Alabama Law Review
Volume 36, Number 4, Summer 1985

FRIVOLOUS LAWSUITS AND DEFENSIVE RESPONSES TO THEM—WHAT RELIEF IS AVAILABLE?*

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I. Introduction

No one disputes that in recent decades American society has become progressively more litigious.[1] Whether this characteristic is a function of new theories of recovery,[2] the increased numbers of new lawyers entering the population each year,[3] or simply a greater

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1. In 1953 the federal courts had 99,000 United States District Court filings and 3,200 appellate filings. In 1983 Chief Justice Burger reported current filings of 240,000 in the district courts and 28,000 at the appellate level, an increase of 142% and 775%, respectively, in 25 years. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 443 (1983).

2. The elimination of the privity requirement and the birth of strict liability have opened new theories of recovery for plaintiffs in products liability actions. For an historical analysis, see 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3 (1985); and 2 *id.* § 16 A[1]. Insurance companies have reported that products liability claims increased 26% between 1969 and 1973. Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1007 n.28 (1977). During approximately this same period, medical malpractice claims increased 56% in New York (1969-74) and 193% in a three-county area surveyed in Michigan (1970-74). This increase in malpractice actions is attributed to a number of factors, including the dominant use of the contingent fee system by plaintiffs' attorneys. *Id.* at 1005-06 & n.20.

3. The number of attorneys practicing in the United States has grown from 242,000 in

awareness on the part of the general population of the availability of legal redress, more and more disputes that formerly were settled privately now are settled in the courts. An unfortunate truism is that, as more people learn to use the legal system for legitimate purposes, many more also learn to use it for illegitimate purposes. Commentators have traced the history of misuse of the litigation process back to Mesopotamian[4] and Biblical times;[5] however, if the frequency and fervor of the commentary discussing the subject in current legal literature[6] is any indication, the problem has grown to alarming proportions.

Unfortunately, as these commentaries reflect[7] and as this Article concedes, in many situations no single device exists that provides the defendant in a frivolous lawsuit with adequate relief. The reason for this is that any attempt to devise a system for responding to spurious actions is, by its very nature, in conflict with the value placed on free access to courts in American society.[8] Perhaps

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1955 to more than 620,000 currently. Blodgett, *Windows into the Legal Past*, 71 A.B.A. J. 44, 44 (1985).

4. *See Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1218 & n.1 (1979).

5. Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743, 743 (1980).

6. *See generally, e.g.*, Birnbaum, *supra* note 2, at 1003; Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976); Comment, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 CASE W. RES. L. REV. 653 (1976) [hereinafter cited as *Effective Attack*]; Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897 (1977) [hereinafter cited as *Do They Overlap?*]; Note, *Attorneys' Liability to Clients' Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values*, 53 ST. JOHN'S L. REV. 775 (1979); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977); Note, *supra* note 5, at 743; Note, *supra* note 4, at 1218.

7. *See* articles cited *supra* note 6.

8. The policy of open access to the courts has been imbedded firmly in both American and English jurisprudence since the days of the Magna Carta. *See* MAGNA CARTA, ch. 39-40 (1616). In addition to guarantees of equal access to justice found in the United States Constitution, the majority of state constitutions have "open courts" provisions that are serious obstacles to restrict access to the judicial process. *See, e.g.*, ALA. CONST. art. I, § 13 ("That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."); ARIZ. CONST. art. II, § 11 ("Justice in all cases shall be administered openly, and without unnecessary delay."); ARK. CONST. art. II, § 13 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws."); COLO. CONST. art. II, § 6 ("Courts of justice shall be open to every person, and a

Americans guard no incident of equality as zealously as they protect each person's undeniable right to seek legal redress in court

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speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay."); CONN. CONST. art. 1, § 10 ("All courts shall be open, and every person, for any injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."); DEL. CONST. art. I, § 9 ("All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense."); GA. CONST. art. I, § 1 ("No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."); IND. CONST. art. I, § 12 ("All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."); KY. CONST. art. I, § 14 ("All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."); LA. CONST. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."); ME. CONST. art. I, § 19 ("Every person, for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."); MD. CONST. Declarations of Rights art. XIX ("That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land."); MASS. CONST. pt. I, art. XI ("Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; comformably to the laws."); MINN. CONST. art. I, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws."); MISS. CONST. art. III, § 24 ("All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."); MO. CONST. art. I, § 14 ("That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."); MONT. CONST. art. II, § 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character . . . . Right and justice shall be administered without sale, denial, or delay."); NEB. CONST. art. VII, § 13 ("All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."); N.H. CONST., pt. I, art. 14 ("Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all

for any wrong done him. The attitude of the courts therefore is not surprising; courts traditionally have been hostile to devices that allow a party to make the pursuit of a claim against him the basis of

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injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; comformably to the laws."); N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."); N.D. CONST. art. I, § 9 ("All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay."); OHIO CONST. art. I, § 16 ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."); OKLA. CONST. art. II, § 6 ("The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice."); OR. CONST. art. I, § 10 ("No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."); PA. CONST. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."); R.I. CONST. art. I, § 5 ("Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial; promptly and without delay; comformably to the laws."); S.C. CONST. art. I, § 9 ("All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."); S.D. CONST. art. VI, § 20 ("All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice administered without denial or delay."); TENN. CONST. art. I, § 17 ("That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."); UTAH CONST. art. I, § 11 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay . . . ."); VT. CONST. ch. I, art. 4 ("Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws."); W. VA. CONST. art. III, § 17 ("The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."); WIS. CONST. art. I, § 9 ("Every person is entitled to a certain remedy in the laws of all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."); WYO. CONST. art. I, § 8 ("All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay.").

a cause of action in his favor.[9]

In recent years, commentators have displayed an increased interest in examining the remedies available to a party faced with a frivolous lawsuit. Some commentators have suggested new theories for dealing with unfounded actions;[10] some have suggested new uses of existing theories.[11] Despite their valuable contributions to this field of the law, none yet have suggested a simple, reliable system for responding to these claims.

The present authors accept as part of their premise that, given the importance of the competing values drawn into conflict in this area, a theory to have broad application to combat spurious actions is impossible to accomplish. Rather than attempting to devise a new system for dealing with these actions, the authors suggest that, if used properly, the present system adequately responds to spurious actions without threatening free access to courts.

The recurrent theme in the literature on this subject is not so much the idea that relief is not available for a party faced with a spurious claim, but that the forms of available relief are cumbersome and that they really do not help a party forced to defend what is at best a marginal claim. The authors hope to demonstrate in this Article that, although the traditional common-law responses to unfounded claims may be difficult to use in some situations, they are supplemented by a number of other devices found in the Federal Rules of Civil Procedure and various state and federal statutes. Those devices provide some relief to any party subjected to a truly frivolous claim. Responses are also available for parties faced with claims that, although perhaps not completely frivolous, are so questionable that they should not be brought.

Because they form the basis for the principles to follow, the traditional common-law devices are discussed first, followed by the other, more modern devices.

II. Common-Law Remedies

Causes of action for malicious prosecution and abuse of process are the traditional (and most recognized) remedies available

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9. *See, e.g.*, Schwartz v. Schwartz, 366 Ill. 247, 250, 8 N.E.2d 668, 670 (1937) (stating that "the law does not look with favor upon [malicious prosecution] suits").

10. *See, e.g.*, Note, *supra* note 4, at 1224-27, 1232-37; Note, *supra* note 5, at 744.

11. *See* Birnbaum, *supra* note 2, at 1051-77.

for responding to a frivolous action.[12] In addition to these two remedies, this section discusses several tort actions that a plaintiff[13] may bring to recover damages incurred as a result of a prior civil action. Each of the traditional tort theories presents a problem: each imposes a difficult burden of proof on a plaintiff. In certain types of cases, however, the devices can be very useful.

A. Malicious Prosecution or Wrongful Civil Procedure

An action for malicious prosecution or, in the Restatement terminology, wrongful civil procedure[14] lies whenever a defendant (1) has instituted or continued to press a civil claim, (2) which terminated in favor of the plaintiff, (3) when the defendant had no probable cause to believe in the validity of the prior proceeding or pursued the claim with malice toward the plaintiff and, consequently, (4) injured the plaintiff.[15] To illustrate the difficulty of succeeding in a malicious prosecution action, discussion of each of these elements is included below.

1. Institution or continuation of civil proceeding.—An action for wrongful civil procedure may be brought against anyone who initiates, continues, or procures wrongful civil procedure against another party.[16] This includes both the original party plaintiff[17]

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12. For a discussion of the development of these two actions, see Note, *supra* note 5, at 745-46; Note, *supra* note 4, at 1221-27.

13. Throughout this section, "plaintiff" will refer to the party improperly sued in the original action who now is bringing a tort action, and "defendant" will refer to the plaintiff in the original action who now is sued in tort.

14. RESTATEMENT (SECOND) OF TORTS § 674 (1976). Although malicious prosecution actions originally were designed as a response to wrongful criminal actions, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 120 (4th ed. 1971); *see* Note, *supra* note 5, at 745-51 (discussing historical background of malicious prosecution), the large cost in time and money of the modern lawsuit has made its civil counterpart an important response to a groundless lawsuit.

15. Commentators and courts have written on this topic for many years. *See generally, e.g.*, Tool Research & Eng'g Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975); Potts v. Imlay, 4 N.J.L. 377 (1816); W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 120 (5th ed. 1984); Adler, *Malicious Prosecution Suits as Counterbalance to Medical Malpractice Suits*, 21 CLEV. ST. L. REV. 51 (1972); Birnbaum, *supra* note 2, at 1003; *Effective Attack*, *supra* note 6, at 653; *Do They Overlap?*, *supra* note 6, at 897; Note, *supra* note 6, at 775; Note, *Physician Countersuits: Malicious Prosecution, Defamation, and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 U. CINN. L. REV. 604 (1976) [hereinafter cited as *Physician Countersuits*]; Note, *supra* note 4, at 1218.

16. *See* RESTATEMENT (SECOND) OF TORTS § 674 (1976).

17. *See* Allen v. Moyle, 84 Idaho 18, 367 P.2d 579 (1961); Patapoff v. Vollstedt's, Inc.,

and the attorney[18] who pressed the claim. The burden of proving that an action was instituted wrongfully is understandably high. These actions, if easily maintained, could result in the use of "defensive" legal tactics; for example, an attorney might decide not to press arguably meritorious claims that require changing current law or depend on difficult proof questions for fear of liability in a subsequent suit. Similar fears yielded "defensive medicine" as a result of medical malpractice litigation in the medical profession.[19] The requirement that an action be truly wrongful and not merely unsuccessful necessarily remains high to preserve access to the courts.[20]

2. *Favorable termination.*—The plaintiff in an action for wrongful civil procedure must plead and prove that the prior wrongful civil proceeding terminated in his favor.[21] For many plaintiffs, this requirement alone makes a wrongful civil procedure action an unattractive alternative. When the plaintiff institutes the initial cause of action, the defendant must decide whether to defend or settle the claim. If the claim would be cheaper to settle than to defend, settlement is often the course of action chosen. An out of court settlement, however, bars a cause of action for wrongful civil procedure.[22] Obviously, a dismissal on the merits is a

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230 Or. 266, 369 P.2d 691 (1962).

18. *See* Annot., 27 A.L.R.3D 1113 (1969).

19. *See* Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 DUKE L.J. 1179, 1189-90 ("Physicians have been vocal in their claims that the current malpractice situation encourages them to engage in protective maneuvers that are expensive but have relatively little value."). An example of defensive medicine is the use of medical tests to avoid later liability for the failure to discover a disease or other ailment.

20. For examples of what constitutes a wrongful institution of an action, see *infra* notes 29-44. Consider the epigram used by Sheila Birnbaum to introduce her article on spurious medical malpractice claims:

> BOSWELL. "But what do you think of supporting a cause which you know to be bad?" JOHNSON. "Sir, you do not know it to be good or bad till the Judge determines it. . . . An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge."

Birnbaum, *supra* note 2, at 1003 (quoting J. BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 366-67 (Oxford ed. 1934)).

21. *See, e.g.*, Paint Prods. Co. v. Minwax Co., 448 F. Supp. 656, 658 (D. Conn. 1978); Babb v. Superior Court, 3 Cal. 3d 841, 846, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971); W. KEETON, *supra* note 15, § 120.

22. *See, e.g.*, Baird v. Aluminum Seal Co., 250 F.2d 595, 601-02 (3d Cir. 1957); Leonard v. George, 178 F.2d 312, 313-14 (4th Cir. 1949), *cert. denied*, 339 U.S. 965 (1950); W. KEETON *supra* note 15, § 120.

favorable termination,[23] but what favorable termination short of this ruling will satisfy this requirement is not entirely clear.

As a general rule, termination of the action is effected when the proceedings have reached a stage in which the parties can take no further action without commencing the action over again.[24] The determination of whether the termination of the proceeding is favorable to the malicious prosecution plaintiff firmly is intertwined with the third element of a malicious prosecution action—probable cause.[25] One function of the favorable termination element of a wrongful civil procedure action is to sift out actions in which the manner of the termination prevented a discussion of the salient facts relevant to the probable cause element. While a judgment on the merits for the original defendant unquestionably will support a malicious prosecution action,[26] and although a judgment for the original plaintiff obviously will preclude the claim, a wide gray area separates these two results. For example, courts have given varying consideration to underlying actions dismissed based on jurisdictional reasons, defective pleadings, or one party's failure to comply with discovery requirements.[27] Generally, courts look to find a determination or at least a strong indication of the malicious prosecution plaintiff's innocence in the underlying cause of action.[28]

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23. *See, e.g.*, Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 575, 587, 75 P. 168, 169 (1904).

24. *See, e.g., id.* at 587, 75 P. at 169; *see also, e.g.*, Rich v. Siegel, 7 Cal. App. 3d 465, _, 86 Cal. Rptr. 665, 667 (1970); Hudson v. Zumwalt, 64 Cal. App. 2d 866, 872, 149 P.2d 457, 460 (1944).

25. *See infra* text accompanying notes 29-44.

26. *See* Stix & Co. v. First Mo. Bank & Trust Co., 564 S.W.2d 67, 70 (Mo. Ct. App. 1974); Freedman v. Freedman, _ A.D. _, _, 82 N.Y.S. 2d 415, 417 (1948).

27. *See generally* Annot., 30 A.L.R.4TH 572 (1984) (analysis of nature of termination needed to satisfy favorable termination element).

28. This element was discussed in a procedurally intriguing posture in Siegel v. City of Chicago, 127 Ill. App. 2d 84, _, 261 N.E.2d 802, 814 (1970). The defendant in this zoning dispute conterclaimed for malicious prosecution and alleged that the dismissal of plaintiffs' second count was sufficient favorable termination to allow the malicious prosecution action to proceed. Recognizing that under state rules of procedure the dismissal of Count II of plaintiffs' complaint had operated as an adjudication on the merits of that claim, the court reflected on the purpose of the favorable termination element in a malicious prosecution action. The court opined:

> We believe that the legal termination requirement necessitates a judgment which deals with the factual issue of the case, whether the judgment be rendered after a trial or upon motion for summary judgment. However, it is not sufficient to simply obtain a dismissal of the opponents' complaint, for such dismissal need bear no logi-

3. Probable cause.—The plaintiff must prove to the judge[29] that the defendant instituted or continued the prior action without probable cause.[30] Although courts use the term "probable cause" interchangeably in cases arising out of both underlying civil and criminal actions,[31] good analysis should require a different standard for the two types of actions. In the criminal arena, probable cause is the subject of grand jury bind over determinations, preliminary hearings, issuances of search warrants, and applications of the exclusionary rule.[32] In contrast, the purpose of the probable cause requirement in an action for wrongful use of civil procedure is to determine if an attorney or claimant had a reasonable basis for filing or pursuing an action that now is alleged to have been wrongful.[33] The varied purposes of the probable cause requirements in criminal procedures are wholly inapplicable to the civil context.

In *Tool Research & Engineering Corp. v. Henigson*,[34] a California court outlined a two-part test for probable cause. First, the attorney must have a subjective belief in the merit of the claim, and, second, that belief objectively must be reasonable.[35] The court stated that "an attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried."[36]

This test seeks to strike a balance between an objective probable cause requirement and a subjective requirement. A more stringent or objective probable cause requirement would force attorneys

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cal relationship to the legitimacy of the assertions contained therein; therefore, such dismissal lends no credence to the claim that the assertions were baseless. Thus, if the defendants had properly alleged special damage we would still have sustained the trial court's dismissal of their counterclaim because the dismissal of plaintiffs' Count II did not serve as a sufficient legal termination of the cause.

Id.

29. *See* Note, *supra* note 5, at 1235 n.116.

30. RESTATEMENT (SECOND) OF TORTS §§ 674-675 (1976).

31. *See* W. KEETON, *supra* note 15, § 120, at 893; W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 4, at 15-16 (1972).

32. *See* W. LAFAVE & A. SCOTT, *supra* note 31, § 4, at 15.

33. *See North Point Constr. Co. v. Sagner*, 185 Md. 200, 208-09, 44 A.2d 441, 445 (1945); RESTATEMENT (SECOND) OF TORTS § 675 (1976).

34. 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

35. *Id.* at __, 120 Cal Rptr. at 297.

36. *Id.*

to discount a client's recitation of the facts surrounding an incident.[37] In its place, an attorney would be required to perform an investigation before he agrees to institute a claim.[38] A lenient or purely subjective probable cause requirement, however, effectively renders impotent an action for wrongful civil procedure. The lenient standard disregards a potential defendant's interest in not incurring expense and worry over a groundless lawsuit, and the stricter standard chills potentially viable claims from being pursued. A middle ground, however, is difficult to define, and *Tool Research* may offer the only alternative "general rule" approach to the probable cause element.

A more flexible approach, however, also could be argued. In some cases, investigation prior to filing suit may be fruitless, as when the defendant holds all the necessary information and only the discovery mechanisms will allow access. In other cases, time considerations will militate in favor of the prompt filing of a claim. In these instances, the probable cause standard may be more lenient than the test imposed in cases in which more latitude was afforded the attorney for prefiling investigation.

Because the tort of wrongful civil procedure applies to both the initiation and the continuation of proceedings,[39] an attorney may face liability when he allows a lawsuit to continue after "probable cause" no longer exists. For example, if an attorney files a groundless law suit on the basis of misinformation from his cli-

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37. Commentators argue over the merit of creating a duty for an attorney to investigate a claim before filing. Part of the uproar is explainable by simple consideration of the source. If a group is asked to hold itself liable, that group generally will refuse. *See, e.g.*, T. PAINE, *Common Sense*, in THE COMPLETE WRITINGS OF THOMAS PAINE 4 (1945).

A duty to investigate may pose too great a burden on attorneys faced with statute of limitations deadlines and lack of access to pertinent information about the cause of action. In fact, the Model Code of Professional Responsibility only requires that an attorney not file a claim "he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1). Arguably, therefore, an attorney has no duty to second guess his client and can resolve in favor of his client any doubts over the inferences to be drawn from the evidence.

38. Attorneys' due diligence already is required in the context of tax law, securities law, and bond law. Felts v. National Account Sys. Assoc., 469 F. Supp. 54, 67 (N.D. Miss. 1978) (lawyer liable for issuer's fraud when he failed to investigate and correct misleading materials used in soliciting subscriptions); Rev. Rul. 80-266, 1980-2 C.B. 378 (duty to inquire to avoid negligence penalty imposed on tax return prepared under I.R.C. § 6694(a) (1982)).

39. *See supra* note 16 and accompanying text.

ent,[40] a lenient probable cause standard initially may insulate him from liability; however, if the case continues after the evidence shows the claim was groundless, even the lenient standard may not protect the attorney.[41]

Besides begin subject to widely variant judicial definitions, the "probable cause" element also plays a varied role in different jurisdictions. In some jurisdictions, the absence of probable cause is sufficient to imply "malice"[42]—the fourth element in a wrongful civil procedure action.[43] If the absence of probable cause is going to imply "malice," this one element functions as both an objective and a subjective criteria. The California court treatment in *Tool Research* becomes particularly appropriate in this setting. If, however, the probable cause element is separate, the "malice" element fulfills any need for a subjective consideration. In this setting, the objective approach is more appropriate.[44]

4. Malice.—Still another another fundamental problem for wrongful civil procedure relates to semantics. The element of malice in wrongful civil procedure actions receives widely divergent treatment by the courts.[45] Commentators have drawn distinctions among five various uses of the term—constitutional malice, legal malice, malice-in-fact, implied malice, and actual malice.[46] Courts generally do not require one to prove malice by showing the existence of hatred, hostility, or ill will, but do require some willful or

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40. A client may avoid liability for wrongful use of civil procedure if after a complete and honest disclosure of all known facts he is advised by the attorney that a viable claim exists. *See* Williams v. Frey, 182 Okla. 556, _, 78 P.2d 1052, 1055 (1938); *see also* Sazdoff v. Bourgeous, 301 So. 2d 423, 426 (La. Ct. App. 1974) (fact that client filed criminal action only after disclosing full facts to his attorney indicated reasonableness in his complaint).

41. *See Williams*, 182 Okla. at _, 78 P.2d at 1055; *Sazdoff*, 301 So. 2d at 426.

42. *See, e.g.*, Fry v. Bank of Am. Nat'l Trust & Sav. Ass'n, 142 Cal. App. 3d 150, _, 298 P.2d 34, 39 (Dist. Ct. App. 1956); Centers v. Dollars Mkts., 99 Cal. App. 2d 534, _, 222 P.2d 136, 142 (Dist. Ct. App. 1950); Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974); Southwestern R. Co. v. Mitchall, 80 Ga. 438, 442, 5 S.E. 490, 491 (1888).

43. *See infra* notes 45-50 and accompanying text.

44. *See, e.g.*, Baird v. Aluminum Seal Co., 250 F.2d 597, 600-01 (3d Cir. 1958); Burt v. Smith, 181 N.Y. 1, 5-6, 73 N.E. 495, 496 (1905), *appeal dismissed*, 203 U.S. 129 (1906).

45. *See* Birnbaum, *supra* note 2, at 1025-26. Although the definition of malice may vary from court to court, most courts agree that some willful act is required. *See, e.g.*, Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973) (malice evidenced by "wanton or reckless refusal to make reasonable investigation with regard to the propriety of a prosecution"); *Mitchell*, 80 Ga. at _, 5 S.E. at 491 ("[a]ny act done willfully and purposely to the prejudice and injury of another").

46. *See, e.g.*, Birnbaum, *supra* note 2, at 1025-26.

intentional act.[47]

The actual harm caused by groundless proceedings, however, is more than the harm to the plaintiff by the institution of the prior action. It is the use of a civil proceeding for a purpose other than adjudicating a viable claim, thus, draining the resources of the judiciary and of one's opponent. Because that harm also should be enunciated in the standard used, a malice standard is inaccurate. In its place, courts should apply the Restatement standard.[48]

The comments to the Restatement outline five specific situations that constitute improper motives for bringing a civil action.[49] The first is the situation in which a party brings an action that he knows is not meritorious. The second is the situation in which a party institutes or continues a proceeding because of ill will. The third is the situation in which a party institutes the proceeding to deprive the defendant of the beneficial use of some property. The fourth is the situation in which a party institutes an action for the purpose of forcing a settlement without regard to the merits of the claim. Finally, the fifth situation presented occurs if a party files a counterclaim solely to delay expeditious treatment of the subject of an original action.[50] The Restatement standard is much broader than the malice standard currently used.

5. Injury.—The problem with proving injury in an action for wrongful civil procedure arises in those states that require a showing of "special injury" to the plaintiff.[51] Special injury does not include the normal incidents of litigation, such as the costs in time and money.[52] Requiring special injury makes a recovery for wrongful civil procedure more difficult. This requirement normally is jus-

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47. *See Ray*, 358 F. Supp. at 638; *Mitchell*, 80 Ga. at _, 5 S.E. at 491; W. KEETON, *supra* note 15, § 120, at 895.

48. The malice standard generally requires that the initial suit be brought intentionally to harm the plaintiff. *See supra* notes 45, 47, and accompanying text. The broader Restatement standard requires only that the suit be brought for "a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based." RESTATEMENT (SECOND) OF TORTS § 674(a) (1976).

49. *See id.* § 676 comment c.

50. *Id.*

51. *See* Schwartz v. Schwartz, 366 Ill. 247, _, 8 N.E.2d 668, 671 (1937).

52. *See* Alswang v. Claybon, 40 Ill. App. 3d 147, _, 351 N.E.2d 285, 289 (1976). In jurisdictions that impose the special damages requirement, rule 11 and the bad faith exception to the "American Rule" can be used in conjunction with the wrongful civil procedure action to obtain more complete relief. *See infra* notes 112-16, 149-50, and accompanying text.

tified on the theory that awarding of costs to the successful litigant compensates him and that any further assessment would serve only to discourage viable claims.[53]

When all these elements are combined, an action for malicious prosecution or wrongful civil procedure is difficult to prove. No doubt, in the civil context, simplification of this cause of action would be conceivable; however, any reform attempts inevitably will be constrained by the fear that steps taken in the civil context will flow into the criminal arena. Although the concept of penalizing the attorneys who press groundless claims, delay trial, or unreasonably multiply the proceedings is sound, the resulting standard might force hesitation to prosecute crimes because of possible repercussions for failing to meet a far higher burden of proof in a criminal trial. The system should punish the parties and the attorneys who pursue groundless civil suits, but should not threaten the criminal prosecutor unable to meet his burden of proof. The simplest way to avoid such a result is to distinguish more clearly between the standard for civil and criminal cases. Perhaps the best step in this direction is to discard the use of the term malicious prosecution for both and adopt instead the language suggested by the Restatement—wrongful civil procedure—in the civil context.[54]

B. Abuse of Process

The terms malicious prosecution and abuse of process often are used together, but the two causes of action are not interchangeable. One difference is that, unlike a malicious prosecution action, an abuse of process claim may be filed before the termination of the original action.[55] The major distinction, however, concerns the different situations in which an abuse of process action applies.

A party has abused legal process if he used the court's processes in a manner not contemplated by law.[56] An abuse of pro-

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53. *See* Birnbaum, *supra* note 2, at 1015.

54. RESTATEMENT (SECOND) OF TORTS § 674 (1976).

55. *See* Warwick Dev. Co. v. GV Corp. & Grayson Valley Golf & Country Club, 469 So. 2d 1270, 1274 (Ala. 1985) (per curiam); W. KEETON, *supra* note 15, § 121, at 897.

56. Grainger v. Hill, 4 Bing. (N.C.) 212, 132 Eng. Rep. 769 (1838) (Bosanquet, J.) is the leading case in the use of this tort. This case established two elements for the cause of action: first, the process issued for an ulterior purpose; and, second, the use of the process was outside of its intended scope. *See id.* at 224, 132 Eng. Rep. at 774.

Several articles discuss the tort. *See* Witte, *Damages for Injury to Feelings in Mali-*

cess claim requires proof of three elements: first, the defendant's misuse of court process in a proceeding; second, the defendant's improper purpose in using this process; and third, some harm to the plaintiff as a result of the defendant's actions.[57] The most commonly abused processes in civil litigation are discovery mechanisms. Counterclaims that are dilatory or groundless or filed for an improper purpose also fall within the ambit of this tort.[58] An action for abuse of process may be directed against either one's opponent or that opponent's attorney and may be asserted separately from the underlying action or as a counterclaim.[59]

Hoppe v. Klapperich[60] illustrates the classic use of an abuse of process claim. The plaintiff alleged that the defendant issued a writ for her arrest to extort some bonds belonging to plaintiff. The defendant demurred to the claim and argued that, first, abuse of process did not lie unless process properly was issued and, second, because the plaintiff had alleged an irregularity in the writ, the action could not lie.[61] The court, reversing the trial court's decision sustaining the demurrer, held that the action would lie for improper use of process after it was issued.[62] The Court added that whether the process was issued regularly or not was immaterial.[63]

As illustrated by *Hoppe*, the key to an abuse of process claim is the use of legal process to achieve a purpose collateral to the main action. An abuse of process action differs from an action for wrongful civil procedure in that the abuse of process action will not lie when the motive of the underlying action was mere vexation or harassment.[64] The process must have been to achieve a purpose that was improper, such as to obtain an unjustifiable collateral ad-

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cious Prosecution and Abuse of Process, 15 CLEV.-MAR. L. REV. 15 (1966); Note, *Torts—Abuse of Process Defined*, 28 ARK. L. REV. 388 (1974); Note, *The Nature and Limitations of the Remedy Available to the Victim of a Misuse of the Legal Process: The Tort of Abuse of Process*, 2 VAL. U.L. REV. 129 (1967); Note, *supra* note 6, at 775; *Physician Countersuits*, *supra* note 15, at 604.

57. *See* W. KEETON, *supra* note 15, § 121, at 898.

58. *See id.* at 897, n.4.

59. Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947).

60. 224 Minn. 224, 28 N.W.2d 780 (1947).

61. *Id.* at _, 28 N.W.2d at 786.

62. *Id.*

63. *Id.*

64. *See, e.g.*, Pimentel v. Houk, 101 Cal. App. 2d 884, 889, 226 P.2d 739, 741 (1951); Hauser v. Bartow, 273 N.Y. 370, _, 7 N.E.2d 268, 269 (1937).

vantage.[65] A frivolous lawsuit filed with the hope of obtaining money damages, therefore, is not abuse of process. The suit must have been filed for an ulterior purpose, as in *Hoppe* in which the plaintiff issued the writ to extort bonds. The classic modern situation in which the action will lie is the circumstance in which a party files a meritless counterclaim for the sole purpose of forestalling the main action.

C. *Defamation*

Given the strict standards imposed upon actions for wrongful civil procedure or abuse of process, parties continually have sought other remedies for responding to a groundless claim. Within narrow limits, defamation actions have been useful in responding to such suits.

Statements made within the context of a judicial proceeding that tend to lessen a party's reputation are protected from liability by an absolute privilege as long as the statement is relevant to the subject matter of the judicial proceeding.[66] Thus, comments made by parties, attorneys, judges, and witnesses within the context of the proceeding normally are not assailable in tort. However, in a case in which the opponent party or lawyer is quoted outside of the protective womb of the court, for instance, in the press, an action for defamation could lie.[67]

The plaintiff in a defamation action must plead and prove six elements: first, the defamatory statement; second, the publication of that statement; third, the inducement (extrinsic facts that place the statement in a defamatory context); fourth, the colloquialism (allegation that the defamatory statement referred to the plaintiff);

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65. *See Pimentel*, 101 Cal. App. 2d at 889, 226 P.2d at 741; *see also* Malone v. Belcher, 216 Mass. 209, 210, 103 N.E. 637, 637 (1913) (finding abuse of process because defendant brought original suit and obtained subsequent attachment not to get the return of the property, but to prevent plaintiff from transferring the property to third party).

66. *See* W. KEETON, *supra* note 15, § 114, at 817; *see also* F. HARPER & F. JAMES, THE LAW OF TORTS § 5.22 (1956). Louisiana is the only state that does not give to these comments absolute immunity. *See* Oakes v. Alexander, 135 So. 2d 513, 515 (La. Ct. App. 1961). Any judicial immunity that an attorney might otherwise enjoy is lost, however, when he participates with or encourages others to misuse the court processes. *See* Hope v. Klapperich, 224 Minn. 224, 242, 28 N.W.2d 780, 791 (1947).

67. Compare the account provided in Levine, *I Beat a Malpractice Blackmailer*, MEDICAL ECON., Feb. 23, 1976, at 65; with Joseph v. Markovitz, 27 Ariz. App. 122, 551 P.2d 571 (1976).

fifth, the innuendo (allegation of the defamatory meaning of the statement); and sixth, injury to the plaintiff.[68]

Although defamation actions help only in a limited number of cases, they may be used to combat situations not reached by other actions. For example, in a products liability or medical malpractice case that had at least an arguable basis and was not brought for an improper purpose, an attorney or litigant might release damaging publicity to increase settlement pressure. The opposing party could respond with a defamation action even though a malicious prosecution action would not lie.[69]

D. Intentional Infliction of Emotional Distress

In the 1934 Restatement, the reporters explained that the interest in "mental and emotional disturbances is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance."[70] Most states today, however, recognize the tort of intentional infliction of emotional distress, and the 1965 Restatement recognizes liability for "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress."[71]

In the context of a frivolous lawsuit, commentators have opposed the use of this cause of action.[72] No other action, however, provides so clearly for the type of damages sustained by an individual who must defend a completely frivolous lawsuit. If an unjustified lawsuit is instituted to force the defendant psychologically and practically to back down, this extortive effort is clearly an attempt to inflict mental distress; therefore, liability should attach. The major hurdle in this type of action is establishing outrageous conduct sufficient to meet the standards of this tort.

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68. *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 986 (7th ed. 1982).

69. *Cf.* Kennedy v. Cannon, 229 Md. 92, 182 A.2d 54 (1981) (plaintiff brought defendant action against attorney for attorney's slanderous statement to newspaper).

70. RESTATEMENT OF TORTS § 46 comment c (1934).

71. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

72. *See* Birnbaum, *supra* note 2, at 1051.

E. Prima Facie Tort

A prima facie tort has three elements: first, an intentional lawful act by the defendant; second, an intent to injure the plaintiff; and third, injury to the plaintiff.[73] Constitutional support for this tort can be found in the Bill of Rights of many state constitutions, under which a certain remedy for every injury is guaranteed.[74] In the context of a frivolous lawsuit, this is a difficult tort to establish because the torts of malicious prosecution, abuse of process, defamation, and intentional infliction of emotional distress already offer relief from the wrong act at issue. Some courts however, have taken notice of the harsh proof standards required under the traditional tort theories and allowed a cause of action for prima facie tort.[75]

F. Professional Negligence

Generally, the requirement of privity limits an attorney's liability for negligence.[76] An adversary, therefore, cannot sue a lawyer for malpractice unless this requirement is overcome or eliminated. To establish actionable professional negligence in the absence of privity, a party must show fraud or collusion by the attorney.[77] In actions based on wills and title examinations, however, courts have allowed beneficiaries to sue for professional negligence, although they are not clients of the lawyer, because damage to them is foreseeable.[78] Under this rationale, mere foreseeable injury is insufficient to bring into the group a party who properly may bring an action for professional negligence; rather, the injury must be to the intended beneficiary of the attorney's client.[79] Because the adver-

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73. *See* W. KEETON, *supra* note 15, § 130, at 1010. The defendant has the burden of proving the existence of some justification for his actions. *See id.* For a good discussion of the prima facie tort and its requirements, see Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461 (1922); Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U.L. REV. 563 (1959).

74. *See supra* note 8.

75. *See* Birnbaum, *supra* note 2, at 1058-59.

76. *See id.* at 1066; *see also* Nathan v. Beslin, No. 75-M2-542 (Ill. Civ. Ct., June 1, 1976).

77. *See, e.g.*, McDonald v. Stewart, 281 Minn. 35, __, 182 N.W.2d 437, 439-40 (1970).

78. *See* Lucas v. Hamm, 56 Cal. 2d 583, 592-93, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 826 (1961), *cert. denied*, 368 U.S. 987 (1962); Licata v. Spector, 26 Conn. Supp. 378, __, 225 A.2d 28, 31 (C.P. 1966).

79. *See Lucas*, 56 Cal. 2d at 590, 364 P.2d at 689, 15 Cal. Rptr. at 825.

sary in litigation is never an intended beneficiary of the attorney's professional services, the privity requirement will bar actions for professional negligence based on frivolous claims.

III. Other Nonstatutory Responses to Frivolous Claims

The various common-law remedies available to a defendant faced with a frivolous action are difficult to use, and they will apply in only limited contexts. However, the Federal Rules of Civil Procedure supply a number of devices that provide much simpler and more expedient forms of relief. These devices have been used infrequently by lawyers and judges, but the discussion to follow provides an analysis of the precedent that does exist for their use and some suggestions on an expanded role for these rules.

A. Rule 11

The most frequently used device under the Federal Rules to respond to a spurious claim is rule 11, which states that

> [e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . , and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.[80]

In construing this rule, courts have imposed some affirmative obligation upon attorneys to investigate the facts underlying the

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80. FED. R. CIV. P. 11.

pleadings that they sign. The Ninth Circuit has summarized the requirements of the rule as follows: "Before filing a civil action, the attorney has a duty to make an investigation to ascertain that it has at least some merit, and further to ascertain that the damages sought appear to bear a reasonable relation to injuries actually sustained."[81] Although rule 11 applies only to the good faith of an attorney in signing a pleading, and while it provides sanctions only against a violating attorney, it has been used effectively in several cases to combat frivolous claims.

A classic example of the type of case in which rule 11 can be used effectively is *Kinee v. Abraham Lincoln Federal Savings & Loan Association*,[82] a class action brought on behalf of mortgage borrowers in the Philadelphia area against a group of mortgage lenders. The lenders purportedly required all their borrowers to prepay monthly a specified sum to provide for the payment of annual taxes, mortgage insurance premiums, sewer and water rentals, and other potential liabilities that could result in a lien on the mortgage property with a higher priority than that held by the mortgagee. The plaintiffs alleged that, because the mortgage companies paid no interest on this money, the defendants were guilty of a number of violations of antitrust laws and of the federal Truth-in-Lending Act.[83] The case is interesting for the purposes of rule 11 analysis because of the method used by the plaintiffs' attorneys in identifying the proper defendants.

To determine which institutions in the area used the prepaid or escrow method of protecting against priority liens, the plaintiffs' attorneys took the Philadelphia phone book and sued every entity listed under the heading of mortgage brokers. They thereafter engaged in discovery to determine which institutions actually used the escrow method and which ones did not. As a result of this process, the attorneys discovered that over one fourth of the original defendants did not use this device.[84] Although these defendants were dismissed from the action, the court found that this proce-

81. Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979). The Ninth Circuit also suggested in an earlier case that an attorney could not file a pleading based on information and belief if facts that would demonstrate clearly the falsity of the pleading were easily accessible to the attorney. *See* Bertucelli v. Carreras, 467 F.2d 214, 215 & n.4 (9th Cir. 1972).

82. 365 F. Supp. 975 (E.D. Pa. 1973).

83. *Id.* at 977.

84. *Id.* at 982.

dure violated the requirements of rule 11. In referring to the conduct of the plaintiff's attorney, the court stated:

> When they signed their pleading, they could not say that they in fact had reasonable basis to believe that the allegations were true as to each defendant, but merely that there was within the aggregate mass of the defendants sued, a significant number of defendants, exact identities unknown to which the allegations applied, together with an unknown number to which the allegations did not apply. This is simply not a proper way to proceed in federal court, or in any court for that matter.[85]

The court found that taking such action without conducting any prior investigation constituted a clear violation of rule 11 and ordered that each of the dismissed defendants be notified that they had the right to have the costs incurred in having to appear taxed to the plaintiffs' attorneys.[86]

Of course, very few cases call as clearly for the application of rule 11 as did *Kinee*, and to protect the free access to judicial process, courts squarely place on the moving party the burden of proof of rule 11 violations. In *Textor v. Board of Regents of Northern Illinois University*,[87] the United States District Court for the Northern District of Illinois awarded expenses and attorneys' fees under rule 11 based on the conduct of the plaintiff's attorneys toward defendants sued in an inappropriate jurisdiction. Northern Illinois University employed the plaintiff in that case, Alice Textor, as a physical education instructor and women's athletic director.[88] In her complaint, Textor alleged constitutional and statutory violations in the defendants' discriminatory treatment of women's athletics.[89] In response, the members of the conference filed motions to dismiss and supporting briefs based on lack of personal jurisdiction and improper venue.[90] Because the court found no grounds for asserting jurisdiction against the conference members, and because Textor's attorney made no attempt to respond to the jurisdictional motions, the cause of action was dismissed for

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85. *Id.* at 982-83.
86. *See id.* at 983.
87. 87 F.R.D. 751 (N.D. Ill. 1980), *rev'd*, 711 F.2d 1387 (9th Cir. 1983).
88. *Id.* at 752-53.
89. *See* Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387, 1389 (9th Cir. 1983).
90. *Textor*, 87 F.R.D. at 754.

each member school. The court ordered Textor's attorney to pay the expenses, including attorneys' fees incurred by these schools in appearing.[91] Up to that point, the court's ruling in *Textor* was not unusual. What was interesting about the case, however, was the court's allocation of the burden of proof on sanctions.

In its original order, the court directed the defendants to submit a motion for expenses and set a hearing date for those motions.[92] Later, the sanctioned attorneys filed a motion requesting a hearing on the propriety of the award of expenses to the defendants. Although granting the hearing, the court, apparently analogizing to the standards of rule 37,[93] placed the burden on the plaintiff's attorneys to justify their conduct and imposed $28,000 in fees.[94]

Obviously, this procedure completely reversed the burden of proof imposed in a traditional common-law action. Such a course would make recovery of at least some damages easier for a defendant faced with a frivolous claim. Not surprisingly, the Seventh Circuit reversed this award on appeal.[95] According to the Seventh Circuit, the district court erred by imposing sanctions on the plaintiff's attorneys without giving them a prior hearing and by placing the burden on them at the hearing to show that sanctions should not be imposed.[96] The district court's procedure, the appellate court noted, confused the procedure for imposing sanctions for failure to cooperate in discovery under rule 37(a)(4) with the procedure for sanctions under rule 11. The court pointed out that, although the text of rule 37(a)(4) specifically places the burden on the party whose conduct necessitated the motion, no such requirement exists under rule 11.[97] Because of this error in assigning the burden of proof, the fee award was reversed, and the matter was remanded for new hearings.[98]

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91. *Id.* at 754-55.

92. *See id.* at 755-56.

93. FED. R. CIV. P. 37; *see infra* notes 194-223 and accompanying text.

94. *See Textor*, 711 F.2d at 1394. The use of 28 U.S.C. § 1927 and other devices in conjunction with rule 11 is discussed below. *See infra* notes 152-63 and accompanying text.

95. *Textor*, 711 F.2d at 1397.

96. *Id.* at 1394-96.

97. *See id.* at 1395.

98. *See id.* at 1397. In *Textor*, the Seventh Circuit also established the rule that fee awards could be made for effort expended by salaried corporate counsel. *See id.* at 1396-97. Note, however, that this discussion is based upon the court's reading of Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), which construed 28 U.S.C. § 1927.

Because the burden of proof under a rule 11 motion is on the moving party, rule 11 is used most effectively in conjunction with discovery, as illustrated in *Cornaglia v. Ricciardi*.[99] In that case, the plaintiff filed a class action suit to recover money allegedly lost by him, and by others similarly situated, as a result of the purchase of the stock of Richton International Corporation. The complaint, brought under section 11 of the Securities Act of 1933[100] and section 10 of the Securities Exchange Act of 1934,[101] contained allegations of fraud and conspiracy. In response to these charges, the defendants filed interrogatories and requests for production that sought to discover the facts upon which the plaintiff's allegations of fraud were based. When the plaintiff filed evasive responses, the defendants filed a motion under rule 11 to strike the complaint as meritless.[102]

At the hearing held on this motion, the plaintiff submitted an affidavit executed by his attorney in which the attorney outlined the factual basis of the complaint. Based on this affidavit and the record before it, the court overruled the rule 11 motion. As an alternative to their rule 11 motion, however, the defendants had filed a motion under rule 37(a) asking the court to require the plaintiff to file responses to the interrogatories referred to above. The court ordered that these responses be provided and indicated that, at the end of the discovery period, it would entertain a renewed rule 11 motion if the plaintiff failed to produce facts which supplied reasonable grounds for its allegations.[103]

This case represents a proper use by a defendant of the relief available under rule 11. The rule contains no discovery mechanisms of its own, but, because the burden of proof in a rule 11 motion is and should be on the party filing the motion, the moving party must use discovery to develop support for its motion.[104] Once

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99. 63 F.R.D. 416 (E.D. Pa. 1974).

100. 15 U.S.C. § 77k(a) (1982).

101. *Id.* § 78j(b).

102. *See Cornaglia*, 63 F.R.D. at 417-18.

103. *See id.* at 419-20.

104. *See* Chipanno v. Champion Int'l Corp., 702 F.2d 827 (9th Cir. 1983). In that case, the plaintiff filed a claim barred on its face by the applicable statute of limitations. To avoid this bar, the plaintiff alleged that the statute should be tolled because the defendant concealed the plaintiff's cause of action from him. In response to this, three defendants filed a rule 11 motion, and the district court required the plaintiff's attorney to file certificates setting forth the facts upon which he based his tolling arguments. The court found these certificates to be inadequate and dismissed the action against these three defendants. The

discovery is had, a motion for summary judgment filed in conjunction with a rule 11 motion can provide effective relief to a wronged party.[105]

In addition to providing a good example of rule 11's use in conjunction with discovery, the *Cornaglia* opinion also suggested that a rule 11 motion can be used to attack not only the improper filing of a claim but also its improper continuation.[106] Although in *Cornaglia* the court was willing to accept the plaintiff's attorney's affidavit on his subjective good faith in filing, it clearly left open the possibility for sanctions if the plaintiff failed to produce objective facts to support his statement of subjective belief.[107] This approach appears to read an objective standard of good faith into rule 11, which would provide a defendant with a solid basis for deriving the proof necessary to prevail in a rule 11 motion. That rule 11 is based on such an objective standard recently was confirmed in *Wells v. Oppenheimer & Co.*[108]

In *Wells*, the defendant filed a motion for summary judgment, which the court overruled. Thereafter, the plaintiff filed a motion under rule 11 seeking an award of attorneys' fees. Defendant's counsel opposed this motion on the ground that they acted in subjective good faith in bringing the motion. The court rejected this argument and granted the motion on the ground that it could find no objective basis for defendant's counsels' asserted belief that its motion was "well grounded in fact and [was] warranted by existing law."[109] The court clearly held that an attorney's good faith for rule 11 purposes had to be judged on an objective standard or else the rule virtually would be useless.[110]

When based on such an objective standard, rule 11 can pro-

Ninth Circuit reversed and noted that rule 11 was not a discovery device and that the district court erred by requiring the filing of these certificates. *Id.* at 831.

105. *See id.*

106. *Cf. supra* note 16 and accompanying text (discussing the use of a malicious prosecution action for the improper continuation of a lawsuit).

107. *See Cornaglia*, 63 F.R.D. at 419.

108. 101 F.R.D. 358 (S.D.N.Y. 1984).

109. *Id.* at 359 (quoting FED. R. CIV. P. 11). Although the discussion in this Article has focused on the use of rule 11 to combat a frivolous complaint, the rule also has been used against defendants who interposed frivolous defenses. *See, e.g.*, Arney v. Bryant Sheet Metal, Inc., 96 F.R.D. 544, 549 (E.D. Tenn. 1982); White v. Smith, 91 F.R.D. 607, 609 (W.D.N.Y. 1981).

110. The court stated that, if a subjective standard were used, the rule might as well be repealed. *Wells*, 101 F.R.D. at 359.

vide a valuable supplement to the common-law remedies. Although the burden of proof remains on the party seeking an award,[111] the standards for an award under rule 11 are much less formal than in a wrongful civil procedure action. For example, no requirement exists under rule 11 that the action be terminated and that a second action to recover damages be instituted.[112] A motion for relief under rule 11 also presents more manageable standards than the malice requirement in wrongful procedure actions.[113] Because the issue of bad faith is decided by a judge based on equitable standards[114] rather than by a jury, which might be confused by the malice requirement,[115] results are more predictable. The rule also provides an important supplement to wrongful civil procedure actions in states that require proof of special damages other than attorneys' fees before an award can be made.[116] In those states, rule 11 can be used to recover expenses, such as attorneys' fees, that otherwise would be unrecoverable.

As the foregoing demonstrates, rule 11 can provide an effective alternative or supplement to the remedies provided by common law. The rule, however, is limited in its usefulness by attorneys' natural reluctance to ask for sanctions against one another, and by the rule's providing sanctions only against attorneys who violate the rule and not against their clients.[117] However, a number of cases do exist in which rule 11 has been used in conjunction with the federal "bad faith" exception to punish not only offending attorneys but their clients as well.[118]

B. The Federal Bad Faith Exception

Contrary to the practice in England, American courts traditionally have followed the "American rule"—in the absence of a

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111. *See supra* notes 92-98 and accompanying text.

112. *See supra* notes 21-28 and accompanying text.

113. *See supra* notes 45-50 and accompanying text.

114. *See* Comment, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 324 (1977).

115. *See supra* note 46 and accompanying text.

116. *See supra* notes 51-54 and accompanying text.

117. Rule 11 provides that "[f]or a willful violation of this rule an *attorney* may be subjected to appropriate sanctions." FED. R. CIV. P. 11 (emphasis added).

118. *See, e.g.*, Nemeroff v. Abelson, 469 F. Supp. 630, 640 (S.D.N.Y. 1979), *rev'd*, 620 F.2d 339 (2d Cir. 1980).

statute or an enforceable contract, a prevailing litigant is not entitled to collect attorney's fees from the losing party.[119] Federal courts have recognized three significant exceptions to this rule —the common-fund exception, the prior litigation exception, and the bad faith exception.[120] Only the bad faith exception is relevant to this article.[121]

In *Hall v. Cole*,[122] the United States Supreme Court summarized in dictum the application of the bad faith exception: "[i]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons."[123] As is often the case, this rule is easy to state but not so easy to apply. Perhaps the best illustration of its application is found in *Nemeroff v. Abelson*.[124]

In *Nemeroff*, a shareholder of Technicare Corporation brought an action against the columnist, editor, and publisher of a newspaper, as well as several investors in Technicare stock who were friends of the columnist.[125] The basis of the claim was that the defendants had convinced Abelson (the columnist) to write an article predicting a sharp decline in the price of Technicare stock. According to the allegations, the article was written as part of a scheme by the investor defendants to take short positions in the stock prior to the publication of the article and thereby to benefit if the price fell after the publication date. After the article was published, the price of the stock in fact fell, and the investor defendants were able to cover their short positions and to make a substantial profit. During the course of the litigation, however, the plaintiff was unable to establish any proof of a conspiracy, and 11 months after the institution of this action, it was dismissed with prejudice by agreement of the parties.[126]

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119. *See, e.g.*, United States v. Standard Oil Co., 603 F.2d 100, 103 (9th Cir. 1979).

120. *See* Comment, *supra* note 114, at 322-23.

121. For a summary of the application of the other two exceptions, see *id.* at 322-24.

122. 412 U.S. 1 (1973).

123. *Id.* at 5; *see* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977). The authority most frequently relied upon in recent cases is the Supreme Court's decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Although the Court did not address directly the bad faith exception, it did discuss the exception in dictum. *Id.* at 258-59.

124. 704 F.2d 652 (2d Cir. 1983).

125. *Id.* at 654.

126. *Id.*

Thereafter, the defendants filed a motion seeking to recover costs and attorney's fees from the plaintiff and his attorney.[127] The district court found that the investor defendants had failed to carry their burden of proof on these motions; however, the publishing defendants received an award of costs and fees.[128] In making its award, the court emphasized the feeble attempts at discovery made by the plaintiff to support a case that appeared to be unfounded from the outset.[129] On appeal, the Second Circuit court reversed and remanded for futher findings of fact.[130]

In so ruling, the Second Circuit emphasized that prior to the filing of the action the plaintiff's attorney had conducted some investigation of the facts surrounding the dispute. The plaintiff's attorney had received and confirmed reports that both the New York Stock Exchange (NYSE) and the Securities and Exchange Commission (SEC) were investigating the trading in Technicare stock.[131] The court found that based on this and other information[132] it could not accept the district court's finding that the case was *commenced* in bad faith. Nevertheless, because the district court had made no findings on the *conduct* of the case, the case was remanded for further proceedings.[133]

On remand, the district court made additional findings, reinstituted the fee award in favor of the publishing defendants, and

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127. The motion against the attorneys was based on rule 11, and the motion against the plaintiff was based on the bad faith exception. *See* Nemeroff v. Abelson, 469 F. Supp. 630, 632 (S.D.N.Y. 1979), *rev'd*, 620 F.2d 339 (2d Cir. 1980).

128. *See id.* at 640-41. The court stated:

> It is, of course, true that the lawsuit against the short selling defendants was as baseless as it has been found to have been in respect of the publishing defendants, and the former, as well as the latter, were required to spend funds unnecessarily in defense of charges that should never have been brought. However, the requisite malice and bad faith motivation spawning the litigation against the short selling defendants have not been established. As indicated at the outset, mere baseless or misguided litigation does not suffice as a premise for taxing a plaintiff with a defendant's attorneys' fees and expenses. This litigation does not appear to me to have any destructive potential to the business and reputations of the short selling defendants.

Id.

129. *See id.* at 642.

130. *Nemeroff*, 620 F.2d at 339.

131. *Id.* at 343.

132. The plaintiff's attorney also pointed to an alleged correlation between short trading in the Technicare stock and the timing of the Abelson article and comments in a market newsletter that connected Abelson to past short trading activity. *Id.* at 343-46 & n.10.

133. *See id.* at 351.

made a new award to the investor defendants.[134] The court's award was based not upon the plaintiff's activity in filing the complaint but on its activity in continuing the case even after it became obvious that the suit was groundless.[135] The court noted that, although the plaintiff reasonably might have relied upon the NYSE investigation in filing its complaint, that basis for the suit was destroyed on July 17, 1977, when the NYSE issued its report, which concluded that no evidence of a link between Abelson and the investor defendants existed.[136] The fee award, according to the court, was justified by the plaintiff's conduct after it received the NYSE report. In affirming the new award, the Second Circuit said:

> Between July 1977 and the following May when the case was dismissed, Nemeroff's attorneys made only insignificant efforts to replace the "correlation" previously thought to have been uncovered by the NYSE with new evidence linking Abelson's columns to the trading of the investor defendants. During this nine-month period, Nemeroff's attorneys concerned themselves primarily with a motion for class certification and with requests for additional discovery time. The District Court concluded that given the inadequate factual basis for the suit as of July 19, Nemeroff's attorneys had continued the litigation in bad faith by choosing to pursue peripheral, procedural issues after July 19 without making any perceptible efforts to locate evidence that might support the complaint. The District Court also found plaintiff's conduct of the litigation to be intentionally dilatory.[137]

The series of *Nemeroff* cases provided an interesting point: the bad faith exception was used in a factual setting that normally would be covered by a malicious prosecution or wrongful civil procedure action. In other cases, however, the courts applied the bad faith exception in situations in which an abuse of process action would be appropriate. Perhap the best example of this is found in *Philips Business Systems v. Executive Business Systems.*[138]

The plaintiff, PBSI, marketed the Norelco line of office products throughout the United States through a primary network of

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134. *See* Nemeroff v. Abelson, 94 F.R.D. 136, 146 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 652 (2d Cir. 1983).

135. *See id.* at 141.

136. *Id.* at 141-42.

137. Nemeroff v. Abelson, 704 F.2d 652, 655-56 (2d Cir. 1983).

138. 570 F. Supp. 1343 (E.D.N.Y. 1983).

distributors and a secondary network of retailers.[139] Poor market performance during the period between 1979 and 1981 forced PBSI to discontinue the sales advantages that it gave to its distributors. Because this action placed distributors on the same footing as retailers, two distributors successfully sought an injunction against PBSI for what they perceived to be an attempted termination of their business.[140]

PBSI responded by suing both distributors for alleged violations of the Robinson-Patman Act.[141] The distributors filed motions to dismiss under rule 12(b)(6) on the ground that PBSI was attempting to use the action primarily for the purpose of avoiding the court's order in the earlier litigation.[142] The court agreed and found that the second case was filed in hopes of obtaining some redress from the injunction issued in the first case.[143] The court,

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139. The court described the distribution system as follows:

> Until July of 1981 plaintiff Philips Business Systems, Inc. (PBSI) marketed the Norelco line of office products in the United States via a marketing organization comprised of 55 exclusive distributors and 90 Independent Retail Outlets (IROs). Each distributor was assigned a certain geographically defined Primary Area of Responsability (PAR). In exchange for a distributor's pledge to meet a specified sales quota within its PAR, PBSI agreed not to compete with the distributor within its PAR directly and to refrain from appointing any other distributors within that area. Distributors assigned other PARs, however, could come in and compete in any PAR they wished. An IRO was appointed by PBSI for market coverage in an area where a distributor, for one reason or another, was no longer doing the job.
>
> With the exception of provision of customer services, IRO's performed much the same function as PBSI's exclusive distributors and functioned under the same conditions. That function was essentially that of a market intermediary who sold products to both customer dealers on a wholesale basis and retail to final consumers or end users. To reflect their failure to provide customer service, however, the IRO's were charged higher prices for inventory purchased from PBSI. Specifically, exclusive distributors were uniformly given a 16.6% price advantage over IROs on the inventory they purchased from PBSI. In addition, distributors were given more favorable payment terms and advertising allowances than IROs.

Id. at 1344-45 (footnote omitted).

140. *Id.* at 1345 (citing Carlos v. Philips Business Sys., 556 F. Supp. 769 (E.D.N.Y. 1983); Executive Business Sys. v. Philips Business Sys., No. V-81-2075 (E.D.N.Y. July 23, 1981)).

141. PBSI alleged that the distributor had induced PBSI to give them a 16.6% price discount in violation of the Robinson-Patman Act. PBSI sued for both injunctive relief and treble damages. *See Philips Business Sys.*, 570 F. Supp. at 1346.

142. PBSI had been sanctioned earlier for contempt of court in disobeying the court's order establishing the injunctions. *See* Executive Business Sys. v. Philips Business Sys., 539 F. Supp. 76 (E.D.N.Y. 1982).

143. *Philips Business Sys.*, 570 F. Supp. at 1346. In finding the action to be baseless,

> [u]nder these circumstances the court [came] to the inescapable conclusion that

therefore, based on the bad faith exception, granted the motions[144] and awarded costs and attorneys' fees to the two distributors.[145]

The District of Columbia circuit court reached a similar result in *Lipsig v. National Student Marketing Corp.*[146] The court ruled that fees could be awarded even against a party pressing a colorable claim if the party pressing the claim acted in bad faith during the course of the litigation.[147] The court said that, "[w]hile the presence of merit in a claim or defense may well negate any notion of bad faith in its *filing*, it certainly cannot justify abuse of the judicial process in the *methodology* of its *prosecution*."[148]

Although an award of fees based on the bad faith exception is strictly punitive,[149] its standards, like those of rule 11, are less burdensome for a party seeking an award than those of the traditional common-law actions. Although this exception cannot be used in all cases in which rule 11 can be used,[150] one of the two devices can be used to respond to virtually any situation in which a common-law action would lie. Both will apply in many situations. Although these devices do not provide for recovery of special damages, recovery of fees will provide adequate relief in most cases. When special damages are significant, a motion for an award of attorneys' fees under rule 11 or the bad faith exception usually can be supplemented by a later wrongful civil procedure action.

> the filing of these two actions was undertaken as one more step in a pattern of obdurate and obstinate behavior designed to have the court vacate the preliminary injunctions. PBSI's sole recourse to attack these injunctions was within the confines of the original litigations. Failing this, PBSI was not at liberty to expand and escalate the litigation to a new front in pursuit of the identical goal. Rather it was obligated to proceed with the case until such time as its appellate rights accrued at which time a renewed effort to modify the results could be undertaken. What PBSI [chose] to do here instead exceed[ed] what this court consider[ed] to be the outer limit of zealous advocacy.

Id. at 1350-51 (footnotes omitted).

144. *Id.* at 1349.

145. *See id.* at 1350-51.

146. 663 F.2d 178 (D.C. Cir. 1980).

147. *Id.* at 182.

148. *Id.* (emphasis in original).

149. *See* United States v. Standard Oil Co., 603 F.2d 100, 104 (9th Cir. 1979).

150. The Fifth Circuit has held that in diversity cases the exception applies only if the governing state law recognizes the exception. *See* Perkins State Bank v. Connolly, 632 F.2d 1306, 1312 (5th Cir. 1980); Aerosonic Corp. v. Trodyne Corp., 402 F.2d 223, 229 (5th Cir. 1968). The Third Circuit has ruled, however, that because the rule springs from the equitable power of the court it applies in all federal cases. *See* Lichtenstein v. Lichtenstein, 481 F.2d 682 (3d Cir. 1973).

IV. Statutory Responses to Frivolous Claims

A. Federal Statutes

Of the federal statutes that can be used to combat a frivolous claim, the one with the broadest applicability is section 1927 of the Judicial Code.[151] As originally enacted, section 1927 provided that *costs* could be assessed against any attorney who "multiplies the proceedings in any case as to increase costs unreasonably and vexatiously."[152] As amended in 1980, the statute now provides that not only excess costs but also other expenses and attorneys' fees shall be assessed personally against any attorney who "multiplies the proceedings in any case unreasonably and vexatiously."[153] The quoted language indicates that the emphasis of the statute has been shifted from conduct resulting in an unreasonable increase in costs to conduct resulting in an unreasonable delay in the litigation. The legislative history clearly indicates that Congress, in hopes of expediting litigation, intended for the courts to give greater attention to section 1927.[154]

Courts were split under the old statute about whether attorneys' fees properly could be assessed as costs under section 1927. Some courts, including the Second Circuit, held that attorneys' fees were an element of costs.[155] Several circuits, however, refused to extend costs to include attorney's fees, largely because section 1927 is penal in nature and, therefore, should be construed strictly.[156] The Supreme Court resolved this split in *Roadway Express v. Piper*,[157] in which the court affirmed a Fifth Circuit decision[158] restricting costs to those enumerated in section 1920.[159]

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151. 28 U.S.C. § 1927 (1982).

152. 28 U.S.C. § 1927 (1976) (later amended in 28 U.S.C. § 1927 (1982)).

153. 28 U.S.C. § 1927 (1982).

154. *See* H.R. REP. No. 1234, 96th Cong., 2d Sess. 8, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2781, 2782.

155. *See* Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977); *see also* Fisher v. Fashion Inst. of Technology, 491 F. Supp. 879 (S.D.N.Y. 1980).

156. *See* Monk v. Roadway Express, Inc., 599 F.2d 1378, 1382 (5th Cir. 1979), *aff'd sub nom.* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); United States v. Ross, 535 F.2d 346, 350 (6th Cir. 1976). In *Ross*, the court limited recoverable costs under section 1927 to costs ordinarily taxed to a losing party. *Ross*, 535 F.2d at 350.

157. 447 U.S. 752 (1980).

158. *Monk*, 599 F.2d at 1378.

159. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 757-61 (1980).

As a result of the *Roadway Express* decision, the 1980 amendment to section 1927 was treated in two recent decisions as an expansion of the law, rather than as a clarification of the prior statute, and, therefore, was not applied retroactively.[160] Other recent applications have held that, under section 1927, only actual costs and fees, and not disciplinary sanctions, are to be awarded,[161] and that, although some degree of culpability is required, subjective bad faith is not.[162] The emphasis of section 1927 is clearly different from that of rule 11, but it can be used in many of the same types of cases in which that rule would be useful. Section 1927 is broader than rule 11 in that rule 11 applies only to the signing of pleadings by an attorney,[163] but section 1927 applies to any conduct by an attorney that adds unreasonable costs or delays to litigation.

Another federal statute that has broad application is the All Writs Act,[164] which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.[165] The courts have given this Act broad and flexible interpretation [166] in keeping with the legislative intent that it provide a "legislatively approved source of procedural instruments designed to achieve the 'rational ends of law.' "[167] The continued broad interpretation by the courts in effect, has been ratified by Congress. In its original form as section 262 of the Judicial Code,[168] the All Writs Act allowed only writs "necessary" in the proper exercise of jurisdiction. Section 1651 added the words "or appropriate," and thus, extended even further

160. *See* Herrera v. Farm Prods. Co., 540 F. Supp. 433, 436 n.4 (N.D. Iowa 1982); *In re* Silverman, 13 Bankr. 270, 273 (S.D.N.Y. 1981).

161. *See, e.g.*, United States v. Blodgett, 709 F.2d 608, 610-11 (9th Cir. 1983).

162. *See, e.g.*, Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984).

163. *See supra* notes 81-82 and accompanying text.

164. 28 U.S.C. § 1651(a) (1982).

165. *Id.*

166. *See* United States v. New York Tel. Co., 434 U.S. 159, 173 (1977).

167. Harris v. Nelson, 394 U.S. 286, 299 (1969) (quoting Price v. Johnston, 334 U.S. 266, 282 (1948)); *see* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942) ("Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.").

168. All Writs Act, ch. 231, § 262, 36 Stat. 1156, 1162 (1911) (codified at 28 U.S.C. 1651 (1982)).

this broad reaching power.[169] In response to a demonstrated pattern of frivolous, repetitious, malicious, vexatious, or harassing litigation, a district court may invoke the All Writs Act, on motion or *sua sponte*, to enjoin the plaintiff from further filings in pursuit of his frivolous claims.[170]

In *Gordon v. U.S. Department of Justice*,[171] the court addressed an enjoined plaintiff's constitutional right of access to the courts. The plaintiff had filed a series of complaints against the judges of the federal district court in Massachusetts and of the First Circuit and the Supreme Court justices for ruling against him. The court held that "it is proper and necessary for an injunction to issue barring a party . . . from filing and processing frivolous and vexatious lawsuits."[172] In practice, this remedy has been used primarily when principles of res judicata bar the plaintiff's claim.[173] Although a very clear set of facts must be present before the statute applies, it should not be overlooked by defendants faced with repeated claims based on the same facts.[174]

B. State Statutes

In response to the problem presented by meritless lawsuits, legislatures in over twenty states have enacted statutes imposing sanctions, generally in the form of attorneys' fees, on parties who

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169. *See New York Tel. Co.*, 434 U.S. at 173.

170. Annot., 53 A.L.R. FED. 651, 653 (1981).

171. 558 F.2d 618 (1st Cir. 1977).

172. *Id.* at 618 (citing Rudnicki v. McCormack, 210 F. Supp. 905, 908-12 (D. Mass. & R.I. 1962), *appeal dismissed sub nom.* Rudnicki v. Cox, 372 U.S. 226 (1963)); *see* Meredith v. John Deere Plow, 261 F.2d 121, 124 (8th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959); Adams v. American Bar Ass'n, 400 F. Supp. 219, 227 (E.D. Pa. 1975); Boruski v. Stewart, 381 F. Supp. 529, 535 (S.D.N.Y.), *aff'd sub nom.* Boruski v. United States, 493 F.2d 301 (2d Cir.), *cert. denied*, 419 U.S. 808, 861 (1974).

173. *See* Annot., 53 A.L.R. FED. 651, 655 (1981). In Butterman v. Walston & Co., 308 F. Supp. 534 (E.D. Wis. 1970), the court dismissed the plaintiffs' action on grounds of res judicata because the same complaint had been filed by plaintiffs over 7 years before in another district, had been prosecuted to final judgment, had been appealed unsuccessfully, and twice had been the subject of a certiorari petition to the Supreme Court. *See id.* at 537-38. The court refused to issue the injunction despite a finding that "[t]he plaintiffs' charges [were] wholly unsupported by any allegations of credible fact." *Id.* at 537. The court noted that no showing had been made that plaintiffs had "vexatiously start[ed] multitudinous suits designed solely to harass the defendants." *Id.* at 538.

174. One commentator writes that at least 75 federal statutes exist that authorize an award of fees in specific contexts. *See* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 303 & n.104 (1977).

assert frivolous claims.[175] The statutes vary in two major respects: first, according to the standard of conduct for which sanctions may be imposed; and second, according to whether the application of sanctions are mandatory or discretionary with the court.

The majority of the statutes describe the prohibited conduct as the assertion of claims or defenses that are either frivolous, groundless, not in good faith, or some combination of the three.[176] Statutes in Florida and Hawaii appear to require a more grievous transgression before a court will impose sanctions. The Florida statute will not provide relief without a "complete absence of a justiciable issue of either law or fact raised by the losing party."[177] In Hawaii, the court must find "that *all* claims made by the party are completely frivolous and are totally unsupported by the facts and law."[178]

Legislation in three states focuses on the reasonableness of the claim rather than on the attorney's or party's good faith and appears to impose sanctions on a broader standard. In North Dakota, for example, a party may be compelled to pay attorneys' fees even if he asserts his claim in good faith. The standard used is whether or not a reasonable person could believe that the claim would be adjudicated in his favor.[179] The prevailing party must allege the frivolous nature of the claim in his responsive pleading to recover.[180] Statutes in Illinois[181] and Michigan[182] provide for an

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175. *See infra* notes 176-89 and accompanying text.

176. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-341.01C (1982) ("clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith"); COLO. REV. STAT. § 13-17-101 (Supp. 1984) (bringing, maintaining, or defense of action against the party entitled to such award was frivolous, groundless, or vexatious); CONN. GEN. STAT. § 52-240a (West Supp. 1984) (frivolous, limited, however, to products liability actions); KAN. STAT. ANN. § 60-2007(b) (1983) (without a reasonable basis in fact and not in good faith); MD. R. CODE ANN. § 1-341 (1984) ("bad faith or without substantial justification"); MASS. GEN. LAWS ANN. ch. 231, § 6F (West 1985) ("wholly insubstantial, frivolous and not advanced in good faith"); MINN. STAT. ANN. § 549.21 (West Supp. 1985) (frivolous; asserting an unfounded position solely to delay or to harass); S.D. CODIFIED LAWS ANN. § 15-17-35 (1984) (frivolous or brought for malicious purposes); UTAH CODE ANN. § 78-27-56 (Supp. 1983) ("without merit and not brought or asserted in good faith"); WASH. REV. CODE ANN. § 4.84.185 (Supp. 1985) ("frivolous and advanced without reasonable cause"); WIS. STAT. ANN. § 814.025(3)(a) (West Supp. 1984-1985) (frivolous—defined as "bad faith, solely for purposes of harassing or maliciously injuring another").

177. FLA. STAT. ANN. § 57.105 (West Supp. 1984).

178. HAWAII REV. STAT. § 607-14.5(b) (Supp. 1984).

179. *See* N.D. CENT. CODE § 28-26-01(2) (Supp. 1983).

180. *Id.*

181. *See* Illinois Civil Practice Act § 41, ILL. ANN. STAT. ch. 110, § 2-611 (Smith-Hurd

award of attorneys' fees when the opposing party asserts an unreasonable allegation or denial.

The statutes are divided between those that provide for a mandatory award of attorneys' fees once the opposing party has violated the appropriate standard of conduct[183] and those that permit an award at the court's discretion.[184]

Several states also have devised other means to deal with the problem of frivolous claims. Indiana has not passed a statute directly on point, but its courts have interpreted trial rule 54(b) of the Indiana Rules of Civil Procedure to allow attorneys' fees to be taxed as costs if the action is asserted or defended in bad faith.[185] Vermont's Rules of Civil Procedure provide that, if service or filing occurred in an untimely manner and if the action was "vexatiously commenced," the court may award reasonable attorneys' fees as costs.[186] Nevada awards attorneys' fees to a plaintiff who recovers less than $10,000 and also to a prevailing defendant if the plaintiff sought less than $10,000.[187] The statute is not made expressly applicable solely to frivolous claims, but is discretionary in its application.[188] An Idaho statute provides that attorneys' fees shall be awarded to the prevailing party if the claim or conterclaim does not exceed $2500.[189] A companion statute, applied only in frivolous cases, allows an award in the court's discretion.[190]

V. Responding to Marginal Claims

The measures discussed in the preceding sections of this Arti-

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1983).

182. MICH. GEN. CT. R. 11.6.

183. *See* ARIZ. REV. STAT. ANN. § 12-341.01C (1982); COLO. REV. STAT. § 13-17-101 (Supp. 1984); FLA. STAT. ANN. § 57.105 (West Supp. 1984); KAN. STAT. ANN. § 60-2007(b) (1983); MASS. GEN. LAWS ANN. ch. 231, § 6F (West 1985); WIS. STAT. ANN. § 814.025(1) (West Supp. 1984-1985).

184. *See* CONN. GEN. STAT. ANN. § 52-240(a) (West Supp. 1984) (applicable to products liability cases only); MD. R. CODE ANN. § 1-341 (1984); MINN. STAT. ANN. § 549.21 (West Supp. 1984); N.D. CENT. CODE § 28-26-01 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 15-17-35 (1984); UTAH CODE ANN. § 78-27-56 (Supp. 1983); WASH. REV. CODE ANN. § 4.84.185 (Supp. 1985).

185. *See* Cox v. Ubik, _ Ind. Ct. App. _, _, 424 N.E.2d 127, 129 (1981).

186. VT. R. CIV. P. 3.

187. *See* NEV. REV. STAT. § 18.010(2) (1979).

188. *See id.*

189. IDAHO CODE § 12-120(1) (1979).

190. *See id.* § 12-121.

cle apply only to relatively clear cases of abuse. The strict proof requirements under the common-law remedies[191] and even the more flexible standards of rule 11 and the bad faith exception[192] all concentrate on evidence of an improper motive either in bringing an action or in conducting an action after it is brought. Fortunately, however, most litigants and most attorneys do not file actions in bad faith. The more common situation faced by a defendant is a lawsuit that, although commenced in good faith, had little or no foundation in fact. In addition to the remedies that provide relief in situations in which a party has commenced or continued an action in bad faith, two devices available under the federal rules, rule 36 and rule 68, provide mechanisms for responding to marginal claims. Of the two mechanisms, rule 36 is presently more effective.

A. Rule 36

Rule 36 provides a procedure by which a party can recover costs and fees when another party has refused to admit facts without reasonable grounds for his refusal.[193] The advantage rule 36 gives to a litigant is that the rule requires a low standard of proof. A party seeking sanctions does not need to show that his opponent acted in bad faith but only that the opponent refused to admit the truth of various matters without a reasonable chance of prevailing on that issue at trial. Because of this lower standard of proof, rule 36 has much broader application than the remedies discussed earlier.

Rule 36(a) as originally drafted was intended to avoid the necessity of proving facts not in dispute in litigation.[194] Although requests under the original rule could be directed to questions of fact dispositive of the litigation,[195] they could not be applied to controverted legal issues or conclusions held by an opposing party.[196] Be-

191. *See supra* notes 14-72 and accompanying text.

192. *See supra* notes 119-50 and accompanying text.

193. FED. R. CIV. P. 36(a), 37(a)(4).

194. *See* Johnstone v. Cronlund, 25 F.R.D. 42, 44 (E.D. Pa. 1960).

195. *See id.* at 44 (request cannot be avoided simply because the question might be crucial to liability).

196. *See, e.g.*, Lantz v. New York Cent. R.R., 37 F.R.D. 69 (N.D. Ohio 1963); Pittsburgh Hotels Ass'n v. Urban Redev. Auth., 29 F.R.D. 512 (W.D. Pa. 1962). For a good summary of the use of rule 36 prior to the 1970 amendments, see generally Finman, *The Re-*

cause this severely limited the usefulness of the rule, and because the line between a matter of fact and a matter of opinion proved hard to define, the rule was amended in 1970.[197] As presently written, the rule reads as follows:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.[198]

As a result of this amendment, rule 36 can be used to address virtually any issue in a lawsuit, including opinions and the application of law to fact.[199] In the years since this amendment, rule 36 has been construed very broadly by the courts.[200]

The case of *Lumpkin v. Meskill*,[201] a school desegregation case brought against the school board of Hartford, Connecticut, and certain state officials, exemplified the broadest reach of rule 36. At issue in the case was the racial mix of the Hartford school system from 1950 to the date of the filing of the action. After the plaintiffs filed the action, they learned that the school system had maintained statistics on the racial mix of its students only since 1964. For the period from 1950 through 1964, the only records maintained from which this information could be extracted were the individual files maintained on each student.[202] Because a compilation of statistics from these records would have been unreasonably expensive,[203] the plaintiffs used a random sampling technique to arrive at an accurate approximation of the racial composition at the school during these years.[204] Once these figures had been tabulated, the plaintiffs submitted three requests for admissions: first,

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quest for Admissions in Federal Civil Procedure, 71 YALE L.J. 371 (1962).

197. *See* 4A J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 36.01(5), at 36-37 (1984).

198. FED. R. CIV. P. 3b(a).

199. *See* Bayle v. Leviton Mfg. Co., 94 F.R.D. 33, 35 (S.D. Ind. 1981).

200. *See infra* notes 201-13 and accompanying text.

201. 64 F.R.D. 673 (D. Conn. 1974).

202. *Id.* at 675.

203. The court noted that compiling these statistics would have required an examination of roughly 321,000 individual files. *Id.*

204. Under the technique used, the plaintiffs' statistical expert randomly examined 11,000 files upon which he based his estimates. This technique yielded an estimate that was 95% accurate within a 5% range according to the expert's affidavit. *Id.*

that valid random sampling was a reliable method of determing the racial mix during the years in question; second, that the methodology selected by the plaintiffs for their sampling was statistically valid; and third, that the results of the plaintiffs' sampling provided a reasonably accurate approximation of the racial mix during the disputed years.[205] The State defendant responded by admitting that the statistics were compiled according to the procedure described in the expert's affidavit, but refused either to admit or to deny the substance of the requests based on the argument that the requests did not pertain to verifiable facts.[206] The defendant took the position that rule 36 could not be used to force it to express an opinion on the validity of these sampling techniques.[207]

Because the defendant had argued not that the statistical techniques themselves were invalid but merely that opinions regarding them were not properly the subject of rule 36, the court ordered the first and second requests admitted.[208] More importantly, the court ordered that the defendant amend its response to deny the third request or to state that after a reasonable inquiry it was unable to admit or to deny the request. The court's reasoning in imposing this requirement is worth noting:

> In the instant case, the defendant is only being asked to "secure such knowledge and information as are readily obtainable by [it]." In addition, it is clear that if the defendant finds that it cannot admit the accuracy of the statistics, the research required of it here will not have been wasted. It will be "necessary either to [its] own case or to preparation for rebuttal." Indeed, it does not even seem unreasonable to require the defendant to conduct independent re-

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205. *See id.* The actual requests submitted by the plaintiffs read as follows:

1. Where the Hartford Board of Education maintains that actual figures for the racial composition of the Hartford Public Schools were not kept, a formulation based on statistically valid random sampling techniques is a reliable means of approximating the racial composition of those individual schools.

2. The methodology employed by Dr. Kenneth Paul Hadden as set out in the "Affidavit of Kenneth Paul Hadden in Support of the Attached Document 'Racial Composition of Hartford Public Schools, Determined by Sample Count of Student Population' " is a statistically valid random sampling technique.

3. The results of the methodology referred to in item #2 above and depicted in the table entitled, "Racial Composition of Hartford Public Schools, Determined by Sample Count of Student Population" are accurate as a reliable means of approximating the racial composition of the schools listed in that table.

206. *Id.* at 675-76.

207. *See id.* at 676.

208. *Id.* at 678.

search if necessary to verify the accuracy of the raw data obtained by Dr. Hadden's field workers.[209]

The *Lumpkin* court apparently established that, as long as a party would be required to do no more investigation to respond to the request than to respond to the facts or opinions embraced by the requests at trial, rule 36 mandates that the request be answered. Under rule 36, therefore, a party who does not want to admit a request must choose whether to deny the request, and to run the risk of incurring sanctions if the requested admissions are later proved, or to conduct an appropriate pretrial investigation into the matter at an early stage of the litigation to satisfy the reasonable inquiry requirement of rule 36. In many cases decided since *Lumpkin*, this approach strictly has been followed.[210]

The practical advantages of using this device in defending a questionable case are obvious. Once a request for admission is filed a party has only three responses available. The party may admit the matters covered by the request, in which case the proof established through the admissions can be used as a basis for a summary judgment or other dispositive motion or as trial evidence.[211] The party may respond that after a reasonable inquiry it does not have sufficient information either to admit or deny the matter covered by the request. If such a response if filed, however, the requesting party may file a motion to determine the sufficiency of the response. If the court finds that a reasonable inquiry was not conducted, it may enter an order deeming the requests admitted or it may order a supplemental response.[212] This procedure also yields evidence that can be used at trial.[213] The remaining option is to deny the request, which can lead to an award of fees as discussed below.

Rule 36 itself provides no relief to a party forced to prove a matter which should have admitted. Sanctions for failure to admit a given matter are provided for under rule 37(c) which reads as

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209. *Id.* at 679.

210. *See, e.g.*, Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981); Brown v. Arlen Mgt. Corp., 663 F.2d 575, 579-80 (5th Cir. 1981); United States v. Kenealy, 646 F.2d 699, 703 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); Cada v. Costa Line, Inc., 95 F.R.D. 346, 348 (N.D. Ill. 1982).

211. *See, e.g.*, Pleasant Hill Bank v. United States, 60 F.R.D. 1, 2 (W.D. Mo. 1973).

212. *See, e.g., Asea, Inc.*, 669 F.2d at 1247.

213. *See Brown*, 663 F.2d at 581.

follows:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.[214]

Although an award made pursuant to rule 37(c) certainly involves a great deal of judicial discretion, the rule directs that costs and attorneys' fees be awarded unless the party served can justify his conduct under one of the four exceptions noted.[215]

The standard for prevailing on an objection to a Rule 36 request is basically the same as the standard for prevailing on an objection to a discovery request under rules 30, 33, and 34. Although rule 36 is not technically a discovery device,[216] the rule itself states that a request may cover any matter within the scope of rule 26(b). The major limitation on requests under rule 36 is that they may be found objectionable if so phrased that they cannot be answered without explanation.[217] Furthermore, if no answer is filed within the specified time period, the requests are deemed admitted; however, the trial court may accept late answers in its discretion.[218]

If no valid objections are filed in response to a request that is denied, the party filing the denial bears the burden of showing that the denial was reasonable.[219] To carry this burden, a party must

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214. FED. R. CIV. P. 37(c).

215. *See* Bradshaw v. Thompson, 454 F.2d 75, 81 (6th Cir. 1972), *cert. denied*, 409 U.S. 878 (1973).

216. *See* McHugh v. Reserve Mining Co., 27 F.R.D. 505, 506-07 (N.D. Ohio 1961).

217. *See, e.g.*, Kasar v. Miller Printing Mach. Co., 36 F.R.D. 200, 203 (W.D. Pa. 1964); Johnstone v. Cronlund, 25 F.R.D. 42, 45 (E.D. Pa. 1960).

218. *See* Pleasant Hill Bank v. United States, 60 F.R.D. 1, 3 (W.D. Mo. 1973).

219. No presumption exists in favor of a party seeking an award under rule 37(c). Rule 54(d), however, creates a presumption that the prevailing party can receive costs unless the losing party can show some fault on the part of the prevailing party. Although rule 37(c)

show that he had a reasonable chance of prevailing on the issue covered by the request. If he cannot show that he had such a chance, an award should be made.[220]

A good example of what constitutes reasonable grounds is found in *Leas v. General Motors Corp.*[221] The plaintiff suffered an accident while employed by General Motors and, nearly 4 years later, developed an ulcer. The plaintiff filed a request seeking an admission that the ulcer was caused by the accident. The defendant denied the request, and the plaintiff prevailed on the issue at trial.[222] The plaintiff then moved for an award under rule 37(c) of the costs of proving causation. The court found that, because 4 years elapsed between the time of the accident and the development of the ulcer, good reason existed for the defendant to deny causation.[223]

The advantage of rule 36 is that it can be used to obtain relief in situations not covered by the previously discussed devices. It also can be used to shift the burden of proof on the question of the propriety of a fee award in cases that might be covered by rule 11 and other devices.[224]

B. Rule 68

Rule 68,[225] as now written, is less complicated to use than any other device, but it provides more limited relief. If a defendant offers to submit to judgment for a specified amount, and if the plaintiff refuses the offer and subsequently receives a judgment in an amount less than the offer, the plaintiff must pay costs incurred after the date of the offer.[226]

For several reasons, rule 68 has been used infrequently. First, because the term "costs" generally does not include attorneys'

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enjoys no such presumption, the party filing the denial must show that his actions were reasonable. *See* Popeil Bros., Inc. v. Schick Elec., Inc., 516 F.2d 772, 777 (7th Cir. 1975).

220. *See* Pioneer Nat'l Title v. Andrews, 652 F.2d 439, 443 (5th Cir. 1981).

221. 50 F.R.D. 366 (E.D. Wis. 1970).

222. *Id.* at 368.

223. *See id.* at 368-69.

224. Rule 37(c) provides that, once a party proves the truthfulness of the admission, he may recover reasonable expenses, including attorney's fees. The court must award these expenses unless the opposing party can show reason why he failed to admit the truthfulness of the matter. *See* FED. R. CIV. P. 37(c); *supra* text accompanying note 214.

225. FED. R. CIV. P. 68.

226. *See id.*

fees,[227] they are often too small to encourage the parties to resort to the rule.[228] In addition, a plaintiff who obtains a judgment for less than a rejected offer is still a prevailing party and, in a civil rights case, may be awarded attorneys' fees accruing after he rejected the more favorable offer.[229] Finally, the Supreme Court ruled in *Delta Airlines v. August*[230] that rule 68 is available only to plaintiffs and that a defendant must seek a discretionary award of costs under rule 54.[231]

The defendant in *Delta Airlines* made an offer of $450 to settle a civil rights claim. This offer was rejected, and the defendant ultimately prevailed at trial. The defendant's motion for costs under rule 68 was denied on the ground that the offer was not reasonable, and the Seventh Circuit affirmed on the same ground.[232]

The Supreme Court affirmed, not because the offer was unreasonable, but on the ground that the plain language of the rule confined its application to situations in which judgment is obtained by the plaintiff.[233] In dictum the Court stated that a "reasonable" offer is not required;[234] however, it did confine the operation of the rule to situations in which the plaintiff prevails but the judgment is in an amount less than the offer.[235]

Justice Rehnquist, in dissent, noted the illogical result of this interpretation: a defendant is allowed a mandatory award of costs in an amount less than his offer if he loses, but must resort to the court's discretion if he prevails.[236]

Because several decisions of the lower courts award costs under rule 68 to prevailing defendants,[237] *Delta Airlines* effectively overruled them. Partially as a result of that decision, a recent

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227. Pigeaud v. McLaren, 699 F.2d 401, 403 (7th Cir. 1983).

228. *See* FED. R. CIV. P. 68 committee note (Preliminary Draft of Proposed Amendments 1983), *reprinted in* 98 F.R.D. 337, 363 (1983).

229. *See* Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984).

230. 450 U.S. 346 (1981).

231. *See id.* at 352-54.

232. Delta Airlines v. August, 600 F.2d 699 (7th Cir. 1979), *aff'd*, 450 U.S. 346 (1981).

233. *See Delta Airlines*, 450 U.S. at 351, 355.

234. *See id.* at 355.

235. *See id.* at 351.

236. *See id.* at 379-80 (Rehnquist, J., dissenting).

237. *E.g.*, Dual v. Cleland, 79 F.R.D. 696, 697 (D.D.C. 1978); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974).

amendment to rule 68 was proposed.[238] Under the amendments, an award would be available whether a party prevails or loses after rejecting a more favorable settlement offer.[239] The proposed rule protects plaintiffs from sham offers by permitting the court the discretion to disallow an award of costs, fees, and interest if the court finds that the offer was made in bad faith.[240]

The amendment is intended to encourage settlement before a party incurs large costs and fees.[241] The addition of fee awards to the nominal costs previously provided for clearly would help to achieve this goal. If the amendments are adopted, rule 68 might become the single most important device for responding to spurious claims. However, because its applicaiton would be very broad, and because it would allow parties through a simple procedural device virtually to undo the American Rule, the present authors are not optimistic that it will be adopted and are not sure that such a radical device is needed.

VII. Conclusion

No doubt, frivolous lawsuits are a significant problem in this country, and they benefit no one except possibly those parties who file them and who are not penalized for their actions. The authors have sought to show through this Article that any truly unfounded claim can and should be challenged aggressively. Lawyers and judges have been reluctant in the past to use the devices at their disposal for dealing with a frivolous claim. As new methods of responding to such claims are proposed, they should be considered. In the meantime, the legal community should not neglect, as it has so often in the past, the use of the devices discussed in this Article. Considered in isolation, these devices may provide only piecemeal relief for parties faced with a meritless claim. As this Article demonstrates, however, when the devices are used in concert with one another pursuant to an organized plan, they can provide effective relief to a wronged party without threatening the important right of free and equal access to the system of justice.

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238. Fed. R. Civ. P. 68 committee note (Preliminary Draft of Proposed Amendments 1983), *reprinted in* 98 F.R.D. 337, 364 (1983).

239. *See id.*, *reprinted* in 98 F.R.D. at 367.

240. *See id.*, *reprinted in* 98 F.R.D. at 367.

241. *See id.*, *reprinted in* 98 F.R.D. at 364.