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Rule 11 Recalibrated in Civil Rights Cases

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RULE 11 RECALIBRATED IN CIVIL RIGHTS CASES

CARL TOBIAS*

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THE United States Supreme Court promulgated the 1983 amendments to the Federal Rules of Civil Procedure out of growing concern about abuse of the civil litigation process. The most controversial aspect of the implementation of these revisions has been judicial enforcement of amended Rule 11 (the Rule) in ways that disadvantage or “chill”¹ civil rights plaintiffs and attorneys.² As the federal judiciary enters its eighth year of implementing the Rule, courts apparently have improved their application of it by becoming more solicitous of the needs of civil

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1. “Chilling effects” are inappropriate effects that discourage possibly legitimate lawsuits. The effects are attributable to various factors including the Rule’s overly vigorous enforcement, resource restraints on civil rights plaintiffs, and the non-traditional nature of civil rights litigation. Civil rights litigation consists of lawsuits to enforce values and commands involving civil rights in the Constitution and such civil rights legislation as 42 U.S.C. § 1983. The deficient resources of many civil rights plaintiffs and attorneys make them risk averse and particularly susceptible to being chilled. For an examination of these concepts, see Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 495-98 (1988-89).

2. Rule 11 (the Rule) requires that judges sanction attorneys and litigants who fail to conduct reasonable pre-filing inquiries. FED. R. CIV. P. 11. These sanctions are the focus of this article. The Rule also prohibits papers interposed for inappropriate purposes. Because relatively few judges have employed that provision and it has less potential for chilling legitimate lawsuits, it will not be treated here.

rights plaintiffs and their counsel, in recognition of the important social function that civil rights litigation fulfills in combatting discrimination.

The first section of this article briefly examines the Rule's early implementation and the disadvantages that enforcement had for civil rights plaintiffs and attorneys. The second section analyzes recent developments suggesting that judicial application of the Rule has improved. Precisely how widespread such enforcement actually has been or will become is unclear. These complications prevent definitive conclusions about whether the improved application will suffice for civil rights plaintiffs. Given the present uncertainty, the third section of this article provides suggestions for the future. It proposes that the Supreme Court, the Advisory Committee and Congress expeditiously amend the Rule and offers suggestions for judicial enforcement until the Rule is revised.³

I. EARLY PROBLEMATIC APPLICATION OF RULE 11

Implementation of the Rule disadvantaged civil rights plaintiffs and their counsel for at least five years following the August 1983 revision.⁴ Considerable data, gleaned primarily from published opinions issued before 1989, support this observation.⁵

3. The recent flurry of Rule 11 activity and the importance of what is at stake in the amendment's application—vindication of fundamental civil rights—warrant additional examination. Cf. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1925 (1989) (author who suffered steady diet of Rule 11 for more than year as Reporter of Third Circuit Task Force on Rule 11 "felt like a character in *La Grande Bouffe*, a movie in which people literally eat themselves to death"). The Advisory Committee has undertaken a study that may lead to proposals for change. See *infra* note 91 and accompanying text.

4. The early effects of the Rule's implementation have been documented elsewhere. In this section I rely most on Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 How. L.J. 161 (1990); Tobias, *supra* note 1, at 490-507; Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988). The early judicial application of the Rule does not warrant extensive treatment in this article, because numerous courts and commentators have already examined this enforcement and found it to be problematic for both civil rights plaintiffs and attorneys. See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part), *cert. dismissed*, 485 U.S. 901 (1988); *Yancey v. Carroll County*, 674 F. Supp. 572, 575 (E.D. Ky. 1987), *aff'd*, 884 F.2d 581 (6th Cir. 1989); Tobias, *supra* note 1, at 490-507; Vairo, *supra*, at 200-02, 205, 213-14; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987).

5. See S. BURBANK, *RULE 11 IN TRANSITION* (1989) (report of Third Circuit Task Force); Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1338-52 (1986); Vairo, *supra* note 4, at 199-201. The year 1989 is an approximate date to

Professors Nelken and Vairo, who each undertook comprehensive studies, found that Rule 11 motions were filed and granted against civil rights plaintiffs and attorneys much more often than against civil rights defendants and their counsel, and that the plaintiffs were sanctioned at a higher rate than those who brought any other type of federal civil claim.⁶ A Task Force that analyzed all Rule 11 activity in the Third Circuit over a one-year period found that courts were considerably more likely to sanction civil rights plaintiffs than they were other litigants.⁷

Application of the Rule is a two-stage process: determining whether it has been violated, and, if so, selecting the appropriate sanction. Some judges and numerous commentators asserted that judges strictly enforced against civil rights plaintiffs and practitioners the Rule's requirements of reasonable factual investigations and legal inquiries before filing court papers.⁸ Yet judges apparently applied the mandatory sanctions requirement rather leniently and levied comparatively few large sanctions against civil rights plaintiffs and attorneys.⁹ It does not necessarily follow that the judicial implementation had minimal impact on the parties and lawyers. For example, courts' selection of monetary assessments as the sanction of choice, combined with substantial awards in a small number of civil rights actions, may well have detrimentally affected civil rights litigants and their counsel.¹⁰

There was considerable lack of consensus in the judicial application of the Rule to many significant issues. Courts differed

which I do not rigidly adhere, and it can vary from circuit to circuit and even within districts.

6. See Nelken, *supra* note 5, at 1327; Vairo, *supra* note 4, at 200-01.

7. See S. BURBANK, *supra* note 5, at 69. The Task Force studied motions filed under the Rule from July 1, 1987, to June 30, 1988, in the five district courts within the Third Circuit. It ascertained that in cases in which defendants had filed Rule 11 motions, courts sanctioned civil rights plaintiffs 47.1% of the time as compared to 8.45% for plaintiffs in non-civil rights cases.

8. See, e.g., Szabo, 823 F.2d at 1082-85 (five dense paragraphs and 20 case citations necessary to show plaintiff's due process claim "wacky"); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194, 205-06 (7th Cir. 1985) (affirming finding of Rule violation although information important to plaintiff's compliance with Rule was only available upon discovery); see also LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331, 333 (1988) (Rule 11 is antithetical to public interest law); Vairo, *supra* note 4, at 200-02, 213-14 (statistics show stricter application in civil rights cases).

9. See Tobias, *supra* note 4, at 164; see also Tobias, *supra* note 1, at 498-501. There were a few large sanctions awards, however. See, e.g., *Avirgan v. Hull*, 705 F. Supp 1544 (S.D. Fla.) (sanction of \$1,000,000), order clarified by 125 F.R.D. 189 (S.D. Fla. 1989) (attorney and clients jointly and severally liable), appeal docketed, No. 89-5515 (11th Cir. May 30, 1989).

10. See Tobias, *supra* note 4, at 165; Tobias, *supra* note 1, at 500-01.

over exactly what plaintiffs must do to satisfy the amendment's reasonable prefiling inquiry requirements. The courts frequently confused the reasonableness of prefiling inquiries with the quality of the papers submitted or the merits of the litigation.¹¹ Judges who agreed that civil rights plaintiffs or practitioners had contravened the Rule often disagreed substantially about the proper purpose, kind and size of sanctions in similar factual circumstances.¹²

Many courts and writers criticized the inconsistent judicial implementation of the Rule. For instance, Professor Vairo observed that the consensus that had previously existed in the appellate courts had begun to unravel by 1986,¹³ while Professor Burbank found a "conflict between or among circuits on practically every important question of interpretation and policy under the Rule" as recently as early 1989.¹⁴ In one case in which the district judge had levied a \$1000 sanction, a circuit judge chastised the other members of his panel for suggesting that the lower court might exercise its discretion to assess a sanction of \$10,000—he found a \$53,000 award appropriate.¹⁵ There was also much unnecessary, costly litigation over issues exogenous to the merits of the lawsuits.¹⁶ Concerned that excessively rigid im-

11. See, e.g., *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 485 (3d Cir. 1987); *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir. 1987); see also FED. PROCEDURE COMM., SECTION OF LITIG., A.B.A., SANCTIONS: RULE 11 AND OTHER POWERS 18-19 (2d ed. 1988) [hereinafter SANCTIONS]. The papers' quality and the merits of the underlying dispute are not irrelevant. The judge, however, should first attempt to ascertain whether the prefiling inquiry was reasonable. Only after such an attempt is inconclusive should the judge examine the papers or the merits to inform the reasonableness determination. See Burbank, *supra* note 3, at 1933-34, 1942, 1948; Tobias, *supra* note 4, at 168 n.37.

12. See, e.g., *Napier v. Thirty or More Unidentified Fed. Agents, Employees or Officers*, 855 F.2d 1080, 1083, 1093-94 (3d Cir. 1988) (award of \$17,163 to American Legion remanded for recalculation with suggestion that considerable reduction appropriate); *Johnson v. New York City Transit Auth.*, 823 F.2d 31, 33 (2d Cir. 1987) (award of \$3450 remanded for recalculation); *infra* note 15 and accompanying text.

13. See Vairo, *supra* note 4, at 205-07; accord SANCTIONS, *supra* note 11, at 14-16.

14. Burbank, *supra* note 3, at 1930-31.

15. See *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 126 (2d Cir.) (Pratt, J., dissenting), cert. denied, 484 U.S. 918 (1987); see also Tobias, *supra* note 1, at 499-500 (more thorough treatment of *Eastway* litigation). Judge Pratt also chided his colleagues for fostering arbitrary and inconsistent sanctions decisionmaking and for disregarding the Rule's "second purpose"—compensation.

16. Satellite litigation often involved technical issues, such as the meaning of the Rule's phraseology, or tangential questions, such as the proper amount of attorneys' fees to award. See, e.g., *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (1986), dissent from denial of *en banc reh'g*, 809 F.2d 584 (9th Cir. 1987); *Eastway*, 821 F.2d 121.

plementation of the Rule would foster satellite litigation, one circuit judge warned that a majority of his panel appeared "almost at the point of saying that the main question before the court is not 'Are you right?' but 'Are you sanctionable?'"¹⁷

Many civil rights plaintiffs and attorneys have an acute lack of time and money. It is important to understand that the Rule's vigorous invocation required civil rights attorneys who litigated in objective good faith to spend substantial resources defending their reputations and their wallets. Resource restraints make them particularly susceptible to being chilled by overly enthusiastic application of the Rule.¹⁸ One dissenting judge specifically admonished that overzealous, technical application of the Rule would chill the most, as well as the least, legitimate civil rights action.¹⁹ Some courts championed careful enforcement in civil rights cases, apparently evincing concern about chilling,²⁰ while others remarked more generally that overzealous application could limit the creativity and enthusiasm of civil rights plaintiffs and attorneys.²¹ Numerous commentators concurred with, and expanded on, these judicial observations.²²

17. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1086 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part), *cert. dismissed*, 485 U.S. 901 (1988); *see also Yancey v. Carroll County*, 674 F. Supp. 572, 575 (E.D. Ky. 1987) ("I would not be surprised if shortly the Rule 11 tail were wagging the substantive law dog in many cases."), *aff'd*, 884 F.2d 581 (6th Cir. 1989). Moreover, the Rule's vigorous enforcement may have effectively imposed stricter pleading requirements on civil rights plaintiffs, if only to avoid opponents' requests for sanctions. *See Tobias, supra* note 1, at 494; *see also Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 449 (1986).

18. *See* Letter from Professor George Cochran, University of Mississippi School of Law, to addressees working on Rule 11 Project (Mar. 26, 1990) [hereinafter Letter] (copy on file with author). Although some observers may contend that defending against motions under the Rule is a fixed, fair cost of litigating in federal court, it is one that is borne disproportionately by civil rights plaintiffs and lawyers, who have little ability to assume the substantial expense.

19. *Szabo*, 823 F.2d at 1086 (Cudahy, J., concurring in part and dissenting in part).

20. *See, e.g., Thomas v. Capital Sec. Servs., Inc.* 836 F.2d 866, 877 (5th Cir. 1988) (advisory committee note expressly disclaims any intent to chill attorneys' enthusiasm or creativity in pursuing factual or legal theories); *Yancey*, 674 F. Supp. at 575 (concern about chilling good faith zealous advocacy in civil rights litigation); *see also Tobias, supra* note 1, at 506-07.

21. *See, e.g., Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) ("Nor is Rule 11 intended to chill innovative theories and rigorous advocacy that bring about vital and positive changes to the law."); *Cabell v. Petty*, 810 F.2d 463, 468 (4th Cir. 1987) (Butzner, J., dissenting) ("Plaintiffs' attorney's creativity in seeking to argue the theory of qualified immunity was squarely within the scope of Rule 11."); *see also Tobias, supra* note 4, at 166.

22. *See* SANCTIONS, *supra* note 11, at 23-24 (although not explicitly analyzing

II. RECENT JUDICIAL APPLICATION OF RULE 11

The enforcement of the Rule in civil rights litigation has apparently improved over the past two years and particularly during 1990.²³ During 1990, panels in more than half of the federal circuits enforced the provision in ways that were solicitous of the needs of civil rights plaintiffs and their counsel.²⁴ This section explores whether judicial application actually has been enhanced and, if so, whether the improved implementation will suffice for effective civil rights enforcement.²⁵

A. Apparent Improvements in Judicial Application

Each circuit has issued rulings that are solicitous of the needs of civil rights plaintiffs and attorneys, and a surprising number have been published in the last year.²⁶ Underlying many of these

civil rights actions); Nelken, *supra* note 5, at 1338-46; Vairo, *supra* note 4, at 199-201. Several writers stated that critics' fears that the amendment would chill legitimate advocacy were well-founded. See Nelken, *supra* note 5, at 1339; Vairo, *supra* note 4, at 200. One court and a few commentators asserted that it was impossible to determine how many valid lawsuits were abandoned out of concern about expensive satellite litigation or substantial assessments. See Yancey, 674 F. Supp. at 575; Elson & Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365 (1988); Vairo, *supra* note 4, at 201. Considerable anecdotal data on threats to sanction civil rights lawyers suggest that the amendment's application could have dampened the practitioners' enthusiasm. See Tobias, *supra* note 1, at 502, 505 (data gleaned from conversations with civil rights and public interest lawyers); see also Thomas, 836 F.2d at 871 n.4 (quoting Center for Constitutional Rights' memorandum on proposed Rule 11 project) (civil rights attorneys believe they were "primary victims of Rule 11"). These conclusions comport with reasonable inferences that might be derived from the Rule's judicial enforcement during the applicable period.

23. The two year period is an approximation, and geographic variations do exist. See *supra* note 5. In this section, I emphasize judicial application during 1990, supplementing it with earlier examples when appropriate.

24. Some of the appellate courts have reversed the decisions of district judges imposing sanctions on civil rights plaintiffs and warned about the possible chilling effects of overly stringent application in civil rights cases. See *infra* notes 26-36 and accompanying text. Other circuit courts have deferred to determinations by trial judges that civil rights litigants had not violated Rule 11 and to decisions awarding small assessments against those civil rights plaintiffs who did contravene the amendment. See *infra* notes 37-39 and accompanying text. A significant number of district courts have evinced special concern for these litigants and lawyers, often finding that plaintiffs pursuing comparatively weak claims had not violated the revised provision. See *infra* notes 46-50 and accompanying text.

25. While judicial application is the focus of this analysis, other considerations, such as the Advisory Committee's activities, are examined where relevant. See *infra* note 91; cf. Tobias, *supra* note 4, at 167-71 (additional relevant factors).

26. See *Mareno v. Rowe*, 910 F.2d 1043 (2d Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); *Alia v. Michigan Supreme Ct.*, 906 F.2d 1100 (6th Cir. 1990); *Davis v. Carl*, 906 F.2d 533 (11th Cir. 1990); *Jenkins v. Missouri*, 904 F.2d 415 (8th Cir. 1990); *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990); *Simpson*

opinions is the concern that the imposition of sanctions might dampen the enthusiasm of those who pursue civil rights actions. A recent Seventh Circuit opinion provides one of the clearest articulations of this concern.²⁷ In finding that the trial court's award of sanctions was erroneous, the appellate panel stated that "Rule 11 cannot be allowed to thoroughly undermine zealous advocacy. . . . This is especially so in civil rights cases involving unpopular clients."²⁸ The court invoked the important admonition that the Rule was "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."²⁹

Other appellate panels recently have demonstrated similar reluctance to sanction those who seek to enforce civil rights. For instance, vacating a determination that a plaintiff had violated the Rule in Title VII litigation, the Fourth Circuit observed:

Even a vague and conclusory complaint may be "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. Indeed, if Rule 11 permitted sanctions merely on the basis of inartful pleading, rather than for a failure to investigate the legal and factual basis for that pleading, Rule 12(e) motions for a more definite statement would be virtually unheard of.³⁰

v. Welch, 900 F.2d 33 (4th Cir. 1990); Hilton Hotels Corp. v. Banov, 899 F.2d 40 (D.C. Cir. 1990); Cruz v. Savage, 896 F.2d 626 (1st Cir. 1990); Kraemer v. Grant County, 892 F.2d 686 (7th Cir. 1990); O'Rourke v. City of Norman, 875 F.2d 1465 (10th Cir.), cert. denied, 110 S. Ct. 280 (1989); Woodrum v. Woodward County, 866 F.2d 1121 (9th Cir. 1989); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191 (3d Cir. 1988).

27. See *Kraemer v. Grant County*, 892 F.2d 686 (7th Cir. 1990). *Kraemer* has special significance because certain judges on the Seventh Circuit have been the strongest proponents of the amendment's vigorous implementation. See, e.g., *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 419-20 (7th Cir. 1988); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988); *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists*, Dist. No. 8, 802 F.2d 247, 255 (7th Cir. 1986); see also *S. BURBANK*, *supra* note 5, at 59 (suspecting that "iceberg" of unreported Rule 11 decisions is large in Seventh Circuit).

28. *Kraemer*, 892 F.2d at 690; accord *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 935 (2d Cir.), vacated, 875 F.2d 39 (2d Cir. 1989) (remanded for factual rehearing); *Davis v. Crush*, 862 F.2d 84, 92 (6th Cir. 1988).

29. *Kraemer*, 892 F.2d at 690 (quoting FED. R. CIV. P. 11 advisory committee note, 97 F.R.D. 165, 199 (1983)); see also *Thomas v. Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989) (also quoting advisory committee note); *Woodrum v. Woodward County*, 866 F.2d 1121, 1127 (9th Cir. 1989) (indirectly citing same note).

30. *Simpson v. Welch*, 900 F.2d 33, 36 (4th Cir. 1990). The court also found that the Rule was an "inappropriate vehicle for the imposition" of sanc-

Another appeals court similarly remarked that its decision to remand the merits of two of plaintiff's counts to the trial judge for additional proceedings was a "strong indication that we do not consider these claims 'frivolous and not warranted by the law.'"³¹ Two appellate panels have reversed lower courts' rulings on the substantive controversies, which meant that they had to vacate the sanctions imposed.³²

Some of these circuit courts have analyzed very closely the plaintiff's prefilings investigations and have occasionally found that the trial courts had improperly assessed their reasonableness.³³ Several of the appellate panels have recognized that in determining reasonableness it is important to consider the limited time which civil rights lawyers frequently have for performing the prefilings investigations.³⁴ Certain courts have reversed apparently because they simply believed that plaintiffs had satisfied the Rule.³⁵ Moreover, a few judges have stated that a finding of

tions "because of appellant's counsel's 'blatant disregard' for the local rules of the district court and for 'his lackadaisical attitude in failing to respond to defendants' Motion for Award of Attorneys' Fees.'" *Id.* at 36-37 (quoting district court opinion). Two recent Fourth Circuit opinions, however, evince little solicitude for civil rights plaintiffs and lawyers. *See Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Dec. 17, 1990) (No. 90-1076) (summarized at 59 U.S.L.W. 3570); *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *petitions for cert. filed*, 59 U.S.L.W. 3406 (U.S. Nov. 11, 1990) (No. 90-802) (summarized at 59 U.S.L.W. 3465), 59 U.S.L.W. 3406 (U.S. Nov. 19, 1990) (No. 90-807) (summarized at 59 U.S.L.W. 3466), 59 U.S.L.W. 3503 (U.S. Jan. 8, 1991) (No. 90-1094) (summarized at 59 U.S.L.W. 3566); *see also infra* note 67 and accompanying text (discussing *Blue* and *Kunstler*).

31. *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 596 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 129 (1990).

32. *See Cooper v. City of Greenwood*, 904 F.2d 302, 306 (5th Cir. 1990) (district court sanctioned attorney on grounds that reasonable inquiry would have shown no property interest in contraband; court of appeals found property interest); *O'Rourke v. City of Norman*, 875 F.2d 1465, 1476 (10th Cir.) (reversed district court on constitutionality of night-time execution of warrant), *cert. denied*, 110 S. Ct. 280 (1989); *cf. Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1274 (10th Cir. 1989) (observing that two civil rights claims should not have been dismissed in context of affirming denial of sanctions).

33. *See, e.g., Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990); *Jenkins v. Missouri*, 904 F.2d 415, 420-21 (8th Cir. 1990); *Simpson*, 900 F.2d at 36-37; *Triad Assocs.*, 892 F.2d at 596.

34. *See Jenkins*, 904 F.2d at 421; *Gillette v. Delmore*, 886 F.2d 1194, 1199-200 (9th Cir. 1989) (attorney retained shortly before statute of limitations would have run); *accord Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir. 1987) (Butzner, J., dissenting) ("Frequently attorneys must act quickly to meet statutory deadlines."); *cf. Cruz v. Savage*, 896 F.2d 626, 633 (1st Cir. 1990) (careful examination of whether district judge considered reasonableness of lawyer's behavior at time lawyer acted).

35. *See, e.g., Jenkins*, 904 F.2d at 420-21; *Gillette*, 886 F.2d at 1200; *accord Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1108 (6th Cir. 1990) (Wellford, J.,

violation must be based on the "paper as a whole," rather than on each allegation.³⁶ A number of circuit courts also have deferred to trial court determinations that civil rights plaintiffs had not contravened the Rule.³⁷

Appellate courts also have been solicitous of civil rights plaintiffs and attorneys when reviewing the mandatory sanctions imposed by lower courts.³⁸ For example, the Fifth Circuit reduced the assessment levied on a pro se civil rights litigant from \$20,000 to \$1800.³⁹ The Sixth Circuit characterized the sanctioning of civil rights plaintiffs with attorneys' fees as an "extreme sanction" that should be employed only in instances of outrageous misbehavior.⁴⁰ Similarly, a First Circuit panel commended a trial judge for remembering that "sanctions should not be imposed to chill an attorney's enthusiasm, creativity or zealous advocacy,"⁴¹ when the lower court granted \$3000 in attorneys' fees

dissenting) (reversing sanctions where "claims were neither unfounded, baseless, nor made in bad faith [They] involv[ed] difficult and complex issues and were in no sense frivolous"). A second member of the three-judge panel joined Judge Wellford's resolution of the sanctions issue, thereby reversing the district court. *See id.* (Boggs, J., concurring in part and dissenting in part).

36. *See* *Thomas v. Evans*, 880 F.2d 1235, 1242 (5th Cir. 1989) ("Rule 11 does not apply when one prong . . . of a claim is deficient, but other prongs support . . . the pleading or motion."); *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir. 1989) (rejecting sanctions where several of complaint's allegations without foundation). *But see* *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc), *overruling* *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1205 (9th Cir. 1988) (sanctions rejected even if two allegations plainly false, if pleading as whole not frivolous); *infra* note 69 and accompanying text.

37. *See, e.g.*, *Perkins v. Spivey*, 911 F.2d 22, 36 (8th Cir. 1990) (affirming district court's refusal to impose sanctions), *cert. denied sub nom.* *Perkins v. General Motors Corp.*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991); *NAACP Special Contribution Fund v. Atkins*, 908 F.2d 336, 340 (8th Cir. 1990) (district court correctly denied sanctions because plaintiff's pleadings posed some difficult questions); *Phelps*, 886 F.2d at 1274; *Tabrizi v. Village of Glen Ellyn*, 883 F.2d 587, 593 (7th Cir. 1989) (correct to deny sanctions where most of complaint was dismissed procedurally); *O'Neal v. Dekalb County*, 850 F.2d 653, 658 (11th Cir. 1988) ("We agree with the district court that although the plaintiff's section 1983 suit does not merit relief, their causes of action were plausible.").

38. *See* FED. R. CIV. P. 11 (court "shall impose . . . an appropriate sanction, which may include . . . the reasonable expenses incurred because of the filing of the . . . paper, including a reasonable attorney's fee") (emphasis added).

39. *Coats v. Pierre*, 890 F.2d 728, 734 (5th Cir. 1989) (\$20,000 excessive and \$1800 sufficient given plaintiff's economic circumstances), *cert. denied*, 111 S. Ct. 70 (1990).

40. *Morrison v. Lipscomb*, 877 F.2d 463, 469 (6th Cir. 1989) (quoting *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986) ("[A]ward of attorney's fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct.")).

41. *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990).

rather than the \$40,000 that defendants had requested.⁴² Some appellate judges have recognized the pertinence of a violator's ability to pay the sanction imposed and have urged trial courts seriously to consider imposing non-monetary assessments.⁴³ Moreover, the Seventh Circuit, in modifying an earlier panel decision, has observed that the Rule is "not a fee-shifting statute in the sense that the loser pays . . . [but] is a law imposing sanctions if counsel files with improper motives or inadequate investigation."⁴⁴ Several courts apparently have recognized the resource restraints that plague many civil rights plaintiffs and lawyers.⁴⁵

Developments in the district courts also merit attention. Much of the Rule's application is similar to appellate court enforcement.⁴⁶ For instance, one judge was "reluctant to impose Rule 11 sanctions absent egregious conduct" by counsel, because

42. *Cruz v. Savage*, 691 F. Supp. 549, 556 (D.P.R. 1988) ("[three thousand dollars] is an amount the Court finds suitable for its purposes with respect to the specific conduct proscribed in . . . Rule 11 while still avoiding the impression that the sanction is imposed to chill counsel's proper zealous conduct."), *aff'd*, 896 F.2d 626 (1st Cir. 1990).

43. *See, e.g.*, *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C. Cir. 1990) (considering ability to pay and deterrence of litigation abuse); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-97 (3d Cir. 1988) (court should consider offender's ability to pay as mitigating factor in determining amount of monetary sanction); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 876-81 (5th Cir. 1988) ("[A]s a less severe alternative to monetary sanctions, district courts may choose to admonish or reprimand attorneys who violate Rule 11."). A four-part formula for calculating sanctions recently enunciated by the Tenth Circuit includes many factors solicitous of civil rights plaintiffs. *See White v. General Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir. 1990) (court should consider (1) reasonableness of fees requested using traditional lodestar approach, (2) minimum necessary to deter misconduct, (3) offender's ability to pay, (4) other factors, including offender's experience and ability, severity of violation, bad faith and risks of chilling); *accord In re Kunstler*, 914 F.2d 505, 523-25 (4th Cir. 1990) (citing *White*), *petitions for cert. filed*, 59 U.S.L.W. 3406 (U.S. Nov. 11, 1990) (No. 90-802) (summarized at 59 U.S.L.W. 3465), 59 U.S.L.W. 3406 (U.S. Nov. 19, 1990) (No. 90-807) (summarized at 59 U.S.L.W. 3466), 59 U.S.L.W. 3503 (U.S. Jan. 8, 1991) (No. 90-1094) (summarized at 59 U.S.L.W. 3566).

44. *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 932 (7th Cir. 1989) (*en banc*); *see Cooter & Gell v. Hartmark Corp.*, 110 S. Ct. 2447, 2462 (1990) (Rule 11 not fee-shifting statute); *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 596 (7th Cir. 1989) (quoting *Mars Steel*), *cert. denied*, 111 S. Ct. 129 (1990); *see also Hays v. Sony Corp.*, 847 F.2d 412, 419-20 (7th Cir. 1988).

45. *See, e.g.*, *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990); *Doering*, 857 F.2d at 195-97.

46. Of course, appellate review differs substantially from trial court decision making. *See generally Cooter & Gell*, 110 S. Ct. at 2461 (prescribing abuse of discretion standard for appellate review of all district court Rule 11 decision-making); *Mars Steel*, 880 F.2d at 933-36 (standards for appellate review); *Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

the court did not want to repress efforts to vindicate civil rights through the injudicious use of sanctions.⁴⁷ Another judge refused to sanction a civil rights lawyer and acknowledged that the "pressures of filing a timely complaint" were central to ascertaining the reasonableness of a pre-filing inquiry.⁴⁸ Finally, some district courts, though sanctioning civil rights litigants, have expressed reluctance⁴⁹ or exercised restraint in assessing the sanctions.⁵⁰

There are, however, certain differences in application of the Rule at the trial level. Quite a few judges have found that parties pursuing arguably weak civil rights claims had not violated the amendment.⁵¹ Demonstrating appreciation for the pragmatic difficulties of pleading and proving discrimination cases, two district courts have come considerably closer than appellate courts to articulating a special, more favorable standard for civil rights plaintiffs.⁵²

47. *Levy v. City of New York*, 726 F. Supp. 1446, 1456-57 (S.D.N.Y. 1989).

48. *Costello v. Daddario*, 710 F. Supp. 1035, 1037-38 (E.D. Pa. 1989) (because clients could not identify particular officer who assaulted them, counsel could not responsibly omit potential defendants in drafting complaint under time pressure).

49. *See Goldberg v. Weil*, 707 F. Supp. 357, 362 (N.D. Ill. 1989) (court reluctant, but ordered pro se plaintiff to pay \$400 of defendants' legal fees).

50. *See, e.g., Rice v. Hilton Hotel Corp.*, No. 85-1470, slip op. at 4-5 (D.D.C. Sept. 9, 1988) (\$5000 awarded despite expenditure of \$68,000), *aff'd sub nom. Hilton Hotels Corp. v. Banov*, 899 F.2d 40 (D.C. Cir. 1990); *Cruz v. Savage*, 691 F. Supp. 549, 556 (D.P.R. 1988), *aff'd*, 896 F.2d 626 (1st Cir. 1990).

51. *See, e.g., Solberg v. Inline Corp.*, 740 F. Supp. 680, 686 (D. Minn. 1990) (plaintiffs suing under new and untested statute did not violate Rule by failing to anticipate defense); *Moore v. Roth*, No. 90C1097 (N.D. Ill. Apr. 24, 1990) (1990 WL 60735) (refusing to sanction and permitting filing of amended complaint, although if court determined Rule had been violated, plaintiffs' pro se status would not insulate them from sanctions); *Summer v. Fuller*, 718 F. Supp. 1523, 1525 (N.D. Ga. 1989) (good faith attempt to extend existing law where attorney sued district attorney for refusing to allow plaintiff's husband, an assistant district attorney, to prosecute case against defendants represented by plaintiff); *Gordon v. Hercules, Inc.*, 715 F. Supp. 1033 (D. Kan. 1989) (failure to establish prima facie case of racial discrimination does not justify sanctions). A few courts have granted civil rights plaintiffs' motions for sanctions. *See, e.g., Littlefield v. Mack*, 750 F. Supp. 1395, 1403 (N.D. Ill. 1990) (imposing sanctions on civil rights defendant); *Byrne v. Board of Educ.*, 741 F. Supp. 167, 171 (E.D. Wis. 1990) (defendant's contention that appellate opinions were "at odds with the view" of the district court was "not only thin and unconvincing, but also . . . preposterous and wacky"); *cf. United States v. City of San Francisco*, 132 F.R.D. 533, 538 (N.D. Cal. 1990) (because defendant made no good faith argument supporting Rule 11 motion, plaintiff intervenors awarded costs of defending motion).

52. *See Tutton v. Garland Indep. School Dist.*, 733 F. Supp. 1113, 1118 (N.D. Tex. 1990) ("[N]othing in Rule 11 prevents a court *qua* fact-finder from considering the inherent proof difficulties placed upon a discrimination plain-

In short, this assessment suggests that judicial application of the Rule has improved for civil rights plaintiffs and practitioners. Several important considerations, however, make it difficult to formulate definitive conclusions about this apparent improvement.

B. *Qualifications of the Apparent Improvements*

The suggestion of recent improvement in the Rule's enforcement is subject to a number of qualifications. Since January 1989, the civil rights bar has continued to voice substantial concern over the Rule's enforcement.⁵³ Indeed, one civil rights lawyer recently observed: "It is too late to ask such questions as: is there excessive satellite litigation; is imaginative lawyering being chilled; are attorney fee awards too often employed as the sanction of choice; has the Rule generated 'unnecessary hostility' among lawyers; and whether procedural safeguards are in order."⁵⁴ Numerous judges have not hesitated to find civil rights litigants or their lawyers in violation of the Rule,⁵⁵ and appellate courts have up-

tiff."); *Pickens v. Children's Mercy Hosp.*, 124 F.R.D. 209, 211 (W.D. Mo. 1989) ("Very little objective circumstantial proof beyond an unfavorable employment action is required to save a person making a good faith claim of racial discrimination from sanctions for filing a frivolous case."). The *Tutton* court disavowed any intent to "engraft judicially on Rule 11 a higher sanction standard in a discrimination case than is found in the text of the Rule." *Tutton*, 733 F. Supp. at 1118; cf. *Blue v. United States Dep't of the Army*, 914 F.2d 525, 535 (4th Cir. 1990) ("It would be an irony if the concept of equality under the law, so fundamental to the goal of civil rights, were underwritten with exceptions for Title VII litigants from the legal rules that apply to all others."), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Dec. 17, 1990) (No. 90-1076) (summarized at 59 U.S.L.W. 3570). *Oliveri v. Thompson*, 803 F.2d 1265, 1279-81 (2d Cir. 1986) (rejecting "special treatment" under the Rule for "attorneys who handle unpopular civil rights claims"), *cert. denied sub nom. Suffolk County v. Graseck*, 480 U.S. 918 (1987). See generally *supra* note 17 (possibility of stricter treatment of civil rights plaintiffs).

53. This claim is premised on conversations with civil rights and public interest attorneys. Their concern had been substantial before. See *Tobias*, *supra* note 4, at 170 n.46 and accompanying text.

54. Letter, *supra* note 18, at 3; see also Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147, 152 (1990) (recent study finding chilling effects on developments in law); *Tobias*, *supra* note 4, at 170 n.46 (other anecdotes and telephone conversations concerning chilling); *infra* note 67 (three troubling cases).

55. See, e.g., *Gutierrez v. City of Hialeah*, 723 F. Supp. 1494, 1500-01 (S.D. Fla. 1989) (sanctions imposed on plaintiff's counsel because two claims against three defendants included conclusory allegations which were insufficient to state claim for relief, although claim against fourth defendant presented justiciable issues of fact), *reconsideration denied*, 729 F. Supp. 1329 (S.D. Fla. 1990); *Goldberg v. Weil*, 707 F. Supp. 357, 362 (N.D. Ill. 1989) (sanctioning pro se plaintiff). For examples of decisions refusing to sanction civil rights plaintiffs or attorneys for pursuing arguably weak claims, see *supra* note 51 and accompanying text.

held sanctions in what appeared to be close cases.⁵⁶

There is another important reason not to be overly optimistic about the recent improvements in published opinions. Recent data on decisionmaking under the Rule demonstrate that approximately ninety percent of it does not appear in the federal reporter system and that less than forty percent of it is on computerized services.⁵⁷ The dearth of reported decisions thwarts efforts to reach conclusions. It is in the informal setting that courts are most likely to apply the Rule in ways that disadvantage civil rights plaintiffs and attorneys,⁵⁸ and there are numerous anecdotal reports of such application.⁵⁹ One complaint is that judges in chambers threaten to sanction civil rights practitioners if they refuse to retract certain substantive claims.⁶⁰

Those decisions that are published warrant several other

56. See, e.g., *Willy v. Coastal Corp.*, 915 F.2d 965, 968 (5th Cir. 1990) (deferential appellate review in apparently close case); *Jennings v. Joshua Indep. School Dist.*, 869 F.2d 870, 879 (although close case with respect to sanctions and, given factual circumstances, panel might have ruled otherwise if sitting as district judges, it could not say district court abused its discretion in finding that complaint violated Rule), *amended and superseded*, 877 F.2d 313 (5th Cir. 1989) (sanction of \$84,000 remanded for reconsideration in light of *Thomas v. Capital Security Services, Inc.*, 838 F.2d 866 (5th Cir. 1988) (discussed *supra* note 20)), *cert. denied*, 110 S. Ct. 3212 (1990).

57. See *S. BURBANK*, *supra* note 5, at 59, 98-99. Substantial differences in publication practices exist because courts may base their decision whether to publish on a host of considerations, such as concern for a lawyer's reputation, in addition to the Rule's principal purpose, which is deterrence. See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 876-81 (5th Cir. 1988) (same as to sanctioning and Rule's purpose); *S. BURBANK*, *supra* note 5, at 4-6, 44-45, 97 (more discussion of problems involved in relying only on reported Rule 11 activity); *Schwarzer, Sanctions Under the New Rule 11—A Closer Look*, 104 F.R.D. 181, 202 (1985) (helpful treatment of publication and Rule's purposes); *Tobias*, *supra* note 4, at 169.

58. Reported decisions are one of the least likely sources in which deleterious judicial treatment would appear. It would at least be "bad form" to disadvantage, much less evince hostility toward, the litigants in print. Some courts arguably come close to doing so. See, e.g., *United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990) ("[T]he interests of black women are probably better represented now than they were [in 1984]. By 1984 the United States had lost its enthusiasm for quotas."); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083-85 (7th Cir. 1987) ("The picture is of all competitors trying to darken the corporate color."), *cert. dismissed*, 485 U.S. 901 (1988). It is much easier to take similar action informally.

59. See *Tobias*, *supra* note 1, at 502-03 & n.60. Civil rights and public interest attorneys have informed the author of such application. Of course, it is difficult to document informal activity, because lawyers are justifiably reluctant to publicize what they consider improper conduct by judges before whom they regularly appear.

60. See *Tobias*, *supra* note 1, at 502-03 & nn.61-62 (premised on interviews with civil rights and public interest attorneys); *Tobias*, *supra* note 4, at 170 n.46 (same).

qualifications. Opinions that impose or uphold sanctions may have negative effects on parties other than the particular litigants involved. Some opinions include language deprecating the efforts of those who seek to enforce civil rights through litigation in the federal courts. For example, in *Saltany v. Reagan*,⁶¹ fifty-five Libyan residents and citizens brought suit to recover damages sustained during the United States bombing of Libya in 1986.⁶² The defendants⁶³ moved to dismiss the claims and for sanctions under the Rule. The district court dismissed the claims but denied the motion for sanctions in the interest of maintaining the federal court as a forum for litigation pursued as a "public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement."⁶⁴ The Court of Appeals for the District of Columbia summarily reversed and remanded the case with instructions to impose an appropriate sanction, finding that filing a "complaint that 'plaintiffs' attorneys surely knew' had 'no hope whatsoever of success' " violated the Rule.⁶⁵ The court of appeals did "not conceive it a proper function of a federal court to serve as a forum for 'protests,' to the detriment of parties with serious disputes waiting to be heard."⁶⁶ The case could prove problematic for civil rights plaintiffs insofar as a considerable amount of civil rights litigation is in some sense a "public statement of protest."⁶⁷

61. *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (per curiam) (Buckley, D. Ginsburg and Sentelle, JJ.), cert. denied, 110 S. Ct. 2172 (1990). See generally D'Amato, *The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya*, 84 AM. J. INT'L L. 705 (1990) (criticizing *Saltany*).

62. *Saltany*, 886 F.2d at 439.

63. The defendants were the President of the United States, the Prime Minister of the United Kingdom, the two nations themselves and others. See *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), rev'd in part and aff'd in part, 886 F.2d 438 (D.C. Cir. 1989) (per curiam), cert. denied, 110 S. Ct. 2172 (1990).

64. *Saltany*, 886 F.2d at 439 (quoting *Saltany*, 702 F. Supp. at 322). The district court had concluded: "It cannot, therefore, be said that the case is frivolous so much as it is audacious." *Saltany*, 702 F. Supp. at 322.

65. *Saltany*, 886 F.2d at 440 (quoting *Saltany*, 702 F. Supp. at 322).

66. *Id.*

67. *Saltany*, 702 F. Supp. at 322. In addition to *Saltany*, three cases at various stages in the appellate process, unless modified, will disadvantage civil rights plaintiffs and their counsel. The appeal of a \$1,000,000 sanction imposed on a non-profit public interest entity is pending in the Eleventh Circuit. See *Avirgan v. Hull*, 705 F. Supp. 1544, 1545 (S.D. Fla.) (court found counsel's allegations unsubstantial), order clarified, 125 F.R.D. 189 (S.D. Fla.) (attorney and clients jointly and severally liable), appeal docketed, No. 89-5515 (11th Cir. May 30, 1989). *Avirgan* could be said to resemble *Saltany* in that it represents a protest against allegedly improper American political activity in Latin America. Oral argument in *Avirgan* was scheduled for the week of February 25, 1991. Tel-

Moreover, courts do not always display an appreciation of certain important subtleties involved in applying the Rule to civil rights cases. For example, even judges who have written a number of the clearer decisions continue to employ a "product" approach to possible violations rather than focusing on the conduct of litigants and lawyers.⁶⁸ A few courts that emphasized the quality of the papers tendered by the plaintiffs have subjected to scrutiny each count, claim or allegation.⁶⁹

Numerous judges have been insufficiently attentive to the needs of civil rights plaintiffs in choosing the appropriate sanction

ephone interview with Joanne Royce, Litigation Department, Christie Institute, Washington, D.C. (Jan. 22, 1991) (plaintiff's counsel).

In the other two cases, the Fourth Circuit has affirmed findings of Rule 11 violations but vacated and remanded the sanctions determinations as inappropriate. See *Harris v. Marsh*, 679 F. Supp. 1204, 1384-93 (E.D.N.C. 1987) (sanction of \$84,000 levied in employment discrimination litigation), *vacated in part on reconsideration*, 123 F.R.D. 204 (E.D.N.C. 1988), *aff'd in part, vacated and remanded in part sub nom.* *Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990) (affirming finding of Rule violation, vacating and remanding sanctions determination), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Dec. 17, 1990) (No. 90-1076) (summarized at 59 U.S.L.W. 3570); *Robeson Defense Comm. v. Britt*, 132 F.R.D. 650 (E.D.N.C. 1989) (sanction of \$122,834 imposed in civil rights litigation involving Native Americans and African Americans in Robeson County), *aff'd in part, vacated and remanded in part sub nom. In re Kunstler*, 914 F.2d 505 (4th Cir. 1990) (affirming finding of Rule violation, vacating and remanding sanctions determination), *petitions for cert. filed*, 59 U.S.L.W. 3406 (U.S. Nov. 11, 1990) (No. 90-802) (summarized at 59 U.S.L.W. 3465), 59 U.S.L.W. 3406 (U.S. Nov. 19, 1990) (No. 90-807) (summarized at 59 U.S.L.W. 3466), 59 U.S.L.W. 3503 (U.S. Jan. 8, 1991) (No. 90-1094) (summarized at 59 U.S.L.W. 3566).

68. Judges who adopt the "product" approach fail to emphasize the reasonableness of prefiling inquiries and instead concentrate on the quality of the papers submitted or the merits of lawsuits. See *S. BURBANK*, *supra* note 5, at 46; see, e.g., *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990) (emphasizing merits); *Davis v. Carl*, 906 F.2d 533, 535-36 (11th Cir. 1990) (same); *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 596 (7th Cir. 1989) (sanctions determination rested on merits of suit as measure of reasonableness of prefiling inquiry), *cert. denied*, 111 S. Ct. 129 (1990); *Romero v. City of Pomona*, 883 F.2d 1418, 1429 (9th Cir. 1989) (that some allegations made at litigation's outset later proved unfounded did not render frivolous complaint that also included some nonfrivolous claims); *Napier v. Thirty or More Unidentified Fed. Agents, Employees or Officers*, 855 F.2d 1080, 1091 (3d Cir. 1988) (filing of claim was legally frivolous); see also *supra* note 11.

69. See *Frantz v. United States Powerlifting Fed'n*, 836 F.2d 1063, 1067 (7th Cir. 1987) (in antitrust case, "each [claim] must be investigated and researched before filing"); *PaineWebber, Inc. v. Can Am Fin. Group, Ltd.*, 121 F.R.D. 324, 330 (N.D. Ill. 1988) ("Rule 11 applies to every statement and claim in a paper"), *aff'd*, 885 F.2d 873 (7th Cir. 1989); see also *Melrose v. Shearson/American Express, Inc.*, 898 F.2d 1209, 1215-16 (7th Cir. 1990) ("It . . . is neither contrary to the language of Rule 11 as amended, nor an abuse of discretion for the district court to undertake such a detailed [point-by-point] analysis [of a pleading or motion] when the court believes the circumstances warrant it."); *Triad Assocs.*, 892 F.2d at 596-97; *supra* note 36 and accompanying text (especially Ninth Circuit cases).

for contravention of the Rule. For instance, some courts have not specifically considered a plaintiff's ability to pay or the difference between monetary and non-monetary awards.⁷⁰ Similarly, they have not attempted to impose the "least severe sanction" necessary to achieve the Rule's purposes.⁷¹ These factors suggest that too few members of the federal bench fully understand the implications of their Rule 11 enforcement for civil rights plaintiffs.⁷²

Another important qualification is that substantial variations exist within and among the circuits and probably will persist.⁷³ Differently constituted panels in the same circuit may issue quite dissimilar Rule 11 opinions.⁷⁴ The uncertainty is exacerbated because there is slight chance of convincing a court to grant rehear-

70. See, e.g., *West Coast Theater Corp. v. City of Portland*, 897 F.2d 1519 (9th Cir. 1990) (no analysis of proper type of sanction or party's ability to pay); *Jennings v. Joshua Indep. School Dist.*, 869 F.2d 871 (5th Cir.) (same), *amended and superseded*, 877 F.2d 313 (5th Cir. 1989) (remanded to insure justification corresponded to amount, type and effect of sanctions imposed), *cert. denied*, 110 S. Ct. 3212 (1990).

71. See, e.g., *Triad Assocs.*, 892 F.2d at 596-97 (approving district court's monetary sanctions without analyzing appropriateness of other sanctions); *cf. Jennings*, 877 F.2d at 322 (remanding to district court for imposition of least severe sanction). For a discussion of appropriate sanctions and examples of cases considering the matter, see *supra* notes 38-45 and accompanying text.

72. For example, the parties may be discouraged nearly as much by the possibility of costly satellite litigation as by the imposition of sanctions. See *supra* note 1; Tobias, *supra* note 1, at 501 n.57. For examples of courts that have recognized the threat satellite litigation poses to litigants with few resources, see *supra* note 45 and accompanying text.

73. See S. BURBANK, *supra* note 5, at 46, 96-97; T. WILLGING, *THE RULE 11 SANCTIONING PROCESS* 178-89 (1988). Certain difficulties, such as predicting trends in civil litigation and the future composition of the federal bench, obviously complicate prognostication.

74. Indeed, in some circuits the panel might be insensitive or even hostile. Compare *Kraemer v. Grant County*, 892 F.2d 686 (7th Cir. 1990) (Wood, Cudahy and Ripple, JJ.) with *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987) (Cudahy, Posner and Easterbrook, JJ.), *cert. dismissed*, 485 U.S. 901 (1988) and *Dreis & Krump Mfg. v. International Ass'n of Machinists*, 802 F.2d 247 (7th Cir. 1986) (Cummings, Posner and Gordon, JJ.). For those who think the Seventh Circuit is anomalous, compare the treatment given Julius Chambers in *Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990) (Ervin, C.J. and Phillips and Wilkinson, JJ.), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Dec. 17, 1990) (No. 90-1076) (summarized at 59 U.S.L.W. 3570), with the treatment accorded William Kunstler, Barry Nakell and William Pitts in *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990) (Chapman, Wilkinson and Wilkins, JJ.), *petitions for cert. filed*, 59 U.S.L.W. 3406 (U.S. Nov. 11, 1990) (No. 90-802) (summarized at 59 U.S.L.W. 3465), 59 U.S.L.W. 3406 (U.S. Nov. 19, 1990) (No. 90-807) (summarized at 59 U.S.L.W. 3466), 59 U.S.L.W. 3503 (U.S. Jan. 8, 1991) (No. 90-1094) (summarized at 59 U.S.L.W. 3566).

In addition to differences in judicial perspectives on the Rule's application, significant differences among litigators in their views of the risks and benefits of seeking sanctions contribute to variations in the Rule's invocation and application.

ing en banc.⁷⁵

Similar uncertainty and inconsistency exist at the district court level.⁷⁶ A substantial amount of the apparently enhanced judicial enforcement has been in those large urban districts that have experienced much of the Rule activity to date.⁷⁷ Even in those districts, however, uncertainty exists.⁷⁸ Moreover, favorable rulings by a few judges in the Eastern District of Pennsylvania or the Southern District of New York⁷⁹ mean little to litigants outside those districts or within the districts but before a different judge.⁸⁰ Too few courts have actually implemented the

75. For example, in *Kunstler* the Fourth Circuit took just nine days before unanimously rejecting the petition for rehearing en banc. Telephone interview with Professor Barry Nakell, University of North Carolina School of Law (Oct. 30, 1990) (attorney for plaintiff in *Kunstler*). See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 809 F.2d 584 (9th Cir. 1987) (five judges dissenting from denial of rehearing en banc); McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 IDAHO L. REV. 255 (1987-88) (statistics show little chance of en banc disposition). See generally *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) ("It is an enormous distraction to break into [the court's] schedule and tie up the entire court to hear one case en banc.") (emphasis in original), *cert. denied*, 485 U.S. 940 (1988).

Several circuits have issued en banc determinations to clarify sanctions decisionmaking within their jurisdictions. See, e.g., *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 930 (7th Cir. 1989) ("We heard this case en banc to achieve harmony."); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 868 (5th Cir. 1988) ("In view of the high import of Rule 11 to both the bench and the bar, this Court took the instant case en banc to resolve any inconsistencies . . . in this Circuit."); *Donaldson v. Clark*, 819 F.2d 1551, 1553 (11th Cir. 1987) ("This court took this case en banc to consider procedures and standards for the imposition of sanctions under Rule 11.").

76. For a discussion of Rule 11 developments in the district courts, see *supra* notes 46-52 and accompanying text.

77. See *Vairo*, *supra* note 4, at 200 (almost one-third of reported cases arose out of districts covering New York City and Chicago). The Northern District of California, the Eastern District of Pennsylvania and the Southern District of Florida also have experienced considerable Rule 11 activity.

78. For example, there are very few opinions solicitous of civil rights plaintiffs issued by judges in the Northern District of California or the Southern District of Florida, both districts with considerable Rule 11 activity. *But see United States v. City and County of San Francisco*, 132 F.R.D. 533, 537 (N.D. Cal. 1990).

79. For examples of rulings from these districts, see *supra* notes 47-48 and accompanying text.

80. For instance, recent enforcement of the Rule by certain judges in the Eastern District of Pennsylvania has been solicitous of civil rights plaintiffs and attorneys. See, e.g., *Costello v. Daddario*, 710 F. Supp. 1035, 1037-38 (E.D. Pa. 1989) (Pollak, J.) (discussed *supra* note 48 and accompanying text); *Smith v. Philadelphia School Dist.*, 679 F. Supp. 479, 484 (E.D. Pa. 1988) (VanArtsdalen, J.) (where learning impaired student sued for failure to provide individualized education, court found plaintiff's theory untenable but did "not regard the mere filing . . . on this untenable theory to be so completely lacking in merit . . . or in factual or legal support as to impose sanctions"); see also *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-97 (3d Cir. 1988) (by

recent improvements in meaningful ways.

Other developments in related areas may exacerbate the effect of imposing Rule 11 sanctions on civil rights plaintiffs and their counsel. Quite important is the Supreme Court's recent articulation of a deferential standard for appellate review of district court application of the Rule.⁸¹ The Court also has read Federal Rules of Civil Procedure 68 and 23(e) in conjunction with the Civil Rights Attorneys' Fees Awards Act⁸² in ways that could further deplete the already small pool of lawyers who have the wherewithal to assume the mounting risks of representing discrimination victims.⁸³

III. RECOMMENDATIONS FOR THE FUTURE

Analysis of Rule 11 activity indicates that judicial implemen-

implication, courts may consider non-monetary sanctions); S. BURBANK, *supra* note 5, at 37 (Third Circuit has repeatedly emphasized availability of non-monetary sanctions). Despite these developments, the Third Circuit Task Force was "surprised" to find that the "sanctions imposed in reported cases are usually monetary, and usually require payment to another party." *Id.* at 36; *see supra* note 7 and accompanying text (discussing Task Force and its findings).

Inconsistent enforcement by different courts may be explained by the difficulty of applying the reasoning of the recent opinions which include suggestions for enforcement. The best example of this phenomenon is the difficulty courts have in according proper emphasis to the reasonableness of prefilng inquiries rather than to the papers' quality or the merits. *See supra* notes 68-69 and accompanying text; *see also* Tobias, *supra* note 1, at 510-17 (problems of clarity, translation and transferability).

81. *See Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990). The Court held that the courts of appeals should apply an abuse of discretion standard to all aspects of district court Rule 11 determinations. *Cf. Crabtree v. Muchmore*, 904 F.2d 1475, 1479 (10th Cir. 1990) (district court abused its discretion in not awarding attorneys' fees under the Rule to defendants in civil rights case). The Court also resolved a conflict among the courts of appeals by holding that district courts could not award costs of appeals under the Rule. *Cooter*, 110 S. Ct. at 24 (determination is for courts of appeals under FED. R. APP. P. 38).

82. Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976), codified at 42 U.S.C. § 1988 (1988). For a discussion of litigation financing and the problems posed by these interpretations of the Fees Act and Rules 23(e) and 68, *see* Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 310-19 (1989).

83. *See Evans v. Jeff D.*, 475 U.S. 717 (1986) (Rule 23(e) requires judicial approval of class action settlements, and district courts may approve settlements waiving attorneys' fees otherwise available under § 1988); *Marek v. Chesny*, 473 U.S. 1 (1985) (Rule 68 provides that if final judgment is not more favorable than pretrial settlement offer, offeree must assume own post-offer costs, which include § 1988 attorneys' fees); *cf. Spencer v. General Elec. Co.*, 894 F.2d 651, 660 (4th Cir. 1990) (Title VII case in which defendant "instituted an extensive company-wide anti-sexual harassment policy . . . at least partially in response to" plaintiff's suit but plaintiff recovered only \$1 in nominal damages, under *Marek* plaintiff had to assume \$330,000 in post-offer fees incurred).

tation in civil rights cases has improved since the beginning of 1989. During 1990, relatively few reported opinions seriously disadvantaged civil rights plaintiffs or practitioners. The substantial qualifications described above, however, prevent the conclusion that no additional change in the Rule is needed. What federal judges and those institutions possessing authority to alter the rules should do, however, remains quite controversial.

A. *Possible Amendment*

The Supreme Court, the Advisory Committee on the Civil Rules and Congress should promptly revise the Rule in ways that are responsive to civil rights plaintiffs and their counsel. The entities with rule-amending responsibilities should remember that a number of the Rule's primary objectives, namely prompting lawyers to "stop and think" before filing papers and reducing abuse of the litigation process, have been substantially accomplished.⁸⁴ These purposes and additional goals that have not been achieved fully can be attained nearly as effectively with other measures, such as judicial case management.⁸⁵ The essential role that civil rights litigation plays in reducing discrimination in the United States makes the risks of not amending the Rule too substantial.

Courts, commentators and critics have offered a multitude of cogent suggestions for change that need not be comprehensively recounted here. One example is Professor Nelken's proposal for modifications that would emphasize the sufficiency of prefiling inquiries and limit the importance of attorneys' fees as an appropriate sanction.⁸⁶ This suggestion was primarily intended to reduce the Rule's chilling effects, especially in civil rights actions. Other recommendations have included reinstating the Rule's pre-1983 formulation or awarding attorneys' fees only upon a showing that violators have abused the civil litigation process or acted in bad faith.⁸⁷ Some critics have even championed Rule 11's repeal.⁸⁸ That prospect still warrants serious consideration, although it

84. See, e.g., T. WILLGING, *supra* note 73, at 11-12; Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014-15 (1988).

85. See, e.g., SANCTIONS, *supra* note 11, at 16, 24-25; Vairo, *supra* note 4, at 233.

86. Professor Nelken proposed changes both in the Rule's text and in its accompanying advisory committee note. See Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 385, 405-08 (1990).

87. See, e.g., SANCTIONS, *supra* note 11, at 2-3, 24-25; see also Tobias, *supra* note 1, at 524; Vairo, *supra* note 4, at 233; *infra* note 90.

88. See, e.g., LaFrance, *supra* note 8, at 352-58; Tobias, *supra* note 1, at 524.

may be too draconian for some, including numerous individuals who are responsible for possible amendment.⁸⁹

B. *Additional Study Is Unnecessary*

Additional analysis should not be a prerequisite to informed amendment. Those with rule-revising power presently have sufficient information on which to base rational determinations regarding the Rule's possible amendment. Nevertheless, in February 1990, Judge Grady, then Chair of the Advisory Committee, denominated numerous areas that he considered appropriate for future study.⁹⁰ The Advisory Committee announced in August 1990 that it was undertaking a study of the Rule that may lead to proposals for change in April 1991.⁹¹ The American Judicature Society also recently commenced an assessment of activity

89. Those responsible for amendment simply seem unamenable to such a substantial change, especially in light of the rather widespread belief, particularly in the federal judiciary, that much litigation abuse remains to be deterred and that the Rule is a valuable tool for doing so. *See infra* notes 90-91, 102 and accompanying text.

90. *See* Letter from Judge John Grady to Representative Robert Kastenmeier (Feb. 9, 1990) [hereinafter Letter] (on file with author). Representative Kastenmeier was the Chair of the Subcommittee on Courts, Intellectual Property and the Administration of Justice of the House Judiciary Committee. Judge Grady also asserted that the 1983 "amendments were, after all, addressed to what was perceived to be a serious problem of litigation abuse."

91. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 335 (1990) [hereinafter *Call for Comments*]. The Committee requested that the bench, the bar and the public submit written comments on the Rule's operation by November 1, stated that it would hold a public hearing to receive oral testimony in February, 1991, and suggested that it might propose changes in the Rule at the Committee's regularly scheduled meeting in April 1991. It also commissioned an Empirical study of Rule 11 by the Federal Judicial Center. *See id.* at 345.

The prospect of actual revision remains too nascent to warrant substantial treatment in this article. The Committee's indication of interest is only the first step in what could be a lengthy revision process. *See generally* Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987) (comprehensive analysis of inefficiencies in process of rules revision). The mere indication of interest does not mean that the Rule actually will be amended. The Committee has already indicated that it may choose not to proceed beyond the hearing stage. *See Call for Comments, supra*, at 345.

Even if the process continues beyond the hearing stage, problems will remain. If the adverse effects on civil rights enforcement result from the Rule as applied, not as written, only significant revisions are likely to confer much benefit. The Committee is unlikely to suggest substantial rewriting or changes that would significantly help civil rights plaintiffs. Finally, whatever amendment the Committee suggests probably would not become effective for several years. All of these considerations warrant minimal treatment in this article of the Committee's expression of interest and an emphasis on judicial application.

under the Rule in the Second, Fifth, Seventh and Ninth Circuits.⁹²

Conditioning amendment of the Rule on completion of these studies is unnecessary. There presently exists a base of information considerably larger and more sophisticated than the one on which the rule-amending authorities premised the 1983 revision.⁹³ Studies have already established that sanctions have been sought from, and imposed upon, civil rights plaintiffs at high rates.⁹⁴ Accumulating anecdotal evidence on informal activity under the Rule complements these findings.⁹⁵ Moreover, additional studies will not completely overcome the principal difficulty with previous studies—the general unavailability of information on much Rule 11 activity, particularly that which is informal. The data that are likely to be the most informative are also the hardest to secure, document and synthesize in ways that generate supportable conclusions.⁹⁶

If the Advisory Committee determines that additional study is necessary, it should capitalize on prior work. Further inquiry will consume money and time. The cost of the information, especially when there is concern over federal spending, may be prohibitively high. Moreover, while the studies proceed, disadvantageous judicial application of the Rule will continue to impose significant costs on civil rights plaintiffs and attorneys who cannot afford the expense. Therefore, future study should build on what has come before. The Third Circuit Task Force has provided numerous valuable ideas about precisely what constitutes civil rights litigation, which Rule 11 activity should be analyzed, and how evaluations ought to be performed.⁹⁷ A 1988 report by

92. See American Judicature Society Rule 11 Project (1990) (copy on file with author).

93. See Burbank, *supra* note 3, at 1927-28; Letter, *supra* note 18, at 3. Certain ironies are implicated here. For instance, proponents of the 1983 amendment, which was based substantially on anecdotal information, now seem to be demanding that critics who seek to change it not be permitted to rely on such information but be required to make very substantial showings. See Letter, *supra* note 90, at 1-2; see also Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 505-06 (1990).

94. See, e.g., *supra* notes 6-7 and accompanying text.

95. See *supra* notes 58-60 and accompanying text.

96. For example, few district judges will admit that they threatened to sanction civil rights lawyers who refused to withdraw certain substantive claims. See *supra* notes 58-59 and accompanying text. Correspondingly, a civil rights attorney might believe that a court was threatening to impose a sanction, although the judge actually intended to issue a warning in an attempt to minimize sanctions should they be levied. It is difficult to distinguish improper threats from appropriate or even beneficial warnings. See Tobias, *supra* note 1, at 502 n.60.

97. See S. BURBANK, *supra* note 5, at 4-6, 44-45, 68-72, 96-99.

the Federal Judicial Center has been another helpful source of suggestions, particularly for securing geographically diverse data and detecting potential chilling.⁹⁸

C. *Judicial Application*

Barring dramatic change, such as the highly improbable prospect of congressional legislation exempting civil rights litigation from Rule 11 sanctions,⁹⁹ the manner in which the Rule is applied will remain important to effective enforcement of civil rights in this country. Federal judges should seriously consider curtailed enforcement of the Rule evident in some jurisdictions.¹⁰⁰ The courts might follow the suggestions of certain Third Circuit judges that the Rule's application be restricted to exceptional situations, such as those involving misuse of the litigation process.¹⁰¹

Courts that wish to continue enforcing the Rule broadly, out of a belief that abuse of the process of civil litigation remains widespread,¹⁰² should keep in mind when resolving sanctions motions the factors discussed throughout this paper, particularly civil rights plaintiffs' dearth of resources and vulnerability to chilling. Central to judicial analysis should be the reasonableness of prefiling inquiries; courts should remember that civil rights plaintiffs and attorneys typically have limited time and money for performing their investigations.¹⁰³ If a court finds that a litigant or lawyer has contravened the Rule, it should take into account the violator's ability to pay and carefully consider the possibility of levying non-monetary sanctions. The imposition of attorneys' fees should be the "sanction of last resort."¹⁰⁴

98. See T. WILLGING, *supra* note 73, at 8-10, 15-19, 160-63, 168, 179-89; cf. Tobias, *supra* note 4, at 176-79 (additional suggestions).

99. See *supra* notes 89-91 and accompanying text. Congress's recent failure to override President Bush's veto of the Civil Rights Act of 1990 makes the prospect of enacting an exemption unlikely. See *President's Veto of Rights Measure Survives by One Vote*, N.Y. Times, Oct. 25, 1990, at A1, col. 3; see also *New Battle Looming as Democrats Reintroduce Civil Rights Measure*, N.Y. Times, Jan. 4, 1991, at A12, col. 1 (House Democrats reintroduced civil rights bill significantly tougher than one President vetoed).

100. See Tobias, *supra* note 1, at 513-17.

101. See, e.g., *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483-85 (3d Cir. 1987).

102. See Schwarzer, *supra* note 84; Tobias, *supra* note 4, at 180-81.

103. See *supra* notes 1, 34 and accompanying text.

104. See, e.g., *Morrison v. Lipscomb*, 877 F.2d 463, 469 (6th Cir. 1989) (citing *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986)); *Doering*, 857 F.2d at 194-97.

IV. CONCLUSION

Federal judicial enforcement of Rule 11 has adversely affected civil rights plaintiffs and lawyers since the Rule was amended in August 1983. Numerous courts recently have enhanced the quality of their formal decisionmaking under the revised provision, and judges should similarly apply the amendment in the future. It remains impossible to ascertain, however, whether the apparent improvements will suffice for civil rights plaintiffs and practitioners, principally because the enforcement most detrimental to them has been informal. Because civil rights litigation plays a significant role in American society, the Supreme Court, the Advisory Committee and Congress should expeditiously revise the Rule. Until they do, courts should apply the amendment in ways that are solicitous of the needs of civil rights plaintiffs and attorneys.