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Rule 11 and Factually Frivolous Claims-- The Goal of Cost Minimization and the Client's Duty to Investigate

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I. INTRODUCTION

Federal Rule of Civil Procedure 11 is designed to streamline the litigation process in the federal court system by imposing sanctions on those who submit frivolous pleadings, motions, or other papers.[1] The Rule authorizes sanctions for three types of frivolous claims: (1) claims that have an insufficient legal basis; (2) claims that are brought for an improper purpose; and (3) claims that have an insufficient factual basis.[2]

The advisory committee's notes suggest that courts may sanction attorneys, clients, or both for Rule 11 violations.[3] Because the law is the lawyer's domain, courts usually have imposed sanctions for claims with

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1. FED. R. CIV. P. 11 advisory committee's notes to the 1983 amendments. The full text of the Rule is as follows:

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

FED. R. CIV. P. 11.

2. *See* FED. R. CIV. P. 11 advisory committee's notes to the 1983 amendments (noting that the Rule expands upon the equitable doctrine permitting the court to award expenses and attorney's fees to a litigant whose opponent acts in bad faith, and also noting that the Rule requires a prefiling inquiry into both factual and legal elements of the claim).

3. *Id.*

insufficient legal basis on the filing attorney.[4] Courts have imposed sanctions for claims brought for an improper purpose—bad faith claims—on the individuals who acted in bad faith, be they attorneys, clients, or both.[5] When claims have an insufficient factual basis courts have imposed sanctions on the attorney alone or on the attorney and client together.[6]

Courts have developed a system for allocating the sanctions they impose for claims with an insufficient factual basis. Once a court concludes that a claim lacks a sufficient factual basis, it must determine who, if anyone, is to blame for the improper filing.[7] To determine whether to sanction an attorney for failure to undertake an adequate factual investigation, courts must ascertain whether the prefiling inquiry was reasonable under the circumstances.[8] This objective standard imposes sanctions against attorneys who have failed to make a reasonable prefiling factual investigation, even if they filed in good faith.[9] The objective standard also applies to pro se litigants.[10]

The standard applicable to clients who are represented by counsel in inadequate factual investigation cases has been less clear. Some courts have considered an empty head and a pure heart a valid excuse, refusing to sanction clients who made frivolous claims without knowledge of the factual deficiency.[11] Other courts, applying an objective test, have sanctioned clients who made claims in good faith.[12]

The Supreme Court resolved this confiict in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*,[13] holding that Rule 11 provides a single objective standard that applies to both attorneys and

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4. *See, e.g., In re* Disciplinary Action Against Mooney, 841 F.2d 1003 (9th Cir. 1988).

5. *See, e.g.*, Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977) (imposing sanctions on an attorney only); Friedgood v. Axelrod, 593 F. Supp. 395 (S.D.N.Y. 1984) (imposing sanctions on a client only); Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985) (imposing sanctions on an attorney and a client).

6. *See, e.g.*, Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988) (imposing sanctions on an attorney only); Portnoy v. Wherehouse Entertainment Co., 120 F.R.D. 73 (N.D. Ill. 1988) (imposing sanctions on both an attorney and a client).

7. *See, e.g.*, CTC Imports & Exports v. Nigerian Petroleum Corp., 739 F. Supp. 966 (E.D. Pa. 1990).

8. *See, e.g.*, Greenberg v. Hilton Int'l Co., 870 F.2d 926, 934 (2d Cir. 1989).

9. *Id.* For attorneys, "an empty head and a pure heart is no excuse." *See* Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and a Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343 (1988).

10. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 892 F.2d 802, 811 (9th Cir. 1989), *aff'd*, 111 S. Ct. 922 (1991).

11. *See, e.g.*, Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988) (adopting a subjective standard), *rev'd in part sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989).

12. *See, e.g., Business Guides*, 892 F.2d 802 (adopting an objective standard).

13. 111 S. Ct. 922 (1991).

clients. Under *Business Guides*, clients represented by counsel have a duty to make a reasonable prefiling inquiry into the facts of their claims and are subject to sanctions should they neglect this duty.[14] Although the decision specifically referred to represented parties whose signatures appear on their filings, courts likely will apply the same objective standard to clients who have not actually signed their filings.[15]

This Note examines the duty Rule 11 creates and its allocation between attorneys and their clients from an economic perspective. Part II examines Rule 11's historical purpose of deterring frivolous claims and traces the roots of the duty the Rule imposes on attorneys to achieve this purpose. Part III discusses how Rule 11 ideally should function in a society with perfect information about the cost of frivolous claims to the judicial system compared to the cost of deterring such claims, and determines that an optimal Rule would minimize the sum of these costs. Given the information constraints of the real world, Part III concludes that the Rule can come closest to achieving the goal of cost minimization by placing the duty to investigate the facts of a claim on the party that can best minimize costs—in economic terms, the "cheapest cost avoider."

Part IV employs an example to illustrate that the cheapest cost avoider varies from case to case and that too strict an application of the objective standard fails to minimize costs because it often places the primary duty to investigate on clients who are not the cheapest cost avoiders. Part V examines the possibility of shifting the duty to investigate factual claims from the client to the attorney through indemnification agreements and concludes that such attorney-client bargaining generally will not be effective in minimizing costs.

Part VI proposes several indicators of client sophistication that will help courts to identify the cheapest cost avoider in a given case. Because in many cases, however, a client will be neither clearly sophisticated nor clearly unsophisticated, Part VII suggests that courts adopt a hybrid approach and impose a duty to investigate at the level of a reasonable person in the client's position who knows that bringing a frivolous claim could result in personal liability.

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14. *Id.* at 933. A represented client's duty under the objective standard of factual inquiry is similar to the duty of care created by tort law. Hays v. Sony Corp. of America, 847 F.2d 412, 418 (7th Cir. 1988).

15. *See* 111 S. Ct. at 941 (Kennedy, J., dissenting); *see also* FED. R. CIV. P. 11 advisory committee's notes to the 1983 amendments (suggesting that it may be appropriate to sanction a nonsigning client).

II. The History of Rule 11—Deterrence As Primary Purpose

Rule 11 of the Federal Rules of Civil Procedure is intended to combat the delay and high cost associated with modern litigation by deterring frivolous pleadings.[16] Essentially, the Rule creates a tort of abuse of process,[17] imposing sanctions on those who breach their duty to the legal system.[18] In attempting to define what duty of factual investigation Rule 11 imposes on clients represented by counsel, one must examine the deterrent purpose of the Rule and the historical derivation of that duty.

A. The Need to Deter Frivolous Pleadings

A fundamental principle of our system of justice is that every citizen should have access to the courts to resolve disputes and enforce rights.[19] Judicial resources are limited, however, and the courts cannot offer immediate access to all citizens at once.[20] Some delay is inherent in the litigation process.[21] When the delay associated with resolving a dispute in court becomes too great, the courts are unable to perform their function,[22] and the public loses confidence in the judicial pro-

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16. Fed. R. Civ. P. 11, advisory committee's notes to the 1983 amendments; *see also* Carter, *The History and Purposes of Rule 11*, 54 Fordham L. Rev. 4, 4 (1985).

17. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S. Ct. 922, 941 (1991) (Kennedy, J., dissenting).

18. *See, e.g.*, Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989) (stating that "[t]he Rule creates duties to [an attorney's] adversary and to the legal system, just as tort law creates duties to [an attorney's] client").

19. *See, e.g.*, Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1, 8 (1984) (discussing easy access procedures that "reflect the desire to provide all citizens with the right to a day in court" and the "propaganda, which literally beckons potential litigants with sweet talk of 'equal access to justice' ").

20. The rate of appointment of additional judges could never match the demand for the services of the judicial system. *Id.* at 12. "America has a staggering profusion of courts. . . . Staffing the benches of these various tribunals, even at existing levels, consumes a substantial portion of the pool of highly competent lawyers who are politically acceptable and willing to be distracted from the more lucrative arena of private practice." *Id.*

21. Many courts are facing backlogs as long as four or five years. J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 10.1, at 452 (1988). The most frequently mentioned reason for delay in the resolution of cases is the sheer volume of cases brought, often described as the "litigation explosion." *See, e.g.*, Miller, *supra* note 19, at 2-3. Prior to the tremendous increase in litigation in the last 30 years, *id.*, the delays related primarily to cases awaiting trial by jury. J. Friedenthal, M. Kane & A. Miller, *supra*, § 10.1, at 452.

A certain amount of delay may be desirable because it encourages parties to settle disputes on their own without going to court and exacerbating the overcrowding problem. *See, e.g.*, Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 8 & nn.20-22 (suggesting that the portion of cases that have been settled prior to trial or soon after trial begins has increased as the amount of litigation in the court system has increased).

22. *See, e.g.*, Miller, *supra* note 19, at 29 (suggesting that "[i]f conditions continue to deteriorate, we might as well chisel off the legend above the Supreme Court's door, 'Equal Justice Under Law,' and replace it with a sign that says, 'Closed—No Just, Speedy, or Inexpensive Adjudication for Anyone' ").

cess.[23] Lack of confidence in the system and the rule of law may result in increased lawlessness.[24]

By the 1980s the United States faced a "litigation explosion" brought on by a number of factors peculiar to our society and our judicial philosophy.[25] This country had the highest litigation rate and the most lawyers per capita in the world.[26] Moreover, the "American Rule" that requires each party to a lawsuit to pay its own costs,[27] the allowance of contingent fee arrangements,[28] the provision in many statutes for court-awarded attorney's fees,[29] and the tax deductibility of litigation expenses,[30] all provided economic incentives to litigate. The earlier proliferation of federal substantive rights, particularly the enactment of the Civil Rights Act of 1964[31] and the Voting Rights Act of 1965,[32] opened the courts to a great number of citizens.[33] Finally, the Federal Rules of Civil Procedure encouraged litigation through a procedural system that allowed ready access to the courts through the "notice pleading" provisions,[34] liberal amendment provisions,[35] and expansive

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23. *See, e.g., id.* at 36 (discussing signs of growing alienation with the system).

24. *Id.* (noting that many see the courthouse as a place to resolve disputes in a "violence-free atmosphere," and that "a breakdown in the public's confidence in the judicial system or the development of a widespread conception of its being paleolithic in character could be catastrophic"); *see also* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 300 (A.L. Levin & R. Wheeler eds. 1979) (observing that "[s]tatutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it"); Miller, *supra* note 19, at 1 (noting that "[i]t is axiomatic that justice delayed is justice denied").

25. *See generally* C. WRIGHT & A. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1331, at 13 (discussing causes of the "litigation explosion"); *see also* Galanter, *supra* note 21, at 3-5 (discussing concern over increasing litigation). Galanter argues, however, that there are substantial benefits to America's "hyperlexis" and that there is no crisis. *Id.* at 37-39.

26. C. WRIGHT & A. MILLER, *supra* note 25, at 13 & n.18.

27. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). In most other countries, including Great Britain, litigants who are defeated in court must bear their opponent's expenses. C. WRIGHT & A. MILLER, *supra* note 25, § 1331, at 13. For a discussion of the history and purpose of the American rule, see Note, *supra* note 9, at 347-48.

28. C. WRIGHT & A. MILLER, *supra* note 25, § 1331, at 13-14. The contingent fee arrangement allows many litigants who cannot afford to pay regular hourly rates to bring claims by agreeing to pay their attorneys a percentage of any award made. This practice has resulted in parties filing many claims that they otherwise would not have filed. *Id.*

29. *Id.* at § 1331, at 14 (stating that "[t]he availability of statutory fee awards has made claims with little or no prospect of a significant monetary award for the plaintiff attractive to lawyers, who in the past could not have afforded to take such cases, especially on a contingent basis").

30. *Id.* at § 1331, at 14 n.23 (stating that in effect the tax system subsidizes lawsuits by permitting taxpayers to deduct litigation expenses in some contexts).

31. Pub. L. No. 88-352, 78 Stat. 241 (1964).

32. Pub. L. No 89-110, 79 Stat. 437 (1965).

33. *See* C. WRIGHT & A. MILLER, *supra* note 25, § 1331, at 15.

34. FED. R. CIV. P. 8 (requiring only a "short and plain statement" of the claim). This stan-

discovery rules.[36] Ironically, policy choices designed to make the federal courts more accessible to aggrieved parties may have increased caseloads, thereby worsening the delay associated with litigation.

With such a large number of legitimate cases awaiting trial on United States dockets,[37] courts needed to minimize the time taken by frivolous lawsuits.[38] While there is no empirical data on the number of frivolous lawsuits filed, frivolous litigation clearly posed a major problem in the early 1980s.[39] The 1983 amendments to Rule 11 were made with an eye toward deterring frivolous litigation.[40]

B. The History of the Duty Imposed by Rule 11

Because our legal system is adversarial rather than inquisitorial,[41] courts decide cases and make laws based on the issues raised by the parties to the case.[42] As officers of the court, lawyers in this system

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dard requires only that the opposing party and the court be able to obtain a basic understanding of the claim. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 21, § 5.7, at 254.

35. FED. R. CIV. P. 15 (providing that parties may make one amendment as a matter of course and further amendments by written consent of the adverse party or by leave of court, which shall be given freely when justice so requires).

36. FED. R. CIV. P. 37 (allowing parties to obtain admissible evidence after they are through the door of the court); *see also* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 21, § 7.1, at 381.

37. The problem has not abated. In 1990 there were 211,626 civil cases filed in the district courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 3 (Dec. 31, 1990).

38. *See, e.g.*, Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) (address by Chief Justice Warren E. Burger to the American Bar Association (Jan. 24, 1982)); Note, *Insuring Rule 11 Sanctions*, 88 MICH. L. REV. 344, 375 (1989) (noting that "[i]n an already overburdened system, frivolous filings and motions make an already lengthy process lengthier").

A suit is "frivolous" if it is unworthy of the court's attention and wastes the court's valuable resources. The legal definition of the term "frivolous" has been stated as "[g]iven to trifiings, not worth notice," 37 C.J.S. 1392, and "[o]f little weight or importance." BLACK'S LAW DICTIONARY 601 (5th ed. 1979). Examples of obviously frivolous suits include a fan's suit against the Chicago Bears for misrepresenting itself as a professional football team and an inmate's suit for nuisance on the grounds that a newly installed toilet seat was too cold. W. FREEDMAN, FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES § 1.1, at 4 (1987) (listing other humorous examples of frivolous cases). Aside from such obvious cases, however, dictionary definitions give little guidance on whether a particular claim or filing is frivolous. The types of claims that this Note addresses—those based on untrue facts—are frivolous by definition. Whether such filings are sanctionable and who the court should sanction depends on the allocation of duty that this Note discusses.

39. *See, e.g.*, S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 1 (1985) (stating that "courts are too often confronted with an unknown but unacceptably large number of frivolous actions"). "Because frivolousness is a matter of judgment, it is not reflected in court statistics . . . [however,] few would dispute . . . that there is a good deal of frivolous litigation. . . ." *Id.* at 2 n.4.

40. FED. R. CIV. P. 11 advisory committee's notes to the 1983 amendments (stating that "in practice Rule 11 has not been effective in deterring abuses").

41. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 21, § 1.1, at 2. The Anglo-American judicial system differs in this respect from systems in civil law countries where the inquisiterial system prevails. *Id.*

42. *Id.*

must conduct themselves and their cases according to the highest standards of professional conduct.[43] This responsibility includes the duty to refrain from using the courts for frivolous purposes.[44]

Rule 11 of the Federal Rules of Civil Procedure provides an additional incentive to avoid frivolous lawsuits by requiring courts to impose sanctions on those who file "pleadings, motions, and other papers" that are not "well grounded" in fact or law.[45] Joseph Story introduced the concept of well-grounded pleadings in the United States in an 1838 treatise in which he described the rule requiring the signature of counsel on pleadings as seeking to ensure that the suit rested on "good ground."[46] The signature requirement, which had arisen in England in the time of Sir Thomas More, originally gave counsel the quasi-judicial function of examining the pleading to certify that its form was proper.[47] Thus, the good ground language arose originally from a function of attorneys that is loosely analogous to their modern role as officers of the court.[48]

Story's purpose in initiating the good ground requirement in Federal Equity practice was apparently only to secure lawyer honesty.[49] The 1912 version of Equity Rule 24, however, required a lawyer's signature as a certification of good ground for the plea, thereby restoring the historical quasi-judicial function of the signature requirement.[50] The

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43. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981). The Preamble provides: "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct" *Id.*, Preamble (footnote omitted).

44. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Preamble ¶ 4 (1983) (recognizing that "[a] lawyer should use the law's procedures only for legitimate purposes"). *But see* Miller, *supra* note 19, at 18 (arguing that attorneys are driven by their duty to represent their clients and their own economic self-interest and that "vague notions that attorneys owe a duty to the judicial system by virtue of their status as court officers are feeble counterweights in making day-to-day decisions").

45. FED. R. CIV. P. 11. This Note concentrates on the "fact" portion of this requirement.

46. J. STORY, EQUITY PLEADINGS ch. 11, § 47 (1838), discussed in Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 9-14 (1976).

47. Risinger, *supra* note 46, at 10-11 & n.22.

48. See *id.* at 10 n.22 for a history of the split nature of the legal profession and the varying levels of status, duty, and privilege afforded to counsel in the tiune of Sir Thomas More. More took the siguature function from the Masters of Chancery, a section of the profession with the status of junior judges, and gave it to the ordinary Counsel. *Id.*

49. *Id.*

50. Equity R. 24, 226 U.S. 655 (1912) provided:

> Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.

See also Risinger, *supra* note 46, at 13 & n.26 (stating that "[t]he Rule . . . explicitly restored the

1912 Rule also added a new certification that the pleading was not interposed for delay.[51]

The drafters of the 1938 version of Rule 11 associated the good ground requirement of Equity Rule 24 with a sanction for filing sham pleadings.[52] While commentators have criticized the 1938 version of Rule 11 as inartfully drafted[53] and confused,[54] it is important to note that the Rule nonetheless contemplated the traditional quasi-judicial role of attorneys and imposed consequent duties on attorneys.

As with the current Rule 11, the primary purpose of the 1938 Rule was to deter frivolous actions.[55] The Rule permitted judges to "strike as sham or false" pleadings designed to defeat the purpose of the Rule.[56] Rule 11 required the signature of an attorney on every pleading of a party represented by an attorney, and instructed parties who were not represented by an attorney to sign their own pleadings.[57] The Rule imposed a duty of good faith on attorneys: courts could sanction them only for willful violations.[58] The 1938 Rule imposed no duty on clients since it did not provide for sanctions against clients who were represented by attorneys.[59]

The 1938 version of Rule 11 has been criticized universally as ineffective in deterring abuses.[60] In its first half-century, courts rarely invoked Rule 11.[61] Sanctions were underutilized because the situations in which to impose them were not clear,[62] the range of available sanctions

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historical office of being a safeguard against impertinence and scandal").

51. *See* Risinger, *supra* note 46, at 13 n.26.

52. FED. R. CIV. P. 11 (1938); *see also* J. MOORE & D. LUCAS, 2A MOORE'S FEDERAL PRACTICE § 11.01, at 615 (1938). The 1938 Federal Rules of Civil Procedure were adopted to "lay upon counsel a definite moral and professional obligation." *Id.*

53. Risinger, *supra* note 46, at 8 n.20.

54. FED. R. CIV. P. 11 advisory committee's notes to the 1983 amendments.

55. Carter, *supra* note 16, at 4.

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

57. *Id.* The certification sentence of the 1938 Rule read as follows: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." FED. R. CIV. P. 11 (1938).

58. FED. R. CIV. P. 11 (1938); *see also* Risinger, *supra* note 46, at 59 (stating that "the standards of Rule 11 are subjective standards").

59. Nor was there any provision for sanctions against a pro se litigant in the final version of the 1938 Rule. *See* C. WRIGHT & A. MILLER, *supra* note 25, § 1331, at 10 & n.7 (discussing a provision in the May 1936 Preliminary Draft of the Rule that subjected pro se litigants to the same obligations and penalties prescribed for attorneys, but which was not included in the final version of the Rule).

60. *See, e.g., id.* § 1331, at 10-11; Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988); FED. R. CIV. P. 11 advisory committee's notes to the 1983 amendments.

61. Risinger, *supra* note 46, at 34-37 (noting that there are only 19 reported cases between 1938 and 1976 in which a party sought sanctions). *See also* S. KASSIN, *supra* note 39, at 2 & n.7 (citing only one more case where a Rule 11 sanction was imposed through 1979).

62. C. WRIGHT & A. MILLER, *supra* note 25, § 1331, at 11.

was not flexible enough to provide proper deterrence,[63] and the standards of professional conduct expected of attorneys who signed pleadings were vague.[64] The threat of sanctions under the 1938 version of Rule 11 was so remote that the Rule was largely ignored.[65]

The Federal Rules of Civil Procedure were amended in 1980 in response to the widely shared perception that litigants often abused the discovery and pretrial processes.[66] Similar concerns of abuse motivated the 1983 amendments to Rule 11, which were part of an integrated package of changes designed to curb the increasing delay and cost associated with litigation.[67] The overriding policies of the 1983 amendments were to encourage earlier pretrial disposition through greater judicial involvement in case management, and to require lawyers to acknowledge their responsibilities to the court and the judicial system.[68]

The 1983 amendments to Rule 11 attempted to put "teeth" in the old rule through several important changes.[69] First, the current rule requires that all litigation papers filed on behalf of a represented party be signed by an attorney.[70] The signature certifies that the signer has read the document and has concluded after a reasonable inquiry into the facts and the law that the document is well grounded.[71] Second, the current rule mandates sanctions when a violation of its provisions occurs.[72] Finally, the current rule extends the duty to conserve court resources to all signers of documents, thus permitting sanctions against clients as well as attorneys.[73]

C. *The Client's Objective Duty to Investigate Factual Claims*

Although the scope of the Rule 11 duty has been disputed,[74] attorneys and pro se litigants must make a reasonable investigation into the

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63. Miller, *supra* note 19, at 25 (stating that existing sanctions were either wrist slaps or draconian dismissals or defaults which penalized clients for the misbehavior of their attorneys).

64. *See, e.g.*, Carter, *supra* note 16, at 5 (noting that "[a]lso unsettled under the old Rule 11 was . . . how sure the attorney had to be before he or she could sign the pleadings").

65. Vairo, *supra* note 60, at 191.

66. Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980); *see also* Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 TEX. TECH L. REV. 887, 888 (1984).

67. Rules 7, 11, 16, and 26 of the Federal Rules of Civil Procedure were amended simultaneously. Amendments to the Federal Rules of Civil Procedure, 461 U.S. 1095 (1983); *see* A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 2 (1984); *see also* Vairo, *supra* note 60, at 190.

68. Vairo, *supra* note 60, at 190.

69. Carter, *supra* note 16, at 4.

70. FED. R. CIV. P. 11; *see supra* note 1.

71. *Id.*

72. *Id.* The old rule did not require sanctions in any case.

73. *Id.*

74. *See, e.g.*, Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100

facts of their claims.[75] The nature of a represented client's duty to investigate factual claims, however, was even less clear under the Rule. Two views emerged: the subjective good faith duty embraced by the Second Circuit,[76] and the objective duty of reasonable investigation imposed by the Ninth Circuit.[77]

In *Calloway v. Marvel Entertainment Group*[78] the Second Circuit remanded for reconsideration under a subjective good faith standard a case in which the district court had awarded sanctions against a client for a frivolous copyright infringement claim.[79] Calloway, the author of a script for an animated science fiction movie, claimed the defendant infringed on his copyrighted material by demeaning and cheapening it in a movie presentation book.[80] The court noted that Calloway had agreed to the defendant's use of his work, and that he had no evidence to support his claim that his former attorney had forged his signature on the contract with the defendant.[81] The court found, however, that Calloway did not know his claim was frivolous and that he did not act in bad faith.[82] Although it affirmed the sanctions against the attorney, the *Calloway* court held that courts cannot sanction a party represented by an attorney unless the party had "actual knowledge" that the filing made false statements.[83]

The Ninth Circuit in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*[84] took a different approach. Business Guides, a leading publisher of business directories, protected itself against copyright infringement by competitors by planting bits of incorrect information called "seeds" in its directories.[85] When the same incorrect information appeared in a competitor's directory, it was

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HARV. L. REV. 630, 641 (stating that "almost half the judges in the survey would have sanctioned as frivolous the same paper the other half . . . thought did not violate the [R]ule").

75. *See, e.g.*, Danik, Inc. v. Hartmarx Corp., 120 F.R.D. 439 (D.D.C. 1988) (imposing sanctions on both attorney and client for their failure to investigate factual allegations).

76. Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988), *rev'd in part sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989).

77. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 892 F.2d 802 (9th Cir. 1989), *aff'd*, 111 S. Ct. 922 (1991).

78. 854 F.2d 1452 (2d Cir. 1988) *rev'd in part sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989).

79. *Id.* at 1456.

80. *Id.* at 1458.

81. *Id.* at 1455, 1464.

82. *Id.* at 1474.

83. *Id.* at 1474. Because courts should not sanction clients for legally frivolous claims, *see infra* subpart VI (D), such a subjective standard means in effect that courts may only sanction clients for bad faith claims.

84. 892 F.2d 802 (9th Cir. 1989), *aff'd*, 111 S. Ct. 922 (1991).

85. 892 F.2d at 804.

evidence that the competitor had copied Business Guides' directory.[86] Due, however, to a logical flaw in the process by which Business Guides created the seeds for a particular directory, the seeds that were the basis for Business Guides' action against the defendant contained accurate, rather than inaccurate, information.[87] Consequently, the district court dismissed the copyright infringement action and imposed Rule 11 sanctions on Business Guides.[88] On appeal, Business Guides claimed that the district court erroneously applied an objective standard to a represented party.[89] The Ninth Circuit rejected this contention, and, stressing the language of the Rule,[90] held that the Rule imposes the same objective standard of reasonable factual inquiry on represented parties as it does on attorneys.[91]

In a five to four decision,[92] the United States Supreme Court upheld the Ninth Circuit's objective standard and rejected the Second Circuit's subjective test. Under the majority's plain meaning approach,[93] Rule 11 applies a single standard of objective reasonableness to attorneys and represented parties.[94] The majority did concede, however, that what is reasonable for a client might be different from what is reasonable for an attorney.[95]

According to the dissent, the majority mistakenly read into the Rule a duty of factual investigation for clients.[96] The dissent admonished the majority for ignoring the Rule's historical role of governing the conduct of attorneys.[97] The dissent also rejected the Ninth Circuit's

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86. *Id.*

87. *Id.* Business Guides created the seeds for the directory at issue in this case by checking the final directory against the responses to the initial questionnaires it had sent to the companies listed. When it found differences, Business Guides assumed they were errors in the final directory. Nine of the then resulting seeds, however, were caused by errors in the responses to the questionnaires that had been corrected prior to the final version of the directory. *Id.*

88. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 119 F.R.D. 685 (N.D. Cal. 1988); Business Guides, Inc. v. Chromatic Communications Enter., Inc., 121 F.R.D. 402 (N.D. Cal. 1988).

89. *Business Guides*, 892 F.2d at 807.

90. The language the court emphasized was: "The signature of an *attorney or party . . .*" and *"to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact."* *Id.* at 809 (emphasis in original).

91. *Id.* at 812.

92. Business Guides, Inc. v. Chromatic Communications, Enter., Inc., 111 S. Ct. 922 (1991). Justice O'Connor wrote the majority opinion in which Chief Justice Rehnquist and Justices White, Blackmun, and Souter joined. Justice Kennedy dissented, joined by Justices Marshall, Stevens, and Scalia. (Justice Scalia joined the dissent in parts I, III, and IV only.)

93. *Id.* at 928 (citing Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456, 458 (1989)).

94. *Business Guides*, 111 S. Ct. at 931.

95. *Id.* at 933.

96. *Id.* at 935, 937 (Kennedy, J., dissenting).

97. *Id.* at 936 (Kennedy, J., dissenting).

contention that applying an objective standard to pro se litigants but not to represented parties is inconsistent,[98] arguing that applying different standards to the two groups would preserve the Rule's purpose of imposing a duty on those who practice before the court.[99] The dissent maintained that it was reasonable to apply an objective standard to pro se litigants who stand before the court in the capacity of an attorney but not to represented parties.[100]

III. Economic Analysis of the Objective Standard

As with any legal rule, the Court's objective standard for clients inevitably will be interpreted differently in different cases.[101] When deciding how to apply the standard in a particular case, courts should keep in mind the purpose of Rule 11. This section, using simple economic analysis, first examines what the Rule theoretically should do in a perfect society.[102] After studying the effects of the optimal Rule 11, this section examines what Rule 11 can do within the constraints of the real world if it is applied properly.[103]

A. What Should Rule 11 Do?

1. Deterrence As Cost Avoidance

Rule 11 speaks the language of tort law;[104] it creates a duty to take reasonable care to avoid frivolous pleadings and imposes sanctions for the breach of that duty. By imposing a duty to investigate the factual basis of claims on both attorneys and their clients, the Rule shifts the costs of such investigations to those who use the courts.[105] Economic analysis is helpful in understanding how and why the Rule imposes

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98. *Id.* at 937 (Kennedy, J., dissenting); *see also Business Guides*, 892 F.2d at 811.

99. 111 S. Ct. at 937 (Kennedy, J., dissenting).

100. *Id.* The majority rejected this view, finding that the Advisory Committee could have made such a distinction between represented and unrepresented parties, but did not do so. *Id.* at 931.

101. For a general discussion of problems of interpretation, see R. Posner, The Problems of Jurisprudence 262-85 (1990). The *Business Guides* Court conceded that what is reasonable will vary from case to case. 111 S. Ct. at 933.

102. *See infra* subpart III(A)(1). While the Court's job may be to decide what the law is, thankfully this Note is not so constrained. *See Business Guides*, 111 S. Ct. at 932 (cautioning that the Court is "not acting on a clean slate" with respect to Rule 11 and must decide not what the Rule should be, but what it is).

103. *See infra* subpart III(B).

104. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989).

105. *Cf.* W. Landes & R. Posner, The Economic Structure of Tort Law 126 (1987) (discussing the costs of due care in negligence). When a party filing a legal paper is required to make a certain factual investigation before filing the paper, the cost of the factual investigation is equivalent to a processing fee for the privilege of having the court consider that paper.

these costs.[106]

Deterrence is the overarching goal of Rule 11.[107] The Rule seeks to deter frivolous lawsuits because they are wasteful—they impose social costs by occupying scarce judicial resources that could be used on meritorious causes of action.[108] The Rule seeks to minimize the social costs that frivolous claims generate.[109] Thus, the goal of deterrence is really a goal of cost avoidance.[110]

2. The Costs of Frivolous Claims

To determine how best to avoid the costs of frivolous claims, one must first identify those costs. The most obvious cost is that of defending against a frivolous claim.[111] This cost consists of legal fees and other expenses, including opportunity cost, incurred in defending against the frivolous claim.[112] In the absence of a fee-shifting provision such as Rule 11,[113] the defendant would bear this cost. Frivolous claims also require the court's involvement.[114] This court time cost includes the salaries of the judge and the court staff as well as the cost of supplies and

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106. Economic analysis is particularly useful in analyzing rules such as Rule 11 that impose duties and consequent costs on parties, and it has been employed particularly in the area of tort law. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS—A LEGAL AND ECONOMIC ANALYSIS (1970).

107. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990) (stating that "any interpretation [of Rule 11] must give effect to the rule's central goal of deterrence"); *see also* Carter, *supra* note 16, at 4; Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 903 (1988). *But see* Note, *supra* note 38, at 354-57 (stating that Rule 11 has multiple purposes).

108. *See* G. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 257 (1989).

109. This emphasis on the cost of frivolous claims may seem counter to the historical notion of Rule 11 as a mechanism for achieving ethical goals. *See supra* note 49 and accompanying text. That courts sanction good faith as well as bad faith claims by attorneys and clients, however, indicates that the ethical considerations behind the Rule are secondary to the goal of cost minimization.

110. For a discussion of the cost avoidance goal in tort law, see G. CALABRESI, *supra* note 106, at 26-31. Professor Calabresi outlines three subgoals of accident cost reduction: (1) to reduce the number and severity of accidents; (2) to reduce the societal costs arising from accidents; and (3) to reduce the cost of administering our treatment of accidents. *Id.* Replacing the term "accidents" in this list with "frivolous claims" gives an accurate description of Rule 11's goals.

111. For example, Chromatic Communications' legal expenses alone in defending against Business Guides' frivolous claim were $13,865.66. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 892 F.2d 802, 807 (9th Cir. 1989).

112. For example, if *D*'s wage is $10 per hour and he spends $50 in legal fees and 5 hours of his time defending against *P*'s frivolous claim, his cost is $100. *See* Harb v. Gallagher, 131 F.R.D. 381, 390 (S.D.N.Y. 1990) (showing the calculation of attorney's fees and costs). To determine the proper amount of sanctions, courts frequently have used the lodestar approach, which is based on the average billing rate of attorneys in the region and the average amount of time the defense should have taken. *See, e.g., id.* at 385.

113. The Supreme Court held recently, however, that the courts have inherent power to shift the burden of attorney's fees apart from the sanctions provisions contained in Rule 11, FED. R. APP. P. 38, and 28 U.S.C. § 1927. Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2135 (1991).

114. The time the court takes to determine that the claim is frivolous is costly. *See* W. LANDES & R. POSNER, *supra* note 105, at 126 (noting that "[i]nformation costs are real costs").

electricity.[115] If Rule 11 did not require litigants who bring frivolous claims to reimburse these costs through Rule 11 sanctions,[116] society at large would bear these costs. Finally, a less direct and less obvious, but much discussed, cost is the delay frivolous claims cause in already overcrowded courts.[117] This consists of the cost to other litigants of waiting to have their disputes resolved in court, the cost of the decline in the quality of justice due to overworked judges,[118] and the general cost of society's disillusionment with the judicial system.[119] While they are difficult to measure, it is clear that to individuals who use the court system and to society as a whole these costs could be enormous.[120]

3. The Costs of Deterrence

Rule 11 seeks to avoid the costs imposed by factually frivolous claims by creating a duty to investigate before a litigant brings a claim. But the Rule itself imposes costs.[121] Most obviously, the party filing a pleading faces the cost of conducting an investigation to determine whether the filing is well grounded in fact. This cost may be negligible

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115. The average cost to the government of a civil case in 1982 was $1500. J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM xix (1983).

116. In general, Rule 11 has not been used to impose all these costs on sanctioned parties. *See, e.g., Business Guides*, 892 F.2d at 807 (noting that "the [district court] considered but rejected the possibility of ordering Business Guides to reimburse the public fisc for the cost of the court's time"). Including social costs in sanctions is seen as unduly punitive by most courts. *See* S. KASSIN, *supra* note 39, at 39-40 (noting that only 6 of 292 judges surveyed suggested court costs as a supplement to attorney's fee sanctions).

117. *See, e.g.*, G. JOSEPH, *supra* note 108, at 257; Miller, *supra* note 19, at 1-2.

118. Professor Miller suggests that delay creates a "churning effect," meaning that the longer a case waits to be processed and heard, the more work it will eventually generate for the system. Miller, *supra* note 19, at 14. Miller is also troubled by the ability of an overcrowded judicial system to attract the most talented judges:

> The quality of our justice system depends on the character of the personnel we are able to attract as judges and how long they endure. In the long run the frustration created by the present state of affairs will deprive the system of considerable talent, both by motivating judges to resign early and by deterring potential candidates from serving at all. Judgeships compete with the high salaries of private practice and the prestige and autonomy of academia. The chief attractions of the bench are nonmonetary. If we want to prevent the quality of our judiciary from declining to an unacceptably low level, we must pay attention to the intangibles of the job—both its rewards and its frustrations.

Id. at 35.

119. *See supra* note 24 and accompanying text. One federal district judge has described today's litigation process as "a constant flow of poorly prepared, ill-considered, and often misleading, if not downright deceptive, papers filed by attorneys." Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 182 (1985).

120. *See, e.g.*, Miller, *supra* note 19, at 2 (stating that "the escalating cost of litigation, coupled with intolerable delay, leads to an overall financial and emotional price tag for justice that often is beyond the means of all but the wealthy and sturdy").

121. *See generally* S. BURBANK, RULE 11 IN TRANSITION—THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 77-83 (1989) (discussing costs of Rule 11).

in the case of easily ascertainable facts[122] or could be quite large when the requisite investigation is more difficult.[123] The attorney and client filing the claim bear this cost, which is essentially analogous to a processing fee to get into court.[124]

This prefiling investigation cost creates another less observable cost. When either the cost of investigation or the cost of the sanctions for failure to investigate becomes too high, these costs may deter prospective litigants from bringing valid claims.[125] This "chilling effect"[126] could make the courts inaccessible to certain groups in society.[127] A Rule that imposes too great a prefiling cost on litigants may price the poor out of the legal system.[128] Society in general would bear the resulting costs.[129]

4. The Ultimate Goal—An Optimal Level of Deterrence

Although at first glance the primary goal of Rule 11 appears to be deterrence of the costs imposed by frivolous claims, a Rule that mandates high investigation duties imposes rather severe costs of its own. The ultimate goal of the Rule should be to minimize the sum of the cost of frivolous claims and the cost necessary to avoid frivolous claims.[130] If

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122. For instance, in *Business Guides* the district court judge's clerk spent approximately one hour making a few phone calls to determine that Business Guides' complaint was factually inaccurate. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 892 F.2d 802, 805 (9th Cir. 1989), *aff'd*, 111 S. Ct. 922 (1991).

123. *See, e.g.*, Sauls v. Penn Virginia Resources Corp., 121 F.R.D. 657, 663 (W.D. Va. 1988) (holding that attorneys acted reasonably in filing papers when the only way to find facts was to continue to investigate through discovery).

124. This discussion treats the attorney and client as a unit for simplicity's sake. This Note later discusses how this cost is allocated within the attorney-client relationship. *See infra* Parts IV-VII.

125. Among prospective litigants, there may be a group who will file claims if their only cost is their attorney's fee and the opportunity cost of their time, but who will not file those claims if they must also incur investigation costs or risk sanctions. *See Business Guides*, 111 S. Ct. at 941 (Kennedy, J., dissenting).

126. *See* S. BURBANK, *supra* note 121, at 84-85. The Rule may also poison relations between attorneys and their clients, and sanctions may damage an attorney's reputation. *Id.* at 85-88.

127. *See* G. JOSEPH, *supra* note 108, at 253 (arguing that judges should be wary of allowing Rule 11 sanctions to discourage certain types of litigation).

128. The poor may need the legal system more than any other socioeconomic group to vindicate rights. *See* Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 575 (E.D.N.Y. 1986) (discussing the need to give easy access to courts for cases against government officials, First Amendment cases, civil rights cases, and habeas corpus cases), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

129. An additional cost not included in this discussion is the cost of enforcement that is imposed on the judicial system. *See, e.g.*, Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243, 244 (1984) (stating that "[r]ules require sanctions" and "[s]anctions require enforcement proceedings," and that "[t]hese absorb resources of time, energy, and money that it is the very purpose of the rules to spare").

130. *Cf.* G. CALABRESI, *supra* note 106, at 26 (stating that "it [is] axiomatic that the principal

complete deterrence of frivolous claims imposes higher aggregate costs than those associated with frivolous claims under a less strict rule, then a less strict rule is preferable in achieving the goal of cost avoidance.[131] The optimal level of deterrence is that level at which the total costs of the frivolous claims that get into court under the Rule, combined with the investigation costs imposed and the cost of the Rule's chilling effect, are minimized.[132] The ultimate goal of Rule 11 should be to reach this optimal level of deterrence.

5. The Optimal Rule in Idylica—An Example

An example will illustrate how the optimal Rule 11 would work. The land of Idylica has no rule to deter factually frivolous claims, and each year five litigants bring such claims. In an attempt to minimize the costs of these claims, the Supreme Court of Idylica is considering five options that range from a rule imposing a prefiling investigation duty with a cost of five, which would deter all factually frivolous claims, to a rule imposing a prefiling investigation duty with a cost of one, deterring only one of the five annual frivolous claims.[133] The court commissions a study to determine the costs that current frivolous claims impose on its society and the costs the alternative rules would impose. The study finds the following information:

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function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents").

131. "The challenge . . . is to eliminate the 'frivolous' cases, without unfairly discouraging claims of potential substance and without expending considerable judicial resources in the process." Oberman, *Coping With Rising Caseload II: Defining the Frivolous Civil Appeal*, 47 BROOK. L. REV. 1057, 1058 (1981). *Cf.* G. CALABRESI, *supra* note 106, at 17 (stating that society is not committed to avoiding accidents at all costs).

132. This is the Pareto optimal level of sanctions. Pareto optimality is reached when "there is no change from that situation that can make someone better off without making someone else worse off." A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 n.4 (2d ed. 1989). At the Pareto optimal level of Rule 11 deterrence, any higher level of deterrence would result in chilling effect costs, which would make the total costs higher than they are at the optimal level, and any lower level of deterrence would result in delay costs, which would make the total costs higher than they are at the optimal level. *See also* Coase, *The Problem of Social Costs*, 3 J.L. & ECON. 1, 44 (1960) ("In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.").

133. These various proposals illustrate the way the reasonable duty to investigate require-

TABLE 1

RESULTS OF IDYLICA RULES COMMITTEE STUDY

	COSTS OF FRIVOLOUS CLAIMS			COSTS OF RULE		
Frivolous claims getting to court	Defense costs (5/claim)	Court costs (2/claim)	Delay costs (13/claim)	Investigation costs*	Chilling effect costs	TOTAL COST
0	0	0	0	(5) 25	75	100
1	5	2	13	(4) 20	50	90
2	10	4	26	(3) 15	25	80
3	15	6	39	(2) 10	15	85
4	20	8	52	(1) 5	8	93
5	25	10	65	(0) 0	0	100

* The number in parenthesis is the prefiling investigation cost per claim imposed by the given proposed rule.

As the study shows, in Idylica the cost imposed by frivolous claims is constant at twenty per claim—five of defense costs plus two of court costs plus thirteen of delay costs—ranging from zero cost with no claims getting into court to a cost of one hundred when all five annual claims get to court.[134] The costs imposed by the different proposed rules vary with the number of frivolous claims they deter.[135] Because each proposed rule, however, imposes a different duty to investigate and thus a different cost of investigation, the per-claim cost of the various rules

ment imposes costs under Rule 11. If the reasonable investigation duty means that any factually frivolous claim is sanctionable, then the duty to investigate and its consequent costs are very high—comparable to the investigation cost of 5 in Table 1. If, however, the term "reasonable" is interpreted less strictly to mean cursory, then the duty to investigate and its consequent costs are much lower—more like the investigation cost of 1 in Table 1. Obviously, the assumption made in this discussion, that a given rule imposes a blanket standard of reasonableness in all cases—a given prefiling investigation cost that is always reasonable—is unrealistic. Later sections of this Note explain why this assumption is unrealistic and argue that any interpretation of Rule 11 should be flexible enough to allow variation in the standard of reasonableness. *See infra* Parts IV-VII.

134. Again, this may be an unrealistic assumption. As the number of frivolous claims increases, the marginal cost of each one may increase because the delay costs imposed may increase geometrically. *See supra* note 118. Since multiple frivolous claims may be brought in the same action, however, the marginal defense cost and marginal court cost for each claim within the same lawsuit may actually decrease with more frivolous claims. If a defendant has already retained counsel and the judge has already familiarized herself with the case, a second frivolous claim may be disposed of more easily than the first one. Because data on these possible marginal cost trends is unavailable, the marginal cost of each frivolous claim is assumed to be constant in Idylica. This assumption has the added benefit of simplicity.

135. For example, the proposal that allows one frivolous claim, and thus deters four, has a cost of 70—20 of investigation costs (4 per claim) plus 50 of chilling effect costs.

is not constant.[136] In Idylica a complete deterrent rule, with a prefiling investigation cost of five, has a significant chilling effect on those who would bring valid claims if the prefiling cost were not so high.[137] The cost of this chilling effect to Idylica is seventy-five. With a prefiling investigation cost of four, however, more prospective litigants with valid claims bring their claims, and the chilling effect cost is reduced to fifty. The chilling effect cost is zero under the current regime, which has no prefiling duty to investigate.[138]

The total cost to Idylica of the various rule proposals is the sum of the costs of the frivolous claims allowed under a given rule plus the costs imposed by that rule. As Table 1 illustrates, in this hypothetical society the optimal rule deters three frivolous claims a year and allows two to get into court. Under this proposed rule the total cost to Idylica reaches its minimum at eighty per year. This rule best accomplishes the Supreme Court of Idylica's goal of cost avoidance. In Idylica allowing two factually frivolous claims a year to get to court is optimal.[139]

B. What Can Rule 11 Do?

1. Cost Minimization

In a fantasy world with perfect information, such as Idylica, it is possible to measure the optimal level of deterrence. In our society, however, one can only estimate the cost imposed by frivolous lawsuits and the alternative cost imposed by a rule that chills legitimate claims by

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136. As the per-claim investigation cost imposed by the rule changes, the total investigation cost of the 5 claims changes. In addition, as the duty imposed by the rule varies, the chilling effect of the rule varies, so the costs associated with the chilling effect vary.

137. To illustrate the chilling effect cost shown in Table 1, assume there are 100 people in Idylica who would bring claims if there were no prefiling investigation cost—demand for the courts would be 100. When the investigation cost is 5, 75 people would be deterred from bringing their actions—demand for the courts is only 25. If the investigation cost were lowered to 3, 50 of those who would not hring claims at a price of 5 would bring claims, leaving only 25 people deterred from bringing claims and raising demand for the courts to 75. Table 1 shows chilling effect costs in currency units rather than in terms of numhers of people deterred, but the effect is the same.

138. Because of the delay in bringing claims due to circumstances other than frivolous claims, *see supra* notes 25-36 and accompanying text, there may be a substantial chilling effect in our system aside from that created by frivolous claims. This chilling effect, however, is heyond the scope of Rule 11 and is thus beyond the scope of this Note. The chilling effect costs in Table 1 are those caused solely by costs of the duty to investigate.

139. Again, the goal in Idylica is to reduce the costs of frivolous claims and to discourage litigants from bringing them, not necessarily to reduce the number of frivolous claims. *See supra* note 131. Obviously, this example is oversimplified. First, it assumes that all the costs of frivolous claims and the proposed rules are quantifiable. In the real world this is simply not the case. Second, the example postulates a society in which the chilling effect is rather responsive to changes in the duty imposed by the rules. This may or may not he true in the real world. Despite the admittedly unrealistic assumptions, however, the example does illustrate that the optimal rule may not he the one that completely deters all factually frivolous claims.

overdeterring.[140] Thus, the goal in the real world should be to achieve the optimal level of deterrence given the imperfect information available.

The optimal level of deterrence is the level at which the total costs imposed are minimized.[141] To develop the best rule, a judicial system operating on a clean slate would need to know the delay costs imposed by allowing all factually frivolous claims, the chilling effect costs of deterring all frivolous claims, and the costs of various options between these two extremes.[142] Unfortunately, or perhaps fortunately,[143] we are not operating on a clean slate.[144] Therefore, the discussion must center on how to approach the ultimate goal of cost minimization within the existing Rule. In striving for this goal, however, the optimal rule is not necessarily the one that deters the most frivolous claims.[145]

2. The Cheapest Cost Avoider Goal

In its present form Rule 11 imposes a duty on both the attorney and the client to investigate the facts of a claim before pleading. The Rule seeks to ensure that the lawyer and the client make this prefiling investigation, and incur its costs, by imposing a sanction should they fail to investigate reasonably.[146] The Rule assumes implicitly that in most cases the cost of the investigation will be less than the costs to the opponent and society were there no duty to investigate.[147] Thus, Rule 11 has already taken an important first step that was not taken in Idylica—it has imposed the duty on the party that can minimize the

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140. Obviously, achieving the goal of optimal deterrence in the real world would be extremely difficult, if not impossible, because there is no way to measure accurately most of the costs involved in the equation.

141. *See supra* notes 104-10 and accompanying text.

142. Idylica knew this information in determining its optimal level of deterrence. *See supra* subpart III(A)(5).

143. "Fortunately" because the task of designing the perfect rule to deter frivolous claims from scratch would be extremely complicated. Because Rule 11 has been in use since 1938 and has been modified and interpreted by the courts since then, *see supra* notes 52-65 and accompanying text, this task is not necessary, and the more limited task of making the Rule work as well as possible in its present form is all we face.

144. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S. Ct. 922, 932 (1991).

145. *See supra* subpart III(A)(5).

146. FED. R. CIV. P. 11 advisory committee's notes to the 1983 amendments (stating that "[i]f the duty imposed by the [R]ule is violated, the court should have the discretion to impose sanctions"). To be effective sanctions at least must be higher than the cost of investigation. *Cf.* W. LANDES & R. POSNER, *supra* note 105, at 60 (discussing individual decisions regarding the proper amount of due care). While sanctions awarded by courts frequently do not include all of the social costs imposed by frivolous claims, *see supra* note 123, they do create the threat of imposing costs higher than the investigation cost.

147. This follows from the Rule's cost minimization goal. *See supra* subpart III(B)(1).

total costs to society most easily.[148] Since the overall goal is cost avoidance and the party filing the suit is presumed to be able to avoid costs most cheaply, the Rule imposes the duty on the filing party.

The cheapest cost avoider mode of economic analysis allows courts to employ a legal cost-benefit analysis without having to evaluate the costs and benefits on a case-by-case basis.[149] In an ideal society a case-by-case evaluation would be desirable because the costs and benefits of a rule imposing a duty to investigate will vary from case to case.[150] Instead of requiring courts to make such an ad hoc cost-benefit analysis, however, the cheapest cost avoider rule requires only that they decide who is in the best position to weigh the costs of factually frivolous claims against the investigation costs necessary to avoid them.[151] In the case of Rule 11, the Supreme Court, under the Rules Enabling Act,[152] has decided that the attorney and the client who file the claim are in the best position to make such a cost-benefit analysis. In order to make the cost-benefit analysis reflect more than simply the individual costs and benefits to the attorney and the client,[153] the Rule provides for sanctions should they decide not to perform a reasonable prefiling investigation and if they file a factually frivolous claim.[154] Under Rule 11 the filing party is the cheapest cost avoider.

The Rule, however, is not explicit about how the duty of factual investigation should be allocated between the attorney and the client.[155]

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148. If the cost of investigation (including chilling effect costs) is less than the costs that would accrue without an investigation (defense costs, court costs, and delay costs), the filing party can minimize costs by making an investigation.

149. *See* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

150. *See infra* Part IV.

151. Calabresi & Hirschoff, *supra* note 149, at 1060 & n.19.

152. 28 U.S.C. § 2072 (1988). The Rules Enabling Act authorizes the Supreme Court to promulgate rules of procedure. Actually, the Rules are drafted by committees of the Judicial Conference and approved by the Court.

153. In the absence of a rule shifting at least some of the costs imposed by frivolous claims to the party bringing those claims, the attorney and client would have little incentive to avoid frivolous claims because their opponents in the litigation, the court system, and ultimately society would bear the costs of those claims. Rule 11 seeks to internalize these costs. *See supra* subpart III (A)(2).

154. It is entirely possible that a party undertaking less than the reasonable prefiling investigation will bring a claim which is valid. For this reason the costs discussed here are not really the actual cost of a sanction, but the cost of the sanction multiplied by the risk of incurring it with a given level of investigation—the probability of harm. *Cf.* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (Learned Hand's famous definition of negligence: when the burden of precautions is less than the probability of harm multiplied by the gravity of the injury).

155. The Rule says that the "attorney or party" who signs the pleading, motion, or other paper certifies that to the best of the signer's belief formed after reasonable inquiry the paper is well grounded in fact. FED. R. CIV. P. 11. The case law has imposed the duty on both the attorney and the client in many cases. *See, e.g.*, Continental Airlines, Inc. v. Group Systems Int'l Far East, Ltd., 109 F.R.D. 594 (C.D. Cal. 1986); City of Yonkers v. Otis Elevator Co., 106 F.R.D. 524

The same cheapest cost avoider analysis is helpful in determining the proper allocation of this duty between the attorney and the client. Since the Court and its rulemaking committees have decided that the attorney-client unit can avoid cost more cheaply than can the court system, the opponent, or society, it is helpful to examine how cost minimization best can be achieved within the attorney-client relationship.[156] Courts should allocate the factual investigation duty imposed by Rule 11 based on a determination of the cheapest cost avoider within that relationship.

IV. A Model for Analyzing Client Sanctions

In *Business Guides* the Supreme Court decided that clients who are represented by counsel will be held to an objective standard in determining whether they have conducted a reasonable factual investigation.[157] This holding means that clients who sign papers may be subject to sanctions even if they signed in good faith; as long as the pleading is factually frivolous, the court may sanction the client.[158]

The effectiveness of the objective standard of reasonable factual inquiry in reaching Rule 11's goal of cost minimization depends on how flexibly courts apply it. Because litigants bring a wide range of factual claims, each case requires a varying level of factual investigation.[159] Since there is also a wide variety of attorney-client relationships, the party best able to minimize the costs of a factual investigation also varies from case to case. It thus is desirable to apply Rule 11 flexibly so as to place the duty of factual investigation on the cheapest cost avoider in as many cases as possible.[160] The following example points out the

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(S.D.N.Y. 1985).

156. In other words, since either the attorney, the client, or both has the duty to undertake a factual investigation, the Rule can best approach its overall goal of cost minimization by imposing the duty on whoever can undertake an investigation most cheaply.

157. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S. Ct. 922, 934-35 (1991).

158. *Business Guides*, 111 S. Ct. at 934-35. The objective standard also may apply to clients who do not sign filings. *See id.* at 941 (Kennedy, J., dissenting) (discussing the greater chilling impact if the negligence standard is applied to clients who do not sign a Rule 11 paper); Fed. R. Civ. P. 11 advisory committee's notes to the 1983 amendments (stating that "[e]ven though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client"). The majority in *Business Guides*, however, did not address this issue. *Business Guides*, 111 S. Ct. at 935 (noting that "[w]e have no occasion to determine whether or under what circumstances a nonsigning party may be sanctioned").

159. The necessary factual investigation may range from a mere phone call, *see, e.g.*, Portnoy v. Wherehouse Entertainment Co., 120 F.R.D. 73, 74 (N.D. Ill. 1988), to "check[ing] closely the plausibility" of a certain account of the facts. Mike Ousley Productions, Inc. v. Cabot, 130 F.R.D. 155 (S.D. Ga. 1990).

160. *See* Calabresi & Hirschoff, *supra* note 149, at 1060 n.19 (stating that "[w]e do not mean to suggest that the party in the best position to make the cost-benefit analysis is always in the best

problems created by too rigid an application of the objective standard and illustrates the need for flexibility.

After an extremely successful and very rainy football season, the paint on the bleachers at State U. is peeling. The Board of Trustees, under pressure from several prominent alumni, solicits bids to have the bleachers painted. The trustees distribute a request for bids which specifies the deadline for completion of the job and states that "the paint shall be gray and of the highest quality." The request for bids also states that "the sole criteria for the contract award are ability to complete the job and price—the lowest bidder who can complete the job as specified will be awarded the contract."

The trustees receive four bids. The first bidder is Poor Student Painters (PSP), a group of four State U. students who have no painting experience and are painting during the summer to earn money for school. The second bid is received from the local office of Acme Painting Corporation (Acme), the region's largest painting operation, with approximately five thousand employees and annual revenues of thirty million dollars. The third bidder is Local Family Painters (LFP), a fifty-year-old local painting business with five full-time employees and annual revenues of two hundred thousand dollars. The final bid is received from Slippery Watercolors, an out-of-state painting contractor with no local office. The trustees determine that all four bidders can do the job and in an open bidding process award the contract to Slippery Watercolors, the lowest bidder.

Approximately one week after work begins on the job, PSP, Acme, and LFP each receive an anonymous tip from a person claiming to be a former Slippery Watercolors employee. The tipster claims that Slippery Watercolors habitually dilutes its paints and that this is probably how it was able to underbid the other painters on the State U. job. The painting columnist for the local newspaper, who also received a call from the tipster, writes in his column, "I went down and looked at the State U. bleachers, and based on my three years of experience as a professional painter, I'd say this state is getting ripped off—that paint is diluted."

In response to this tip, PSP, Acme, and LFP retain local attorneys and file separate complaints in federal district court against Slippery Watercolors, seeking an injunction against further work on the State U. job and a reconsideration of the contract award. The three complaints allege that Slippery Watercolors has diluted the paint and thus has vio-

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position to act upon it"). This Note suggests that when the Rule imposes the duty of investigation on a client who is not the cheapest cost avoider, that client should he allowed to bargain to shift the duty to the attorney through attorney indemnification. *See infra* Part V.

lated the "highest quality" clause of the bid request. The basis for the complaints is the anonymous tip and the newspaper article. The complaints are signed by the attorneys and a representative of each painting company.

The three cases go to trial, and the court determines that the paint used by Slippery Watercolors in fact was not diluted. The court finds that it is well known in the painting business that a painter with seven or more years of experience can tell if paint has been diluted by visual inspection. Since seven years is the average level of experience among professional painters, the court determines that an average painting company should have known the paint was not diluted. Despite the fact that the claims were made in good faith in all three cases, the court imposes five thousand dollar sanctions jointly and severally on each of the attorneys and clients, citing the *Business Guides* objective standard for imposing sanctions on clients.

A. Costs of Investigation

In other painting cases the local lawyers have retained a local painting expert who has thirty years of experience as an expert witness. It would have taken the expert approximately one hour to drive to the stadium, look at the bleachers, and determine that Slippery Watercolors' paint was not diluted. His time would have cost each of the lawyers $200. Each of the clients in the three suits, however, would have had different costs of investigation.

1. Poor Student Painters (PSP)

Since none of the students has any painting experience, they could not tell by looking at the bleachers that the paint was not diluted. Consequently, in order to realize that their claim was factually inaccurate the students would have had to hire an expert, such as their lawyer's expert, at a cost of $200. Since the students did not know any painting experts, however, they would have had to leave the job they were working on to locate and retain an expert. The students would have earned $100 during this time had they not been away from work. The total cost of an objectively reasonable investigation for them thus would have been $300—the cost of the expert plus the opportunity cost of their time.

In the case of PSP, the court's objective standard imposes a duty to investigate on the students at a cost of $300. But since PSP's lawyer could have determined the paint was not diluted at a cost of $200, the objective standard imposes $100 more investigation cost than would a less rigid standard that only held clients to a good faith duty. Since

Rule 11 requires an attorney's signature on every paper and imposes an objective standard of reasonable inquiry on attorneys, a good faith standard for clients would result in $200 of investigation cost and, in this case, would achieve the goal of cost minimization. Here, the attorney is the cheapest cost avoider.

2. Acme Painting Corporation (Acme)

Since Acme is a large painting company, it has a number of painters with more than seven years of experience who could examine the bleachers and tell that the paint was not diluted. Acme could ask one of its painters to stop by the football field to make the necessary visual inspection. This inspection would cost Acme $100 due to the time the painter would be away from work. The total cost of an objectively reasonable factual inquiry for Acme is thus $100.

In Acme's case the court's objective standard of reasonable inquiry imposes a $100 duty. Because Acme's local lawyer would have to spend $200 to hire the painting expert to make the same inspection, the objective standard in this case achieves the goal of cost minimization by imposing the duty to investigate on Acme. Under a good faith standard for clients, the attorney would make the investigation at a cost of $200, which would be $100 more costly than necessary. Here, the client rather than the attorney is the cheapest cost avoider.

3. Local Family Painters (LFP)

LFP has five full-time employees, but only one has more than seven years of painting experience. LFP's senior employee manages the paint store, and in order to perform a visual inspection of the bleachers during daylight he would have to close the shop for an hour. This would result in lost revenues for the business of about $200, although this is difficult to estimate since certain days are busier than others. The cost of an objectively reasonable factual investigation for LFP is thus about $200.

In LFP's case the court's objective standard imposes a duty to investigate with a cost of approximately $200, depending on how busy the shop is on the day of the investigation. Since LFP's lawyer also would have to spend $200 for the paint expert, it may not matter whether the Rule imposes the duty to investigate on LFP or its attorney. A good faith standard or an objective standard would result in the same $200 investigation cost. Either standard minimizes costs because LFP and its attorney are equally cheap cost avoiders.

B. Deterrence Revisited

While often stated in terms of deterrence, the primary goal of Rule 11 is cost minimization.[161] Because Rule 11 imposes an objectively reasonable duty to investigate on the filing attorneys, in most cases attorneys will undertake the necessary investigation whether or not courts impose a similar objective duty on clients.[162] For the court system as a whole, holding clients to a higher objective standard of care will minimize costs if it deters enough additional frivolous claims to outweigh the chilling effect costs it causes. If the investigation cost is high and the objective standard does not deter frivolous claims, the chilling effect costs probably outweigh the deterrence benefits of the standard.[163]

The objective standard's deterrence depends on the nature of the specific client, and the cost minimization effect of the Rule depends on the litigiousness of similarly situated prospective claimants.[164] For example, in the case of PSP the objective duty standard imposes a $300 investigation cost but probably has little deterrent effect. There is little deterrence because PSP is unlikely to litigate again; if PSP never files another claim, the sanctioned students will have been punished, but the objective standard of duty will not have deterred them from filing other frivolous claims. Similarly, the cost minimization effect of the objective standard is negligible. Since student painting businesses like PSP rarely go to court, this class of litigants would not bring many frivolous claims.[165] For small student businesses like PSP, however, the $300 cost

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161. *See supra* subpart III(B)(1).

162. When the necessary investigation is simple enough to be undertaken by either the attorney or the client, the objective standard of reasonableness will place the principal duty to investigate on either or both. What is reasonable may be different for a client than for an attorney, however, *Business Guides*, 111 S. Ct. at 933, and whether the attorney or client bears the principal duty to conduct more difficult factual investigations could mean the difference between avoiding or not avoiding a frivolous claim.

163. A high-cost, nondeterrent rule fails to avoid the costs of frivolous claims and simultaneously increases the chilling effects. This situation may occur if courts impose the duty of investigation on a class of litigants whose behavior is not responsive to a change in duty.

164. This distinction has been described elsewhere as that between specific deterrence and general deterrence. Untereiner, *supra* note 107, at 908-09. Rule 11 achieves specific deterrence when a particular sanction prevents the particular party on whom that sanction is imposed from bringing another frivolous claim. *See, e.g.*, Matter of Yagman, 796 F.2d 1165, 1183-84 (9th Cir. 1986) (stating that the primary purpose of Rule 11 is to deter subsequent abuses in the same litigation), *cert. denied*, 484 U.S. 963 (1987). The Rule achieves general deterrence when it discourages other litigants from bringing frivolous claims by encouraging an adequate level of factual inquiry. *See, e.g.*, Untereiner, *supra* note 107, at 908. The cost minimization goal of the Rule is in part a general deterrence goal, and, as this Note shows, cost minimization is not necessarily dependent on specific deterrence. *See supra* subpart III(A)(5). For this reason, the terms "general" and "specific" may confuse more than they clarify.

165. To achieve the goal of cost minimization by deterring the most frivolous claims, sanctions should be directed at those classes of litigants that use the courts most frequently. The most frequent litigators tend to be those with the greatest financial resources because they have the

of getting through the courthouse door will have a significant chilling effect and will discourage many prospective claims. Because the chilling costs of the objective standard outweigh its deterrence benefits in this situation, the objective standard is not the cost-minimizing rule.

In the case of Acme, however, the objective standard probably does have a significant deterrent effect. Acme, a large corporation, frequently disputes contracts in court. The sanction in the Slippery Watercolors case will probably deter Acme from filing frivolous actions in the future. Since the investigation cost for large companies like Acme is low, the chilling effect of the $100 cost to get through the courthouse door will be minimal. Since the deterrent effect of the objective standard probably outweighs the chilling effect, the objective standard is the cost-minimizing rule in Acme's case.

In the case of LFP the $200 investigation duty on the family painting business may have some deterrent effect, depending on how often LFP brings contract claims to court. Since such businesses presumably do have to go to court occasionally, the sanction imposed on LFP in the Slippery Watercolors case probably will prevent some frivolous claims. The $200 investigation cost, however, may chill some legitimate claims for litigants like LFP. Since it is impossible to tell whether this chilling effect cost outweighs the deterrent benefits of the objective standard on an aggregate basis, the objective standard may or may not be the cost-minimizing rule.

C. *Distributional Effects*

In many cases the cost of investigating the facts may be lower for a large corporation than for a small business or individual.[166] In the case of the factual investigation of the State U. bleacher paint, it cost the students $300 to investigate while it cost Acme only $100. As this example shows, applying the objective duty standard may have distributional effects because if a court uses the good faith standard the lawyers for both PSP and Acme would incur a $200 investigation cost.[167] Further-

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most to protect, can best afford the costs of delay, and can hest spread the costs of delay. *See* Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 551 (1981) (reviewing data showing that the probability of a party making a claim increases with income and educational level). The corollary of this is that those with the greatest financial resources also tend to be the cheapest cost avoiders. *See supra* subpart IV(A).

166. A large corporation prohably has more alternative ways to conduct the necessary investigation. In the example, Acme could send an employee whose opportunity cost was $100 per hour, while the only possible investigator for LFP had an opportunity cost of $200 per hour. *See supra* subpart IV(A).

167. A subjective standard would impose the same cost on all litigants—the $200 they would pay their attorneys to investigate their claims. The objective standard, however, could impose different costs on different litigants for investigating the same claim.

more, since small businesses like PSP are more likely to be chilled by every dollar of investigation cost than large corporations like Acme,[168] it is troublesome that PSP faces a $300 cost in contrast to Acme's $100 cost. The objective standard places a disproportionate burden on small companies and individuals by imposing a higher cost on them even though they are more susceptible to chilling effects. Since small companies and individuals often need legal recourse to protect their rights, the distributional effects of the objective standard may run counter to the fundamental maxim of equal justice.[169]

V. BARGAINING TO EFFICIENCY?

The foregoing analysis of the cost minimization effects of the objective duty of factual investigation reveals that when the client's cost of investigation is higher than the attorney's, the attorney is the cheapest cost avoider and the objective standard is not as cost efficient as the good faith or subjective standard. Additionally, the objective standard may have the undesirable effect of imposing a higher investigation cost on less sophisticated clients and a lower investigation cost on more sophisticated clients than the subjective standard imposes. The objective standard often does not impose the costs on the cheapest cost avoider but instead distributes costs disproportionately to those clients least able to absorb them. Because of these misallocations, the objective standard is not optimally effective in achieving the overall goal of cost minimization in every case.

A. Theory

The objective standard's misallocation of duty would not matter if attorneys and clients could bargain with one another to reallocate the duty to investigate, and if such bargaining were costless.[170] The Coase Theorem posits that when transaction costs are zero, the efficient outcome will result through bargaining regardless of the legal rule.[171]

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168. Since each dollar of investigation cost represents a higher portion of a small company's revenues than it does of a large company's, a small company will have to risk a greater portion of its resources to file a claim than a large company.

169. The objective standard may be doubly undesirable because large sophisticated clients like Acme may be better able to deflect the cost of investigation by passing it on to customers than small clients like PSP. For a discussion of cost spreading, see G. CALABRESI, *supra* note 106, ch. 4. The marginal utility theory of money on which cost spreading arguments are based, however, bas been questioned by modern economists. *See id.* at 39-40 (questioning the notion that a one dollar loss by 10,000 people is necessarily less painful than a $10,000 loss by one person). In addition, Rule 11 may poison relations between attorneys and their clients and damage an attorney's reputation. *See* S. BURBANK, *supra* note 121, at 85-88.

170. *See, e.g.*, A. POLINSKY, *supra* note 132, at 12.

171. *Id.*

In *Business Guides* the Supreme Court said that a client who signs a filing assumes a nondelegable duty to conduct a reasonable investigation.[172] To achieve Rule 11's goal of cost minimization, however, bargaining between attorneys and clients through indemnification agreements is desirable when the objective standard places a duty on a client who is not the cheapest cost avoider.[173] While sound policy may prohibit an agreement that requires the client to indemnify the attorney for Rule 11 sanctions,[174] no similar justification exists for preventing attorneys from indemnifying their clients. In tort law parties minimize costs and spread risk by insuring against liability.[175] Clients should be permitted to achieve essentially the same result by paying their attorneys to indemnify them for possible sanctions.

The example of Local Family Painters illustrates the advantage of such bargaining. During its peak season, the cost of closing LFP's shop to have its senior painter inspect the bleachers is $275. LFP presumably would be willing to pay up to $275 to have its attorney investigate the paint. Since the lawyer's cost of investigation is the $200 expense for an expert, the lawyer should be willing to perform the investigation for some amount greater than $200. The attorney and client thus could bargain to shift LFP's duty to investigate to the attorney for a price between $200 and $275.[176] The result would be a lower investigation

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172. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S. Ct. 922, 931 (1991).

173. *Cf.* S. BURBANK, *supra* note 121, at 42 (noting that the reallocation of monetary sanctions from lawyer to client may be desirable).

174. The main reason for preventing attorneys from contracting for indemnification from clients is to protect unwary clients. In the typical attorney-client relationship the attorney directs the litigation and an attorney might ignore ber professional duties by pawning off her risk of sanctions on an unwary client. *See, e.g.*, Harb v. Gallagher, 131 F.R.D. 381, 390 (S.D.N.Y. 1990) (stating that allowing an attorney to indemnify berself for Rule 11 violations "offends deeply" and is "illegal and violative of tbe spirit, intent and purposes of Rule 11"). *But see* Note, *supra* note 38 (arguing tbat attorneys should be allowed to purcbase insurance to cover tbe risk of incurring Rule 11 sanctions and that insurance can alleviate the chilling effect caused by the Rule). *See also* Schaffer v. Chicago Police Officers, 120 F.R.D. 514, 516 (N.D. Ill. 1988) (arguing tbat to allow attorneys to recover sanctions from clients would negate Rule 11's purpose of "interpos[ing] a reasonable attorney's assessment of the merits of [a] dispute between a potential litigant and a potential defendant").

175. *See, e.g.*, Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 573-81 (1985) (discussing tort liability insurance).

176. "One of the basic tenets of economic efficiency theory is that, in the absence of transactions costs, agreements between parties will produce greater economic efficiency tban existed before the agreement." Gross, *Contractual Limitations on Attorney Malpractice Liability: An Economic Approach* 75 KY. L.J. 793, 797-98 (1987). This example assumes bargaining is free, wbich obviously is not tbe case in tbe real world. If it cost each party $25 to bargain witb the other, the range of prices acceptable to both parties for shifting the duty would be between $225 and $250. If tbe combined bargaining costs were greater than the differential between the investigation costs, no bargain would be made and LFP would perform the investigation. For example, if it cost each party $50 to investigate, LFP would pay up to $225 to shift the duty but the attorney would accept

cost than that imposed by the Rule.

The market for clients is extremely competitive, and many attorneys must sell their services aggressively.[177] Permitting an attorney to undertake a more complete factual investigation by agreeing to indemnify a client is equivalent to allowing the attorney to sell a package of services to the client.[178] A client's payment to its attorney for indemnification against possible sanctions simply represents bargaining for more legal service. Such bargaining would aid Rule 11's goal of cost minimization by providing the flexibility that is difficult to achieve with any legal rule.

B. Reality

While in theory attorney-client bargaining could remedy any misallocation of duty caused by the application of the objective standard, in reality such negotiation would be problematic. In the real world courts cannot assume that bargaining between the attorney and client will allocate the duty to investigate to the cheapest cost avoider. Because the attorney and client are presumably already in a contractual relationship, the transactional costs of bargaining will be low. Effective bargaining, however, requires full knowledge of the stakes of the bargain. Clients, particularly those clients who are legally unsophisticated, will seldom have the understanding of Rule 11 necessary to make them effective bargainers. As a result, bargaining for cost-minimizing duty allocation will be rare, and the inefficient allocation of the objective

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the duty for no less than $250.

The Kaldor-Hicks concept of efficiency is illustrative:

> [I]f A values the wood carving at $5 and B at $12, so that at a sale price of $10 (indeed at any price between $5 and $12) the transaction creates a total benefit of $7 (at a price of $10, for example, A considers himself $5 better off and B considers himself $2 better off), then it is an efficient transaction, provided that the harm (if any) done to third parties (minus any benefit to them) does not exceed $7. The transaction would not be Pareto superior unless A and B actually compensated the third parties for any harm suffered by them.

R. POSNER, ECONOMIC ANALYSIS OF LAW 12-13 (3d ed. 1986). In the case of bargaining to allocate Rule 11 investigation duty between attorney and client, the transaction is Pareto superior if the sanctions imposed fully compensate for all the costs a frivolous claim creates. While the level of sanctions is beyond the scope of this Note, it is clear that sanctions do serve to compensate—at least partially—the third parties harmed by frivolous claims.

177. In 1989 attorneys spent $82 million on television advertising, 29% more than they spent in 1978. Dahl, *And Now, A Word from the Lawyers*, MASS. LAW. WKLY., Aug. 19, 1991, at 25 (citing a report from the Television Bureau of Advertising).

178. Legal specialists are allowed to charge their clients more than generalists for certain services. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1), (7) (1983) (indicating, respectively, the factors an attorney may consider in setting a fee include the skill required to perform the service, and the attorney's experience, reputation, and ability. The client may determine the objective of the attorney's representation and scope of the services she provides. *Id.* Rule 1.2(c).

standard will remain.

In the peeling bleacher paint case the objective standard would impose an investigation cost of $300 on PSP, approximately $200 on LFP, and $100 on Acme, while their lawyers could have performed the investigation for $200.[179] It would be advantageous for PSP, and possibly for LFP, to negotiate with its attorneys to indemnify it against sanctions because it could probably obtain indemnification at a cost lower than its cost of investigation.[180] This indemnification agreement would achieve the goal of cost minimization.

Acme, however, is the only client in the example that could bargain effectively with its attorneys. Large companies with in-house counsel such as Acme are probably the only clients that are legally sophisticated enough to bargain with their attorneys over the duty of investigation imposed by Rule 11. Ironically, large companies such as Acme may be cheaper cost avoiders than their attorneys and therefore do not need to bargain for indemnification. Clients such as PSP who need an indemnification agreement from their attorneys to minimize costs are unlikely to have enough legal sophistication to bargain effectively for one.

Because of the lack of information among clients about Rule 11, effective bargaining by clients with their attorneys is unlikely. Although clients should be allowed to bargain for indemnity from their attorneys, such a policy probably will not result in any appreciable movement toward the goal of cost minimization.

VI. Client Sophistication and Rule 11 Case Law

An ad hoc approach that applies a different investigation duty to each case may be preferable to a rigid application of the objective standard.[181] This approach could minimize costs by imposing the correct investigatory duty for each case—a cost of investigation high enough to ensure adequate investigation but low enough so as not to chill valid claims by similarly situated prospective litigants. A case-by-case analysis of the appropriate investigatory duty would be costly to administer,[182] however, and would provide no guidance for prospective litigants. The duty imposed in each case would be applied retrospectively, and Rule 11 would have either too much or too little deterrent effect on

179. *See supra* subpart IV(A).

180. *Id.*

181. *See* W. Landes & R. Posner, *supra* note 105, at 123 (noting that "[i]f the costs to the courts of informing themselves about an individual's ability to avoid accidents were zero, they would set a different due care level for each individual in every accident case").

182. *See id.* at 126 (stating that the costs of ascertaining each individual's due care level are real costs).

future litigants.[183]

The Supreme Court's *Business Guides* decision rules out an ad hoc standard for factual investigation.[184] The Court adopted an objective standard, but acknowledged that the standard may vary according to the circumstances.[185] The majority's "reasonableness under the circumstances" language,[186] while necessary to distinguish its test from a strict objective standard, nonetheless is vague. The only certainty is that clients can no longer make an "empty head, pure heart" defense to sanctions.[187]

To apply the reasonableness standard efficiently and to minimize costs effectively, courts need guidelines to determine when a particular level of factual inquiry should be required.[188] An examination of the range of attorney-client relationships and the types of factual claims that have arisen in Rule 11 cases offers some criteria for identifying the cheapest cost avoider in different cases.

In deciding on an objective reasonable inquiry standard in *Business Guides*, the Supreme Court emphasized that Business Guides was a "sophisticated corporate entity."[189] Because of its sophistication, the

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183. A case-by-case approach applies no clear standard. If courts imposed sizeable sanctions frequently, but the standards for their imposition were unclear, the Rule would overdeter because litigants would undertake more factual investigation than is efficient. If the standards were unclear and courts imposed sanctions infrequently, the Rule would underdeter because the low risk of sanctions would not induce the proper level of investigation. The latter scenario is analogous to that under the 1938 version of Rule 11, which was not uniformly interpreted and was almost never applied. *See supra* notes 60-65 and accompanying text.

184. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S. Ct. 922, 933 (1991) (holding that the standard is an objective one).

185. In discussing the need for the objective standard to be applied flexibly, Justice O'Connor said:

> [T]he legal inquiry that can reasonably be expected from a party may vary from case to case. Put another way, "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney," 892 F.2d, at 810. The Advisory Committee was well aware of this when it amended Rule 11. Thus, the certification standard, while "more stringent than the original good-faith formula," is not inflexible. "The standard is one of reasonableness *under the circumstances*" (emphasis added). Advisory Committee's Note to Fed. Rule Civ. Proc. 11, 28 U.S.C. App., p. 576.

Business Guides, 111 S. Ct. at 933.

186. *Id.*

187. *Cf.* Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.) (noting that "[a]n empty head and a pure heart is no defense," and "[t]he Rule requires counsel to read and consider before litigating"), *cert. denied*, 479 U.S. 851 (1986); Note, *supra* note 9 (discussing the objective standard of duty imposed on attorneys by the 1983 amendments to Rule 11 and the Rule's goal of raising the standard of the legal profession).

188. *Cf.* Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 940 (7th Cir. 1989) (Flaum, J., concurring) (stating that a de novo standard of appellate review is necessary to give guidance and promote uniformity in Rule 11 cases even though the difference between a de novo standard and an abuse of discretion standard is hazy).

189. *Business Guides*, 111 S. Ct. at 932 (quoting the district court's opinion, 121 F.R.D. 402, 405); *see also Business Guides*, 111 S. Ct. at 933 (agreeing with the district court's

Court determined that Business Guides was in a better position than a nonsophisticated client to investigate the facts.[190] Implicit in the notion of "better positioning" was the conclusion that Business Guides was the cheapest cost avoider in that case.[191] The more sophisticated the client is, the more likely it is to be the cheapest cost avoider. Courts should apply a higher standard of reasonableness when analyzing a sophisticated client's duty to investigate the facts.

But what is sophistication? Sophistication clearly involves some notion of a client's experience[192] and size.[193] There are, however, a variety of other indicators of sophistication.

A. Repeat Players

Probably the most important component of sophistication for Rule 11 purposes is whether the client is a repeat litigator. One of the fundamental premises of the 1983 amendments to Rule 11 which imposed an objective duty of reasonable investigation on attorneys was that lawyers are by definition repeat litigators[194] and therefore are in a position to prevent frivolous claims. This use of Rule 11 to encourage those who are in the best position to prevent frivolous claims should also inform a court's analysis of client sophistication.

Courts generally have employed the repeat litigator criterion when evaluating the reasonableness of the client's investigation. For example, in *CTC Imports & Exports v. Nigerian Petroleum Corp.*[195] the plaintiff signed a complaint asserting ownership of the oil aboard a tanker through consignment by an entity that claimed title.[196] The court found that the bill of lading upon which CTC asserted its title was forged and that a reasonable prefiling inquiry would have detected the forgery easily.[197] The court imposed sanctions on CTC for frivolous interference with a sixteen million dollar cargo of oil.[198] In doing so, the court noted

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characterization).

190. *Business Guides*, 111 S. Ct. at 932.

191. *See supra* subpart III(B)(2).

192. *Business Guides*, 111 S. Ct. at 933 (stressing Business Guide's experience with copyright infringement actions).

193. *Id.* at 932 (noting the contrast between Business Guides and the defendant, "a one-man company operating out of a garage" (quoting the district court's opinion, 121 F.R.D. 402, 405)).

194. *See Business Guides*, 111 S. Ct. at 937 (Kennedy, J., dissenting) (noting that applying the certification provisions to attorneys preserves the objective of imposing obligations on those who practice before the court).

195. 739 F. Supp. 966 (E.D. Pa. 1990).

196. *Id.* at 967.

197. *Id.* at 969 (noting that "[a] simple reference to available maritime publications would have revealed that [the ship] . . . was approximately 700 miles into the Atlantic at the time plaintiff's bill of lading was allegedly executed").

198. *Id.* at 970 (characterizing CTC's actions as "manifestly frivolous").

that CTC had experience with forged shipping documents and had made a similar claim in another case a few months earlier.[199]

Repeat litigators are not always large companies. In *Portnoy v. Wherehouse Entertainment Co.*[200] the plaintiff, an individual stockholder, filed a complaint alleging securities violations against the defendant.[201] Because minimal investigation would have revealed that the defendant's stock was not traded on the date in question and that the defendant was not subject to jurisdiction in the district, the court held that Portnoy's prefiling investigation was inadequate.[202] The plaintiff was a frequent litigant,[203] and had ignored the court's warnings that a reasonable prefiling investigation was necessary, so the court imposed sanctions of attorney's fees and costs on him.[204]

As these cases illustrate, repeat litigators may be large corporate entities or individuals who file claims frequently.[205] The underlying assumption in all the repeat litigator cases is that the client is familiar with the litigation process. These decisions also reflect a suspicion that the client may be abusing the judicial process.[206] Courts should hold clients who are not frequent litigators to a lower standard than repeat players.[207]

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199. *Id.*

200. 120 F.R.D. 73 (N.D. Ill. 1988).

201. *Id.* at 75. Portnoy alleged illegal short-swing profits by an insider and sought return of the alleged profits to the corporation. *Id.*

202. *Id.* at 74.

203. *Id.* at 76 (citing another judge's observation that Portnoy "regularly delivered complaints" to the Court).

204. *Id.* at 77. The sanctions of almost $6000 were to be divided equally between Portnoy and his attorney. *Id.* at 75, 77.

205. Some courts have even used the repeat litigator criterion to expand the duty of clients beyond the realm of mere factual investigation to include responsibility for the legality of their claims. For example, in Cannon v. Loyola Univ. of Chicago, 784 F.2d 777 (7th Cir. 1986), a plaintiff sued for the thirteenth time to obtain judicial relief from the decisions of Chicago area medical schools denying her admission. The court held that the plaintiff was liable for costs and attorney's fees under Rule 11 because her present claim was barred by res judicata. *Id.* at 782; *see also* Holley v. Guiffrida, 112 F.R.D. 172 (D.D.C. 1986) (sanctioning a plaintiff who participated in crafting litigation strategy for bringing a second suit that was barred by res judicata and collateral estoppel). The distinction between factual and legal claims, however, is not always clear. *See infra* subpart VI (D).

206. *See, e.g., Portnoy*, 120 F.R.D. at 77 (noting that Portnoy ignored the warnings of the court and for a second time failed to undertake an appropriate investigation prior to filing a lawsuit).

207. Courts for the most part have held nonrepeat litigator clients to a lower standard. *See, e.g.*, Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988) (refraining from sanctioning public school teachers for frivolous claims that the defendant profited from copying a teaching manual they wrote).

B. The Client's Role in the Attorney-Client Relationship

The client's role in filing the claim is a second indicator of sophistication.[208] A client who makes most of the tactical decisions in the litigation, and who has the power to force the attorney to act more quickly or less carefully than the attorney otherwise would, may be in a better position to investigate than a client who allows the attorney to make all important decisions.[209] Faced with the choice between performing a full factual investigation and risking the loss of a large client, or performing a more cursory factual investigation and risking sanctions, an attorney may well choose the latter option.[210] While attorneys have an objective duty to make a reasonable investigation of the facts, when clients can apply pressure on attorneys, courts should impose the duty on the clients to serve the cost minimization purpose of the Rule.[211]

In *Holley v. Guiffrida*[212] the plaintiff, an individual, brought a second action against government officials after an earlier action was unsuccessful.[213] Despite a warning that they risked a motion for Rule 11 sanctions, the plaintiff and his counsel persisted in pursuing a claim that the court held was barred by res judicata and collateral estoppel.[214] Because the court had observed the plaintiff's active participation in the suit and his close consultation with his attorney, the court sanctioned the client and his attorney equally.[215]

When the attorney is the decisionmaker in the attorney-client relationship, the attorney should bear primary responsibility for frivolous

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208. *See, e.g.*, Widell v. Board of Educ. of Chicago, No. 86-C9553, at *2 (N.D. Ill. Nov. 9, 1988) (LEXIS, Genfed library, Dist file) (stating that "[t]he Rule does permit sanctions against a client, however, but only where the client's direction is clearly related to the attorney's misconduct"); *see also* Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193 (5th Cir. 1988) (remanding for apportionment of sanctions among clients who played different roles in a lengthy action).

209. *See, e.g.*, *Widell* at *3-4 (stating that "[i]mposing Rule 11 sanctions on a client is only appropriate where it is clear that the client was acting as master of her attorney in a puppet-like fashion").

210. *See* S. BURBANK, *supra* note 121, at 42 (noting that attorneys may fail to investigate because they do not want to risk losing the client's business).

211. Placing a significant duty on the powerful client in these situations may deter frivolous claims better. For example, an attorney faced with incurring a $5000 sanction or pleasing a client that pays him $100,000 a year in legal fees may risk the sanction. If the client, however, faces a choice between a minor investigation cost and a large sanction, the client will probably investigate and avoid frivolous claims. In these situations, there is little concern about chilling legitimate litigation because powerful clients generally will not be chilled by the cost of a reasonable investigation. *See* Miller, *supra* note 19, at 2 (noting that the escalating cost of litigation may place it beyond the means of all but the wealthy and sturdy). *Cf.* S. BURBANK, *supra* note 121, at 42 (arguing that when an attorney is afraid of losing a client's business, reallocation of the attorney's duty to investigate to the client is highly desirable).

212. 112 F.R.D. 172 (D.D.C. 1986).

213. *Id.* at 173.

214. *Id.*

215. *Id.*

claims.[216] In *Harb v. Gallagher*[217] the plaintiff, recently acquitted of theft charges, brought an unsuccessful—and frivolous—wrongful discharge action against his former employer in federal district court.[218] At the urging of his attorney, the plaintiff brought a similar action in state court, which the defendant then removed to federal court.[219] The plaintiff's claims were barred by res judicata, and the magistrate imposed sanctions on both the plaintiff and his attorney.[220] In expressing strong misgivings about this result, however, the magistrate noted that the attorney should be solely liable because his "lay and untutored" client relied on his advice in bringing the frivolous action.[221]

C. *Client Expertise on the Facts of the Claim*

A third indicator of client sophistication is whether the facts of the claim are within the client's particular area of expertise. If the client is factually sophisticated with respect to the claim, the client, as the cheapest cost avoider, should have a relatively high duty to investigate.[222] If, on the other hand, the facts to be investigated are not within the client's area of expertise, the attorney may be able to investigate more cheaply.[223]

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216. *See, e.g.*, National Union Fire Ins. Co. of Pittsburgh v. Continental Illinois Corp., 113 F.R.D. 637, 644 n.16 (N.D. Ill. 1987) (stating that if lawyers were willing " 'hired guns,' acting without attention to their professional responsibilities," lawyers should pay the whole sanction) (citing Schwarzer, *supra* note 119, at 201-05). *But see* Danik, Inc. v. Hartmarx Corp., 120 F.R.D. 439, 445 (D.D.C. 1988) (holding that although the plaintiff "relied entirely on the advice of its attorneys," it was not absolved of responsibility).

217. 131 F.R.D. 381 (S.D.N.Y. 1990).

218. *Id.* at 383.

219. *Id.*

220. *Id.* at 390.

221. *Id.* at 390 n.8. It appears that the main reason the attorney was so aggressive in bringing an action which was obviously barred by res judicata was that he had an agreement with the plaintiff's mother that she would indemnify him for any Rule 11 sanctions awarded against him by the court. *Id.* at 384. The court held that such an agreement was "illegal and violative of the spirit, intent and purposes of Rule 11." *Id.* at 390. *See supra* Part V.

222. *Cf.* G. JOSEPH, *supra* note 108, at 118 (observing that courts necessarily adopt a sliding scale approach to evaluate when counsel can rely exclusively on a client for facts). In the example of the State U. bleachers, the facts were within Acme's particular area of expertise because it had numerous experienced painters. *See supra* Part IV. Similarly, a legal specialist may be held to a higher standard of care than a generalist. Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987).

223. The student painters in the State U. bleacher example were not factually sophisticated because they were not professional painters. *See supra* Part IV. The bleacher case, however, presents an interesting dilemma: to what extent does an unsophisticated provider of products or services assume the responsibility of knowing what the average provider in that industry knows? In other words, is there an objective level of knowledge in the painting business that courts should impute to all painters? In tort law those with superior learning and experience are held to a higher standard of care than others in fields such as milk hauling, hockey coaching, and skiing. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 185 (5th ed. 1984). But the objective standard of factual inquiry for the legal profession under Rule 11 imputes a minimum level of

For example, in *CTC Imports & Exports*[224] the court found that CTC's experience with bills of lading, coupled with the fact that an investigator had informed CTC of the possibility of forgery, gave the client expertise on the factual question of whether the title documents were forged.[225] The court held that while an attorney cannot simply accept her client's account of the facts, the client was "primarily responsible" and also subject to sanctions.[226] Similarly, in *Portnoy*[227] the plaintiff was an expert in the short-swing profit field[228] and had a duty to investigate his securities claims diligently.[229]

Client control of the facts is also an indicator of factual sophistication. Such control may have been a primary factor in the *Business Guides* decision. The factual error in Business Guides' complaint was due to a mistake it made in compiling its directories.[230] Since the process of placing seeds in directories was completely in its control, Business Guides was factually sophisticated with respect to its allegations. Thus, as the cheapest cost avoider, Business Guides had a duty to make a simple inquiry into the facts.[231]

There is often a suspicion of bad faith when clients who have expertise in the facts raise factually frivolous claims.[232] Whenever courts have such suspicions, they sanction clients for inadequate factual investigation.[233] Even when there is no possibility of bad faith, however, the

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professional competence to all attorneys. *See, e.g.*, Hays v. Sony Corp. of America, 847 F.2d 412, 419 (7th Cir. 1988) (noting that "the generalist acts at his peril if he brings a suit in a field or forum with which he is unacquainted"). The difference is that in the legal field there are licensing procedures and rules of professional conduct to aid courts in identifying minimum standards. *Cf.* W. KEETON, *supra*, § 32, at 187 (discussing availability of minimum professional standards in the medical profession). Such objective standards are not available in fields such as hockey coaching and painting.

224. 739 F. Supp. 966 (E.D. Pa. 1990). *See supra* notes 195-99 and accompanying text.

225. 739 F.Supp. at 969-70.

226. *Id.* at 971.

227. 120 F.R.D. 73 (N.D. Ill. 1988). *See supra* notes 200-04 and accompanying text.

228. 120 F.R.D. at 76 (quoting the observation of another district court that "Portnoy [has] established a cottage industry in the short-swing profit field").

229. *Id.* at 77.

230. Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S. Ct. 922, 926 (1991). *See supra* notes 84-100 and accompanying text.

231. "This entire scenario could have been avoided if, prior to filing the suit, Business Guides simply had spent an hour . . . and checked the accuracy of the purported seeds." 111 S. Ct. at 932 (quoting the district court opinion, 121 F.R.D. 402, 405).

232. *See, e.g.*, Business Guides v. Chromatic Communications Enter., Inc., 119 F.R.D. 685, 687 (N.D. Cal. 1988) (noting that "the Chief Magistrate doubted the good faith of the parties' representations that the factual errors in the affidavit were attributable to coincidences").

233. *See, e.g.*, City of Yonkers v. Otis Elevator Co., 106 F.R.D. 524 (S.D.N.Y. 1985) (imposing sanctions on the client city for filing a fraud claim that had no factual basis and for refusing to withdraw the claim until sanctions motions were brought by defendant); Continental Air Lines, Inc. v. Group Sys. Int'l Far East, Ltd., 109 F.R.D. 594, 600 (C.D. Cal. 1986) (imposing sanctions on a client for a frivolous motion to dismiss for lack of personal jurisdiction when the facts were

greater the client's expertise in the factual area of the claim, the cheaper the investigation costs will be for that client.

D. *Is the Claim Legal or Factual?*

The distinction between a factual investigation and a legal one is sometimes hazy.[234] While Rule 11 requires an attorney to make a reasonable inquiry into the factual and legal bases of a claim,[235] a client should be responsible only for investigating the facts.[236] Courts sometimes tend to merge the factual inquiry into the legal inquiry, however, and hold clients responsible for improper legal claims.[237] This is a dangerous precedent because it goes beyond the scope of Rule 11 and may chill legitimate claims by imposing a duty on clients that in many cases is difficult to fulfill.[238]

Courts should avoid merging the duties associated with factual and legal investigations. Although an attorney occasionally may rely on a client for the facts of a claim,[239] an attorney cannot depend on the client for the law.[240] While some courts have expressed concern over the different duties imposed by Rule 11 on clients represented by counsel and pro se litigants,[241] a litigant who retains an attorney has the right to expect that attorney to be responsible for sanctions arising from the

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known by the client and the client's director was "less than candid" in his deposition).

234. *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2458 (1990) (noting "the difficulty of distinguishing between legal and factual issues").

235. FED. R. CIV. P. 11.

236. *See, e.g.*, Untereiner, *supra* note 107, at 914-15 (suggesting that a rule of attorney liability for legally frivolous claims will be most efficient).

237. *See, e.g.*, Hale v. Harney, 786 F.2d 688 (5th Cir. 1986) (imposing sanctions on both an attorney and a client for appealing a claim against a judge that was barred by judicial immunity); Duncan v. WJLA-TV, Inc., 106 F.R.D. 4 (D.D.C. 1984) (imposing sanctions on an attorney and a client for not investigating the qualifications of their expert witness).

238. For example, in *Duncan* the court's ruling imposed the duty on the client of knowing what the expert witness's qualifications should be. 106 F.R.D. at 6. This knowledge could only come through legal experience and knowledge of the rules of evidence. *See* FED. R. EVID. 702-706.

239. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1278 (2d Cir. 1986) (holding that a plaintiff's story of violent arrest, coupled with his attorney's experience, provided a sufficient basis for bringing a malicious prosecution claim that turned out to be frivolous), *cert. denied*, 480 U.S. 918 (1987).

240. Blake v. National Casualty Co., 607 F. Supp. 189, 193 (C.D. Cal. 1984); *see also In re* Disciplinary Action Against Mooney, 841 F.2d 1003, 1006 (9th Cir. 1988) (observing that an attorney should not have relied on his client's vice president for the law of federal jurisdiction even if the vice president was a lawyer). Even if a legally sophisticated client urges her attorney to adopt a legally frivolous position knowingly, the lawyer should bear the sanctions because tbe lawyer more easily can avoid the costs the frivolous claim imposes. Untereiner, *supra* note 107, at 914 n.92.

241. *See, e.g.*, Business Guides, Inc. v. Chromatic Communications Enter., Inc., 892 F.2d 802, 811 (9th Cir. 1989) (stating that "[w]e fail to see why represented parties should be given the benefit of a subjective bad faith standard whereas pro se litigants, who do not enjoy the aid of counsel, are held to a higher objective standard"), *aff'd*, 111 S. Ct. 922 (1991).

legal aspects of her claims.[242] The existence of a legal claim, or facts intertwined with a legal claim, should signal a reviewing court that, in the absence of bad faith, the investigation was beyond the client's level of sophistication.

E. Subjective Indicators of Client Sophistication

In addition to these factors, courts should be alert to other indicators of client sophistication or the lack thereof. An uneducated or mentally deficient client should be held to a lesser duty.[243] Conversely, a lack of factual sophistication on the part of the client's attorney could make a client better situated to investigate.[244] Courts, however, should remember that the minimum duty to investigate is the same for all attorneys.[245] Although the client's level of sophistication may be higher when the client is an attorney,[246] courts should avoid imposing legal duties on clients even if they have legal knowledge.[247] Courts also should hold clients to a lower standard of reasonableness if any other indicia or circumstances suggest that a lower standard is necessary, such as when the claims are attorney-driven.[248]

Even unsophisticated clients are subject to sanctions for bad faith claims. Courts should not hesitate to impose sanctions on clients for abusing the legal process purposefully.[249] It is important, however, to

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242. "Applying the certification requirements to those who appear on their own behalf preserves the Rule's well-understood object of imposing obligations on those who practice before the court. A *pro se* litigant in essence stands in the place of an attorney." *Business Guides*, 111 S. Ct. at 937 (Kennedy, J., dissenting).

243. *See, e.g.*, Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1465 (2d Cir. 1988) (applying the subjective good faith standard to a client who "was mentally ill and had engaged in bizarre behavior unconnected to the litigation"), *rev'd in part sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989). Prisoners also should be held to a lesser duty. *Cf.* Thomas v. Evans, 800 F.2d 1235 (11th Cir. 1989) (allowing a pro se prisoner the benefit of discovery to locate and prepare materials), *cert. denied*, 111 S. Ct. 261 (1990).

244. *Cf.* Friedgood v. Axelrod, 593 F. Supp. 395 (S.D.N.Y. 1984) (applying sanctions to a prisoner but not to his court-appointed attorney for a bad faith civil rights action).

245. Hays v. Sony Corp. of America, 847 F.2d 412, 419 (7th Cir. 1988).

246. See Rosen, *The Inside Counsel Movement, Professional Judgement and Organizational Representation*, 64 IND. L.J. (1989), for a discussion of the growing importance of corporate in-house counsel.

247. *Cf.* Pravic v. U.S. Industries-Clearing, 109 F.R.D. 620 (E.D. Mich. 1986) (imposing sanctions on an attorney who relied unreasonably on a memorandum prepared by counsel for a codefendant).

248. For example, courts hold attorneys to a lower standard of reasonableness when they are forced to file a complaint quickly, Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2459 (1990), and courts also should hold clients faced with similar time pressures to a lower standard.

249. *See, e.g.*, Blue v. U.S. Dep't of Army, 914 F.2d 525 (4th Cir. 1990) (imposing sanctions on black civilian employees for a bad faith employment discrimination action against the Army), *cert. denied*, 111 S. Ct. 1580 (1991). Under the improper purpose prong of Rule 11, courts hold clients to the same standard as attorneys. *See* FED. R. CIV. P. 11.

limit such sanctions to those who actually acted in bad faith in order to avoid chilling legitimate claims.[250] Furthermore, if a client misleads an attorney on the facts, the client should be liable for sanctions regardless of its lack of sophistication.[251]

VII. A HYBRID APPROACH TO FACTUAL INQUIRY

In *Business Guides* the Supreme Court rejected the subjective good faith standard that some courts had used and instituted an objective approach for applying Rule 11 to clients in inadequate factual inquiry cases.[252] The Court cautioned, however, that courts should hold clients to a lower standard of reasonableness than attorneys.[253] As this Note shows, the standard must also be flexible from client to client and from fact pattern to fact pattern because there will be different cheapest cost avoiders in different situations.[254] Courts should use the indicators of client sophistication discussed in this Note to determine who is the cheapest cost avoider in a given case.[255]

While courts should apply the objective standard flexibly, some commentators have criticized the lack of uniformity in the application of Rule 11.[256] Some courts and commentators see uniformity as a very important goal.[257] Rule 11, however, imposes a negligence-like standard;[258] the standard of reasonable investigation varies from one client to another just as the standard of duty for negligence varies.[259] Some courts have even questioned the desirability of uniformity as a goal.[260]

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250. *See* Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977) (stating that "[b]ad faith is personal").

251. *See, e.g.*, Schaffer v. Chicago Police Officers, 120 F.R.D. 514, 516 n.1 (N.D. Ill. 1988).

252. *See* Business Guides, Inc. v. Chromatic Communications Enter., Inc., 111 S. Ct. 922, 934-35 (1991). The Court rejected the subjective approach the Second Circuit adopted in Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir. 1988) *rev'd in part sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989).

253. *Business Guides*, 111 S. Ct. at 933 (noting that "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney") (quoting the 9th Cir. opinion, 892 F.2d 802, 810).

254. *See supra* Part IV.

255. *See supra* Part VI.

256. Untereiner, *supra* note 107, at 902. The lack of a clear standard has produced inconsistent outcomes and an impression of arbitrariness. *Id.* at 902-03.

257. *See, e.g.*, Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 940 (Flaum, J., concurring) (7th Cir. 1989) (citing commentators); Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986) (holding that there is "no necessary subjective component to a proper rule 11 analysis," and that removing the subjective component will simplify the standard and reduce satellite litigation), *cert. denied*, 480 U.S. 918 (1987).

258. *See, e.g.*, Hays v. Sony Corp. of America, 847 F.2d 412, 418 (7th Cir. 1988).

259. *Mars Steel*, 880 F.2d at 932-33 (stating that what is reasonable depends on the circumstances and that Rule 11 creates duties just as tort law does).

260. *See, e.g., id.* at 934 (arguing that the effort to establish uniformity would "be wasteful because every case would still be a little different from the last").

Whether or not uniformity is desirable, however, frequent application of Rule 11 is vital to achieve its cost minimization goal.[261] For the Rule to serve this function, some uniformity is needed to guide courts and litigants.[262]

Since the indicators of client sophistication discussed in this Note do not provide a foolproof way of deciding the appropriate standard of duty in all cases, courts should have a default standard for cases in which they cannot label a client sophisticated or unsophisticated.[263] Because the Supreme Court has rejected the subjective standard, but admits that its objective standard is somewhat flexible, the proper default standard should be somewhere between a strict objective approach and the subjective good faith approach. The appropriate default standard thus combines the two approaches, requiring the level of investigation that a reasonable person in the client's shoes would have undertaken knowing that she faced sanctions for bringing a factually frivolous claim.[264] This hybrid standard will place the primary duty to investigate on the cheapest cost avoider in the greatest number of cases.[265] Such a standard minimizes the objective standard's chilling effect,[266] but also is threatening enough to induce clients to make a reasonable inquiry when they are better positioned than their attorneys to do so.

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261. It is essential that Rule 11 remains threatening enough to encourage sufficient factual investigation. *See, e.g.*, Vairo, *supra* note 60, at 197-98 (discussing the "in terrorem" effect of Rule 11). *But see* S. BURBANK, *supra* note 121, at 39 (noting that one detrimental effect of availability of attorney's fees as a sanction is that parties may attempt to recover attorney's fees through Rule 11 sanctions in many cases).

262. In addition, the administrative cost of setting a different standard for each individual would be prohibitive. *See* W. LANDES & R. POSNER, *supra* note 105, at 123-26.

263. *Cf.* Rothschild, Fenton & Swanson, *Rule 11: Stop, Think, and Investigate*, LITIGATION, Winter 1985, at 13, 14. The authors point out the need for some sort of uniform standard by defining Rule 11's reasonable inquiry requirement for practicing attorneys:

> In general, the phrase requires you to be careful, skeptical, objective, and a judicious professional in all pleading and motion matters. On the other hand, your duty to your client requires you to be daring, innovative, imaginative, and a fierce partisan. With these clear guideposts you should have no problem—especially if you also know it when you see it.

Id.

264. *Cf.* Note, *Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through an Analysis of Federal and State Civil Procedure Rules*, 72 IOWA L. REV. 701, 713-14 (1987) (noting that a type of hybrid approach has been used in many Rule 11 cases and proposing a similar approach for Iowa Rule 80(a)). Courts have used such a hybrid standard in other areas when faced with a choice between objective and subjective standards. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 321 (1975) (finding that the appropriate standard for qualified immunity "necessarily contains elements of both" the objective and subjective good faith standards).

265. *Cf.* G. CALABRESI, *supra* note 106, at 262 (suggesting that "in the absence of any indication that one party is a cheaper cost avoider than the other, an even split maximizes the chances of allocating costs to the cheapest cost avoider").

266. *See Business Guides*, 111 S. Ct. at 940 (Kennedy, J., dissenting) (noting the chilling effect of "an objective standard applied in hindsight by a federal judge").

VIII. CONCLUSION

In *Business Guides* the Supreme Court attempted to settle the confusion over the application of Rule 11 to represented clients in inadequate factual inquiry cases. The Court's objective standard of reasonable factual inquiry at first glance seems to be a clear and uniform standard. The language of the *Business Guides* decision, however, suggests that even though the Court has chosen to reject the subjective good faith test for clients, the new test is not objective in a strict sense. As the Court admits, the objective standard must be flexible because any determination of reasonableness is fact dependent. This Note has attempted to demonstrate that too rigid an application of the objective standard will result in a misallocation of the duty to investigate and could be costly to society.

The district courts must determine what is a reasonable investigation in the multitude of factual patterns that may arise. Courts should remember the need for flexibility and, in deciding particular cases, should rule in ways that force future litigants to take seriously their duty to investigate the facts of their claims before trial. At the same time, however, courts should avoid applying Rule 11 in a manner that will chill legitimate claims. While deterrence is often mentioned as the primary purpose of Rule 11, this Note shows that the Rule's real goal is cost avoidance. The optimal Rule 11 is not necessarily the one that deters the most frivolous claims because such a Rule would impose its own costs. Rather, courts should evaluate cases with an eye toward minimizing aggregate social costs. The most efficient Rule 11 is the one that imposes a duty on the cheapest cost avoider in the greatest number of cases.

Although the objective standard for clients misallocates the duty to investigate by placing it on clients who are not the cheapest cost avoiders in many cases, the objective standard could still achieve cost minimization if clients could bargain costlessly with their attorneys for indemnification from sanctions. Such bargaining is not possible, however, for the clients who would benefit most from indemnification because they generally lack the legal knowledge to bargain effectively. Unsophisticated clients simply do not know about Rule 11 and their duty of factual investigation under the *Business Guides* standard.

As this Note illustrates, a sophisticated client is more likely to be the cheapest cost avoider. To determine client sophistication, courts should look to factors such as whether clients are repeat litigators, whether they have power to control their attorneys, their level of expertise on the facts of their claims, their ability to spread the costs of investigation, the factual or legal nature of the claim, and other equitable indicators of sophistication. When a client's sophistication level is not

easily ascertainable, courts should take a hybrid approach to determine a client's duty to investigate facts. By refraining from a rigid application of the objective standard that would make clients strictly liable for any factually frivolous claim, courts can place the duty to investigate the facts on the cheapest cost avoider in the greatest number of cases.

James E. Ward IV