed with this "justification,"[138] concluded that further Rule 11 inquiry was not warranted with respect to the Fair Trade Act allegation because there had been at least "a semblance of an issue of law."[139] As to the counterclaim, defendant's attorney asserted lamely that he had "thought of" withdrawing the breach of contract allegation after he discovered that no such contract had existed.[140] The court, observing that one purpose of Rule 11 is "to

129. 101 F. Supp. at 193.
130. *Id.* at 195.
131. *Id.* at 193-94.
132. *Id.* at 196.
133. 104 F. Supp. at 656.
134. 101 F. Supp. at 195, 197.
135. 104 F. Supp. at 655.
136. *Id.*
137. *Id.* at 656.
138. *Id.*
139. *Id.*
140. *Id.*

keep out of a case issues that are known to be false by the attorney who signs a given pleading," concluded that "the violation of the Rule in this case is clear and unmistakable."[141] Consequently, the court ordered its opinion filed separately in the office of the Clerk of Court and indexed against the attorney's name "so that, in the event that his professional conduct in any other connection shall become a subject of inquiry, this case and this record can be referred to for such instruction as it [*sic*] may yield."[142]

Rothman is an interesting case for several reasons. First, it can be interpreted as imposing a requirement of "continuing certification"—a requirement that if an attorney discovers *after* filing a pleading that it lacks good ground, he must take steps to amend or to withdraw it or be treated as if he had initially filed without good ground. Although this seems logical,[143] the continuing certification requirement is by no means clear from the face of Rule 11.[144] Second, the court's treatment of the Fair Trade Act allegation illustrates the general reluctance to impose the sanctions of Rule 11 when there is any reasonably colorable (or, in this instance, any remotely colorable) basis for the pleading at issue.[145] Finally, the court's disciplinary measures—essentially a reprimand and a filing of the rebuke for future reference—seem rather anemic under the circumstances. As a result of the conduct of defendant's attorney, the court was called upon to adjudicate a counterclaim that the attorney knew to be based on a nonexistent contract. This situation is close to a polar case of groundlessness, and it is questionable whether a mere reprimand, albeit indexed next to the attorney's name for future reference, is either an adequate penalty or an adequate deterrent.

In re Lavine[146] was a disciplinary proceeding against an attorney who had requested a federal court, in the exercise of its bankruptcy jurisdiction, to enjoin a state court from proceeding in the dissolution of his client, the Los Angeles County Pioneer Society.[147] In obtaining the injunction, the attorney made repeated and extensive representations that certain funds of the Pioneer Society were held in trust for it by the Historical Society of Southern Califor-

141. *Id.*
142. *Id.*
143. *See* Risinger, *supra* note 1, at 58-59.
144. *See* text accompanying notes 111-15 *supra.*
145. *See* text accompanying notes 137-39 *supra.*
146. 126 F. Supp. 39 (S.D. Cal.), *rev'd on other grounds sub nom. In re* Los Angeles County Pioneer Soc'y, 217 F.2d 190 (9th Cir. 1954).
147. 126 F. Supp. at 40-41.

nia.[148] He sought to have the Pioneer Society, after payment of its debts from the funds in the Historical Society's possession, reinstated in the possession of those assets.[149] The attorney also induced the federal court to issue an injunction restraining the Historical Society from disposing of the assets it allegedly held in trust for the Pioneer Society.[150] He failed to disclose, however, that all of the claims against the Pioneer Society had already been disallowed by the state court in the dissolution proceedings.[151] Moreover, the federal court discovered after issuing the injunctions that the assets held by the Pioneer Society had been adjudged four years earlier to constitute a public trust fund for charitable purposes, that the Historical Society had been appointed successor trustee of all those assets, and that the highest court of the state had affirmed the decision divesting the Pioneer Society of title to the funds.[152] The federal court observed: "Any man in the street . . . would presumably have a better-grounded legal claim to this trust fund [than the Pioneer Society]; at the very least . . . the bar of *res judicata* . . . would not confront his claim."[153] These facts were concealed by the attorney Lavine in seeking the injunctions.[154]

After condemning Lavine's conduct as "incredibly callous chicane and deceit,"[155] the federal court turned to a consideration of "appropriate disciplinary action" under Rule 11.[156] It noted that Lavine had been convicted of the felony of attempted extortion twenty-four years earlier. Although he had been pardoned by the Governor, the court stated that the conviction, considered in conjunction with Lavine's present conduct, shed light upon his moral fitness for the practice of law.[157] Consequently, the court disbarred Lavine for his "willful violation of Rule 11," his "willful and deliberate fraud" on the court, and his "willful and deliberate abuse" of the court's injunctive processes.[158] The Ninth Circuit reversed the order of disbarment on procedural due process grounds,[159] but did not challenge the district court's premise that disbarment is sometimes an appropriate disciplinary measure under Rule 11.

148. *Id.* at 40.
149. *Id.*
150. *Id.* at 41.
151. *Id.* at 42.
152. *Id.* at 42-43.
153. *Id.* at 50.
154. *Id.* at 42-43, 50.
155. *Id.* at 47.
156. *Id.* at 48-51.
157. *Id.* at 49-50.
158. *Id.* at 51.
159. *In re* Los Angeles County Pioneer Soc'y, 217 F.2d 190, 192-94 (9th Cir. 1954).

Although Lavine's misdeeds were more elaborate than those of defendant's counsel in *American Auto. Ass'n v. Rothman*,[160] the difference is one of degree rather than kind. In both cases, the attorneys' conduct led the courts to confront meritless claims. While Lavine's misrepresentations and concealments showed somewhat greater signs of calculation than did those of his counterpart in *Rothman*, it strains credulity to suggest that this difference, coupled with Lavine's twenty-four-year-old criminal conviction, justifies the tremendous disparity between the sanctions imposed on Lavine and the slap on the wrist administered to the errant attorney in *Rothman*.

In *Nichols v. Alker*[161] plaintiffs alleged fraud and conspiracy in the reorganization and consolidation of a corporation.[162] The complaint asserted that certain defendants were officers or directors of the business during the reorganization; actually, these persons were neither officers nor directors at the time alleged, a fact ascertainable from public records.[163] The complaint also alleged that one of the defendants was an employee of the Securities and Exchange Commission at the time of certain alleged negotiations, though the Commission's records revealed that this was chronologically impossible.[164] According to the complaint, one defendant knowingly gave misleading testimony to the Commission during the reorganization proceedings; in fact, the individual never testified.[165] Finally, plaintiff inaccurately alleged that the instant suit was authorized by certain common stockholders of the corporation, when their authorization actually extended only to the original reorganization proceedings concluded four years earlier.[166] Pursuant to Rule 11, the court struck the complaint as sham.[167] It declined to discipline plaintiff's counsel, however, noting that under local rules of court the chief judge had charge of all matters relating to discipline of attorneys.[168] The court left open the possibility of proceedings against plaintiff's counsel in conformity with the rules of the court,[169] but no record exists whether such proceedings were ever instituted.

160. *See* text accompanying notes 130-40 *supra*.
161. 126 F. Supp. 679 (E.D.N.Y. 1954).
162. *Id.* at 680.
163. *Id.* at 683.
164. *Id.*
165. *Id.*
166. *Id.* at 684.
167. *Id.*
168. *Id.*
169. *Id.*

Some of the misstatements in the *Nichols* complaint may have stemmed from a failure of plaintiff's attorney to undertake minimal investigation, rather than from willful perpetration of or acquiescence in a falsehood. Hence, in this respect the case may be a hybrid. The issue of the duty of counsel to investigate the veracity of a pleading is posed more clearly by *Kinee v. Abraham Lincoln Federal Savings & Loan Association.*[170]

Plaintiffs in *Kinee* brought an antitrust action against various mortgage lenders.[171] The conduct complained of was use of the escrow method.[172] Plaintiffs sued every individual and institution listed in the local telephone directory as a mortgage broker; more than one-fourth of these parties did not practice the escrow method and were dismissed from the suit.[173] The court commented:

> The plaintiffs' attorneys set out a dragnet. Having put a large number of parties to the inconvenience, expense and possible anxiety of being sued, they then were able conveniently to separate the wheat from the chaff . . . . They chose to inconvenience a large number of parties rather than inconvenience themselves with proper investigation as to who the proper parties would be.[174]

The court condemned the use of a complaint to discover which parties, in a class of potential defendants, are appropriate objects of suit.[175] It stated, however, that if plaintiffs' counsel had undertaken reasonable investigation, and some of the mortgage lenders had failed to cooperate, counsel's use of the complaint to ferret out the proper defendants might have been justified.[176] On the facts presented, the court concluded that plaintiffs' attorneys had violated Rule 11 insofar as the complaint extended to lenders who did not use the escrow method; the litigation expenses incurred by those parties were taxed to plaintiffs' attorneys.[177] Apart from its allusion to Rule 11, the court did not discuss the authority for its choice of sanctions.[178]

Kinee carries the application of Rule 11 beyond the cases previously discussed. Plaintiffs' counsel in *Kinee* did not know that the claims lacked good ground with respect to any *specific* defendant; counsel knew only that there was a class of parties, some of

170. 365 F. Supp. 975 (E.D. Pa. 1973).
171. *Id.* at 977.
172. *Id.*
173. *Id.* at 982.
174. *Id.*
175. *Id.* at 983.
176. *Id.*
177. *Id.*
178. *See id.*

whom were arguably proper defendants and some of whom were not, and in order to determine which were which they filed their complaint against the whole class. The court properly condemned this blunderbuss method as an abuse of the judicial system, at least when plaintiffs had not undertaken reasonable investigation first. The sanction imposed by the *Kinee* court has many attractive features. It provides full compensation to those who are injured by the attorney's transgression, but does not raise the risk of striking an otherwise legitimate complaint.[179] Most courts, however, have been reluctant to impose attorneys' fees as a sanction.[180]

In *Ferrer Delgado v. Sylvia de Jesus*[181] plaintiff sought to have a federal district court vacate an adverse judgment entered in a Puerto Rico court and enjoin the Commonwealth of Puerto Rico from enforcing the judgment.[182] Plaintiff made this attempt in the face of the federal anti-injunction statute,[183] which prohibits federal courts from enjoining proceedings in state courts except in certain special circumstances.[184] Although plaintiff contended that his action was a civil rights suit fitting within a recognized exception to the anti-injunction statute, the court held that the complaint failed to meet the prerequisites for a civil rights action.[185] No conspiracy was alleged, no state official was a defendant, and the only parties who could be enjoined were judges and other judicial officers cloaked with immunity in the performance of their duties.[186] Moreover, the complaint did not present any other federal question.[187] Relying primarily on a Puerto Rican procedural rule but also citing Federal Rule of Civil Procedure 11, the court assessed defendant's reasonable counsel fees against plaintiff.[188] The opinion does not mention the imposition of any sanctions upon plaintiff's attorney.

Ferrer Delgado raises the issue of legal, as opposed to factual, frivolity. Extreme caution is necessary in this field lest good faith arguments for a modification of existing law be penalized or discouraged. There are probably no general standards that can be prescribed. The potential range of situations is so great that an ad hoc approach, if not intellectually satisfying, is perhaps the least

179. *Cf.* Risinger, *supra* note 1, at 43 (praising *Kinee* approach).
180. *See* text accompanying notes 217-21 *infra.*
181. 440 F. Supp. 979 (D.P.R. 1976).
182. *Id.* at 979, 981.
183. *See id.* at 981.
184. *Id.*
185. *Id.* at 982.
186. *Id.*
187. *Id.*
188. *Id.*

dangerous option, provided that it is coupled with a general admonition to the courts to find legal frivolity only in instances of extreme abuse.[189] In *Ferrer Delgado* the finding of frivolity warranting imposition of sanctions was justified. The case may be criticized, however, for imposing defendant's attorneys' fees solely on plaintiff without exacting any penalty from plaintiff's attorney. It scarcely seems fair that plaintiff, presumably untutored in the law, should bear the full brunt of the punishment when the lawyer who drafted the meritless complaint escapes any discipline.

In *Nemeroff v. Abelson*[190] plaintiff alleged that defendants, who included a well-known financial columnist, a prominent financial publishing house, and various stock dealers, had engaged in a conspiracy to manipulate the price of a stock through the dissemination of unfavorable reports.[191] These contentions were based almost entirely on gossip circulating among persons who held substantial positions in the stock concerned.[192] The only shadow of independent corroboration was the existence of ongoing investigations by the New York Stock Exchange and the Securities and Exchange Commission into the alleged manipulation; these investigations, moreover, had been initiated at the behest of the same persons who indicated to plaintiff's counsel that defendants were conspiring to manipulate the stock.[193] More than a month before the complaint was filed, plaintiff's attorney was informed of the Stock Exchange's tentative conclusion that the accusations were unfounded.[194] Eventually a stipulation and order of dismissal with prejudice of plaintiff's action were filed, subject to defendants' right to move for an award of attorneys' fees and other expenses.[195] They so moved.[196]

The federal district court first summarized the "evidence" plaintiff's counsel had presented in his affidavit.[197] It pointed out that most of the items recited in the affidavit were inadmissible hearsay and that the few admissible items could not possibly be tortured into a cause of action.[198] Although the court conceded that plaintiff and others believed defendants were guilty of the conspiracy charged, it stressed the responsibility of plaintiff's counsel to

189. *See* text accompanying notes 18-19 *supra.*
190. 469 F. Supp. 630 (S.D.N.Y. 1979).
191. *Id.* at 631-32.
192. *Id.* at 633-35.
193. *Id.* at 635-36.
194. *Id.* at 634.
195. *Id.* at 632.
196. *Id.*
197. *Id.* at 637-39.
198. *Id.* at 639.

refrain from making allegations that were unsupported by legal evidence.[199] The suit was motivated, the court reasoned, by a desire to generate publicity detrimental to defendants.[200] Regarding whether to assess costs against plaintiff, the court noted

> [t]he ultimate question concerning taxing of attorneys' fees and expenses as costs against plaintiff and/or his counsel under Rule 11, . . . [Section] 9(e) of the Securities Exchange Act of 1934, . . . or the court's equitable power is whether the plaintiff and/or counsel instituted the action "in bad faith, vexatiously, wantonly or for oppressive reasons."[201]

The court emphasized the devastating effect that allegations like plaintiff's could have on the reputations and livelihoods of the publishing defendants[202] and concluded that by filing such a claim with no significant evidential basis, plaintiff and his attorney proceeded "in bad faith, vexatiously, wantonly, or for oppressive reasons."[203] The court awarded the publishing defendants about one-fourth of the attorneys' fees sought and taxed this amount against plaintiff and his counsel.[204] In contrast, no attorneys' fees were awarded to the defendant stock dealers.[205] The court reasoned that because no special propensity for harm to the stock dealers' reputations was apparent, bad faith with respect to those defendants had not been shown. Absent such a showing, the court concluded, an award of attorneys' fees and related expenses was not proper.[206]

Nemeroff in effect grafted onto Rule 11 the proviso that the aggrieved party must show bad faith before a court will assess attorneys' fees as a sanction. Interestingly, the cases cited for this novel proposition dealt with the federal bad faith exception to the general rule against recovery of attorneys' fees[207] rather than specif-

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199. *Id.* at 635-36.

200. *Id.* at 635.

201. *Id.* at 637 (citations omitted).

202. *Id.*

203. *Id.* at 640.

204. *Id.* at 642. The court found that an award of $50,000 in attorneys' fees and other expenses was "sufficient," *id.*, even though the publishing defendants had shown expenditures of about $200,000. *Id.* at 632. The court did not explain why it considered a partial award sufficient.

205. *Id.* at 640-41.

206. *Id.*

207. *Id.* at 640. The federal bad faith exception is beyond the scope of this Note. Briefly stated, the so-called American Rule requires parties to bear their own counsel fees absent a statutory provision, contractual agreement, or judicial exception to the contrary. *See generally* note 68 *supra.* One of the judicial exceptions allows an award of attorneys' fees to be assessed against a party who acts in bad faith or for "vexatious, wanton, or oppressive reasons." *See, e.g.*, F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1087-88 (2d Cir. 1977). For a catalogue of other judicially created exceptions to the American Rule, as well as express Congressional provisions for the allowance of attorneys' fees under certain federal

ically with Rule 11. *Kinee* had awarded attorneys' fees under Rule 11 without requiring a showing of bad faith.[208] *Nemeroff*'s wholesale importation of the jurisprudence of the federal bad faith exception into Rule 11 reflects a commendable desire to unify a fragmented area of the law, but it raises many problems. If Rule 11 in itself provides no basis for an assessment of attorneys' fees,[209] the "willful" violation for which an attorney "may be subjected to appropriate disciplinary action" under the rule[210] must be something less than the bad faith required by *Nemeroff*. The *Nemeroff* court also noted that the federal bad faith standard is akin to the malice requirement in the action for malicious prosecution.[211] This observation is accurate,[212] but in a malicious prosecution action the malice requirement functions in tandem with the separate requirement of lack of probable cause. The complaining party may show the one and yet fail to prove the other.[213] By contrast, the federal bad faith exception to the general rule against assessing attorneys' fees subsumes an objective standard of groundlessness; the claim must be "entirely without color"[214] and asserted "wantonly, for purposes of harassment or delay, or for other improper reasons."[215] "Entirely without color" may or may not be a more demanding standard than "lacking probable cause." In sum, *Nemeroff*'s juxtaposition of differing standards, each bearing the imprint of a distinct decisional tradition, bears as much potential for confusion as for enlightenment. This does not mean that a unitary view of the problem of groundless suit is inappropriate, but rather that a comprehensive legislative approach is more appropriate than a piecemeal judicial one.

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statutes, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-62 & nn. 33-35 (1975).

208. *See* text accompanying notes 171-78 *supra*. It may be argued that the plaintiffs in *Kinee* in fact acted in bad faith with respect to the wrongfully sued mortgage lenders (i.e. those who did not practice the escrow method), but a reading of the *Kinee* opinion indicates that the court felt Rule 11 in itself was an adequate basis for the sanction it ordered.

209. *Nemeroff* has been cited with approval by the Ninth Circuit in United States v Standard Oil Co., 603 F.2d 100, 103 n.4 (9th Cir. 1979).

210. *See* note 6 *supra* and text accompanying note 115 *supra*.

211. 469 F. Supp. at 640.

212. *Compare* Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977) (claim is in bad faith when asserted without color and "wantonly, for purposes of harassment or delay, *or for other improper reasons*") (emphasis added) *with* RESTATEMENT (SECOND) OF TORTS § 676 (1977) (claim brought primarily for purposes other than an adjudication of the merits may constitute grounds for liability).

213. *See* text accompanying notes 32-48 *supra*.

214. Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

215. *Id.*

B. Summary and Critique

Rule 11, both as formulated and as applied, has many shortcomings. The vagueness of the phrase "appropriate disciplinary action" is mirrored by a vagueness in the case law as to the proper sanctions, as seen in the comparision of *Rothman* and *In re Lavine*.[216] Imposition of counsel fees is potentially the most effective sanction against an attorney who violates the rule, but *Nemeroff* has confused this topic by inserting into Rule 11, as a prerequisite for imposition of attorneys' fees, a requirement that the judicially fashioned standards of the federal bad faith exception be met.[217] Moreover, the current trend is toward the view that the federal bad faith exception should be construed narrowly and applied sparingly.[218] This development certainly does not bode well for the viability of the counsel fees sanction. Rule 11 has more fundamental defects as well. The language of the rule is punitive; it addresses, as it should, the problem of deterrence of meritless suits, but there is no explicit mention of the problem of compensation.[219] Although some courts have employed the rule for compensatory purposes as well as deterrence,[220] nothing on the face of the rule makes this approach mandatory. Moreover, the rule's sanctions extend only to attorneys, not to the parties they represent. Finally, there has been considerable reluctance on the part of the courts to apply Rule 11 at all.[221]

Nevertheless, Rule 11 has some appealing features that should be taken into account in the formulation of a unified procedural technique. It offers greater flexibility than does the proposed counterclaim for groundless suit previously discussed.[222] Under the latter approach, the determination of probable cause, and hence the resolution of the counterclaim, would follow the determination of the case on the merits; the wronged origimal defendant would get no redress until that time.[223] Generally, it is appropriate for the determination of groundlessness to be postponed until after adjudication of the merits; otherwise, the original plaintiff might not have an adequate opportunity to make out a bona fide, though novel, argu-

216. *See* text accompanying notes 130-60 *supra.*

217. *See* text accompanying notes 207-10 *supra.*

218. *See, e.g.*, United States v. Standard Oil Co., 603 F.2d 100, 103 (9th Cir. 1979) (bad faith exception sbould be employed "only in exceptional cases and for dominating reasons of justice").

219. *See* note 6 *supra.*

220. *See* text accompanying notes 171-79 *supra.*

221. *See* note 127 *supra.*

222. *See* text accompanying notes 98-104 *supra.*

223. *See id.*

ment.[224] There are some situations, however, in which the groundlessness of a claim is patently apparent to all parties before the suit goes to judgment.[225] In those circumstances, it is appropriate for the meritless claims to be disposed of and sanctions to be applied against the transgressing claimant or his counsel, prior to final adjudication. If the sanctions are designed, as in *Kinee*, to compensate the injured parties as well, so much the better.

IV. Other Approaches

A. *Section 1927 of Title 28*

Section 1927 of Title 28 of the United States Code provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."[226] On its face, section 1927 would seem to provide a useful technique for dealing with meritless suits. Unfortunately, a split of authority over the appropriate costs allowable severely impairs the utility of this section. On the one hand, the Second Circuit[227] and several district courts[228] have imposed upon offending attorneys counsel fees and other litigation expenses reasonably incurred by the opposing parties. On the other hand, the Fifth,[229] Sixth,[230] and Seventh Circuits[231] have held that the only costs assessable under section 1927 are the relatively nominal amounts contemplated by section 1923 of the Judicial Code.[232] This narrow reading would of course vitiate the effectiveness of section 1927 as a remedial device.

The usual rationale for this restrictive interpretation—that section 1927 is penal in nature and therefore should be strictly construed and read *in pari materia* with the very circumscribed definition of taxable costs in sections 1920 through 1923[233]—is questionable. Section 1927, in its condemnation of "unreasonable"

224. *See* text accompanying notes 18-19 *supra.*

225. *See* text accompanying notes 130-42 *supra.*

226. 28 U.S.C. § 1927 (1976).

227. Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1087-89 (2d Cir. 1977).

228. *See* Monk v. Roadway Express, Inc., 599 F.2d 1378, 1382 (5th Cir. 1979) (collecting district court cases).

229. *Id.*

230. United States v. Ross, 535 F.2d 346, 350-51 (6tb Cir. 1976).

231. 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971).

232. *See, e.g.*, Monk v. Roadway Express, Inc., 599 F.2d 1378, 1382 (5th Cir. 1979).

233. *See id.*; United States v. Ross, 535 F.2d 346, 350 (6th Cir. 1976); 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971). *See also* 28 U.S.C. §§ 1920-1923 (1976).

and "vexatious" conduct that increases costs, sounds very much like the standard formulation of the federal bad faith exception.[234] Thus, it would seem that the bad faith exception to the rule against awards of attorneys' fees could be invoked in any case in which section 1927 had been violated. In any event, the uncertainty currently surrounding the scope of allowable costs under section 1927 renders it a tool of very limited value.

B. The Court's Inherent Disciplinary Power and the Code of Professional Responsibility

Though courts possess considerable inherent power to discipline attorneys who practice before them,[235] the power is rarely invoked to control meritless suits—perhaps because, as one writer suggests, "American lawyers and American courts have always been less than aggressive in using their powers to fasten liability onto other lawyers."[236] Nevertheless, it may be helpful to consider the relevance of the Code of Professional Responsibility[237] (Code) to the problem of unfounded litigation. Although the Disciplinary Rules of the Code are intended for the use of "enforcing agencies,"[238] presumably meaning bar associations, the Ethical Considerations and Disciplinary Rules provide at least persuasive authority for the courts in the exercise of their inherent powers to regulate attorneys' conduct.[239] The Ethical Considerations "are aspirational in character and represent the objectives toward which every member of the profession should strive."[240] The Disciplinary Rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[241] The Canons are generalized "statements of axiomatic norms."[242]

Canon 1 requires attorneys to "assist in maintaining the integrity and competence of the legal profession."[243] Pursuant to Canon 1, Disciplinary Rule 1-102(A) forbids lawyers from engaging in conduct that involves "dishonesty, fraud, deceit, or misrepresentation"

234. *See* note 207 *supra.*

235. *See generally* Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U. CHI. L. REV. 619 (1977).

236. Risinger, *supra* note 1, at 47.

237. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE].

238. *Id.* at 1 (Preliminary Statement).

239. *See, e.g.,* Wright v. Estelle, 572 F.2d 1071, 1083 (5th Cir. 1978) (Godbold, J., dissenting).

240. ABA CODE, *supra* note 237, at 1 (Preliminary Statement).

241. *Id.*

242. *Id.*

243. *Id.,* Canon 1.

or that is "prejudicial to the administration of justice."[244] The former proscription would reach cases of factually dishonest pleading like that in *In re Lavine*,[245] whereas the latter could be read as encompassing the initiation of meritless litigation, but is probably too vague to be of much value in this connection.

Canon 2 requires lawyers to assist the profession "in fulfilling its duty to make legal counsel available."[246] Disciplinary Rule 2-110 limits the lawyer's right to withdraw from employment once he has taken a case.[247] The rule provides, however, that the attorney *must* withdraw if he is aware or it is obvious that his client is "having steps taken for him merely for the purpose of harassing or maliciously injurying [*sic*] any person,"[248] or if he knows or it is plain that his continued employment would result in the breach of a Disciplinary Rule.[249] The attorney *may* withdraw if his client "insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law,"[250] or if the client insists that the lawyer pursue a course of conduct that is illegal or forbidden by the Disciplinary Rules.[251] Furthermore, the attorney *may* withdraw if his continued employment is "likely" to lead to a breach of a Disciplinary Rule.[252]

Finally, Canon 7 imposes the duty to represent one's client "zealously within the bounds of the law."[253] Ethical Consideration 7-1[254] reiterates this obligation of zealous representation and Disciplinary Rule 7-101 forbids a lawyer from intentionally failing "to seek the lawful objectives of his client through reasonably available means."[255] The lawyer *may*, "where permissible" (a phrase not further elaborated by the Code) and in the exercise of his professional judgment, refrain from asserting a right or position of his client[256] and refuse to aid or to take part in "conduct that he believes to be unlawful, even though there is some support for an

244. *Id.*, DR 1-102(A)(4)-(5).
245. *See* text accompanying notes 146-54 *supra.*
246. ABA CODE, *supra* note 237, Canon 2.
247. *Id.*, DR 2-110.
248. *Id.*, DR 2-110(B)(1).
249. *Id.*, DR 2-110(B)(2).
250. *Id.*, DR 2-110(C)(1)(a).
251. *Id.*, DR 2-110(C)(1)(c).
252. *Id.*, DR 2-110(C)(2).
253. *Id.*, Canon 7.
254. *Id.*, EC 7-1.
255. *Id.*, DR 7-101(A)(1).
256. *Id.*, DR 7-101(B)(1). "Where permissible" may be intended to incorporate DR 7-102 by reference. *See* text accompanying note 260 *infra.*

argument that the conduct is legal."[257] The zealous advocate must remain within legal bounds, as well as the bounds of the Disciplinary Rules. Ethical Consideration 7-4 states that the advocate "may urge any permissible construction of the law favorable to his client" including a position "supportable by a good faith argument for an extension, modification, or reversal of the law," regardless of "his professional opinion as to the likelihood that the construction will ultimately prevail."[258] Nonetheless, "a lawyer is not justified in asserting a position in litigation that is frivolous."[259] This subjective requirement of good faith is echoed in Disciplinary Rule 7-102, which provides that an attorney shall not "knowingly" advance a claim that is "unwarranted under existing law" unless he can support the claim by good faith advocacy of a change in the law.[260]

In summary, the Code's applicability to cases of factually dishonest pleading is relatively clear,[261] although the problem of failure to conduct minimal investigation—as distinct from the making of affirmative misrepresentations or calculated concealments—is not explicitly treated. The Code does not provide much help on the question of legal frivolity, but perhaps it should not be expected to.[262] The primary value of the Code lies in the fact that it points out the competing ethical principles and policy interests that must be weighed in any consideration of the appropriate treatment of meritless litigation.[263]

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257. ABA CODE, *supra* note 237, DR 7-101(B)(2).

258. *Id.*, EC 7-4.

259. *Id.*

260. *Id.*, DR 7-102(A)(2).

261. *See* text accompanying note 245 *supra.*

262. *See* text accompanying note 189 *supra.*

263. The tort action for civil conspiracy may sometimes be available to a groundlessly sued party. A civil conspiracy is a combination of two or more persons to achieve by concerted action an unlawful purpose, or to effectuate a lawful purpose by unlawful means, proximately causing detriment to another. Fink v. Sberidan Bank, 259 F. Supp. 899, 902-03 (W.D. Okla. 1966). Some overt act must be done in furtherance of the conspirators' common design. Baker v. Rangos, 229 Pa. Super. Ct. 333, 351, 324 A.2d 498, 506 (1974). An act need not be criminal in order to be "unlawful" within the meaning of the definition; any willful and actionable infringement of a civil right suffices. Cranston v. Bluhm, 33 Wis. 2d 192, 198, 147 N.W.2d 337, 340 (1967). The gravamen of a civil conspiracy action is damages; indeed, it is often stated that the action does not lie by reason of the conspiracy itself, but rather by reason of torts committed pursuant to the conspiracy. *E.g.*, Moffett v. Commerce Trust Co., 87 F. Supp. 438, 442 (W.D. Mo. 1949). *See generally* Note, *Civil Conspiracy and Interference with Contractual Relations,* 8 LOY. L.A.L. REV. 302 (1975).

Injured defendants have rarely employed the civil conspiracy action against groundless claimants, but there are many circumstances in which such an approach would be feasible. For example, the meritless suit might be part of a conspiracy to injure the victim's reputation or business. Such conspiracies are actionable. *Cf.* Greer v. Skyway Broadcasting Co., 256 N.C. 382, 391, 124 S.E.2d 98, 104 (1962) (conspiracy to slander); Savard v. Selby, 19 Ariz. App. 514, 517, 508 P.2d 773, 776 (1973) (conspiracy to force persons out of business by

V. Conclusions and Proposals

A. *The Need for a Unified Statutory Approach*

A synoptic view of the problem of unfounded litigation is sorely needed. It is unrealistic, however, to expect such a treatment to emanate from the courts. As remarked earlier, *Nemeroff*'s valiant attempt at a synthetic approach may simply have further befogged an already foggy area of the law.[264] This is perfectly understandable, for courts are attentive to precedent, and the precedents in this field reflect widely disparate assumptions and approaches; any attempt to reconcile standards evolved in differing conceptual frames of reference is fraught with difficulties. The problem of meritless suit, and of course, meritless defense, dilatory motion practice, and the various other abuses that this Note has refrained from treating in detail, is ripe for legislative intervention.

B. *Important Characteristics of a Uniform Statute*

(1) Procedural Mechanics

A party injured by a meritless suit should not ordinarily be compelled to rely on a subsequent suit for compensation.[265] The punitive and compensatory measures should be internal to the underlying action; the proposed counterclaim for groundless suit provides a useful model.[266] Normally, the determination of the counterclaim would follow the adjudication of the main suit on the merits.[267] Allowance should be made, however, for the bringing of the counterclaim prior to the decision of the main suit when the claimant in that suit has made allegations that are manifestly false or that reveal a failure to conduct even a modicum of investigation.[268] Furthermore, it should be possible to bring the counterclaim against either the original claimant or his attorney or both, de-

unlawful means said to be actionable, though court held no such claim made out on facts at hand). Interesting possibilities are also suggested by Restatement (Second) of Torts § 871 (1977), which provides that one who intentionally and unjustifiably deprives another of a legally protected property interest or impairs that interest is subject to liability. If two or more persons knowingly launch an unfounded attack on title to commercial realty, for example, in an effort to extract a speedy settlement, a strong argument can be made that they are civilly liable for conspiracy to commit intentional harm to a property interest. Because the action for civil conspiracy sounds in tort, attorneys' fees are not ordinarily recoverable. *See* Restatement (Second) of Torts § 914(1) (1977).

264. *See* notes 207-15 *supra* and accompanying text.

265. *See* text accompanying notes 93-97 and 106-07 *supra.*

266. *See* text accompanying notes 98-104 *supra.*

267. *See id.*

268. *See* text accompanying notes 222-25 *supra.*

pending upon the nature and source of the abuse.[269] Finally, common-law actions for malicious prosecution should remain available in cases of extraordinary injury not compensable by the counterclaim.[270]

(2) The Standard of Culpability

The original advocate of the counterclaim for groundless suit makes lack of probable cause the sole requisite for recovery.[271] This author, out of a desire to minimize the risk of a chilling effect on the advancement of innovative legal theories,[272] would add a requirement that malice be shown. This burden could be met in either of two ways. Factually dishonest pleading, whether dishonest by virtue of affirmative falsehood or substantial and calculated concealment, or a gross failure to investigate of the kind exemplified in *Kinee*,[273] would be malice per se. In cases of alleged legal frivolity, however, the counterclaimant would have to show that the original action was brought principally for a purpose other than adjudication of the merits. This definition would replace the oft-recited requirement of bad faith or wanton and oppressive conduct found in the federal case law dealing with awards of attorneys' fees.[274]

(3) Sanctions

Sanctions against meritless claimants should be graded primarily according to the magnitude of the injury inflicted. The sanctions should be designed to compensate the wronged parties for all damages suffered or expenses reasonably incurred by them as a result of the unfounded suit. Factual dishonesty and other extreme abuses could justify punitive damages. Transgressing attorneys should still be subject to potential disciplinary action distinct

269. The statute would have to make an exception to the general rule that an attorney may not testify in a case he is trying. In order to minimize the danger of confusing or prejudicing the jury, the inquiry into the attorney's alleged misfeasance should probably be conducted in chambers or by means of submission of written justifications by the attorney. If the attorney's misconduct were so extreme as to warrant application of the contempt power, greater procedural safeguards for him would be necessary, and a separate jury proceeding with a different judge might be mandated. *See* Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Bloom v. Illinois, 391 U.S. 194 (1968). Contempt would not be a prerequisite to liability on the counterclaim.

270. *See* Note, *Groundless Litigation, supra* note 1, at 1237.

271. *See id.* at 1234-35.

272. *See* text accompanying notes 18-19 *supra.*

273. *See* text accompanying notes 171-78 *supra.*

274. *See* text accompanying notes 211-15 *supra.*

from any liability under the counterclaim; the statute should not strip the courts of their inherent powers in this field.[275]

JOHN RAYMOND JONES, JR.

275. *See* text accompanying note 235 *supra.*