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Seeking a Common Language for the Application of Rule 11 Sanctions: What is "Frivolous"?

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Recommended Citation

78 Neb. L. Rev. 677 (1999).

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Seeking a Common Language for the Application of Rule 11 Sanctions: What is “Frivolous”?

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I. INTRODUCTION

In 1992, in a leading treatise on Federal Rule of Civil Procedure 11, Professor Georgene Vairo wrote that “[f]ew amendments of the Federal Rules of Civil Procedure have generated the controversy and study occasioned by the 1983 amendments to Rule 11.”¹ More recently, Professor Vairo noted that, since the 1983 amendments to Rule 11 were passed, “there have been several major empirical studies published, dozens of law review articles written, several books and monographs published, hundreds of reported opinions filed, and numerous legal and non-legal newspaper and bar association journal articles written which explore the reach and impact of Rule 11.”²

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1. GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* § 1.01 (2d ed. 1992 & Supp. 1995); see also Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 Sw. L.J. 1011, 1011 (1989) (stating, in 1989, that “[m]any dozens of articles, essays, comments, and notes have discussed the issues presented by the recent enhancements of sanctions under rule 11.”); Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943, 943 (1992) (“Perhaps more than any other matter in the history of the Federal Rules of Civil Procedure, the 1983 revisions to Federal Rule of Civil Procedure 11 have spawned a steady stream of critical reaction and debate.”).
 2. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 591-92 (1998); see also Marshall et al., *supra* note 1, at 948 (referring to the “outpouring

Much of the controversy surrounding Rule 11 has centered on the requirement that a legal claim must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."³ Because the Rule does not provide a standard for when an argument is to be deemed "frivolous," courts and scholars alike have engaged in a struggle to establish a definition for this ambiguous term, an endeavor central to effective application of Rule 11.⁴

The aim of this Article is to analyze some of the complex issues involved in attempting to apply the ambiguous concept of frivolousness in the context of Rule 11 sanctions. Part II of the Article documents the inconsistency in judicial interpretation and application of Rule 11 frivolousness. Relying in part on the observations and concerns expressed by scholars, practitioners, and judges themselves who have lamented the lack of uniformity and the troubling results that have followed, this Part examines closely some of the problems inherent in the current standards.

After demonstrating the wide range of approaches put forth by both judges and scholars to the interpretation of Rule 11 frivolousness, the Article continues, in Part III, with a search for a common language for these discussions. Toward that end, this Part looks to some of these innovative approaches, with the aim of finding an approach that may be suitable and useful to the various groups affected by and interested in the administration of Rule 11.

Specifically, building on an opinion of United States District Court Judge Jack Weinstein, this Part suggests a method for considering Rule 11 violations and imposition of sanctions through the use of a continuum, which will allow and require courts to assign a value of reasonableness to claims that come before them. Under this framework, if a claim does not reach a certain level of reasonableness, as determined by the court, it will be subject to sanctions. At the same time, the court will impose sanctions in proportion to the degree to which the claim is found to be unreasonable. The Article concludes with the hope that such an approach will help provide a common lan-

of scholarly writing" about Rule 11); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 399 (1993) ("Rule 11 sanctions have been the subject of an extensive debate by legal practitioners, judges, and academic commentators, especially since 1983, when the availability of such sanctions was substantially expanded."). For a compilation of law review articles relating to Rule 11, see VAIRO, *supra* note 1, at app. F.

3. FED. R. CIV. P. 11(b)(2).

4. See, e.g., Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520, 529 (1997) ("We have no . . . common agreement on what constitutes a 'frivolous suit.' . . . Most commentators use the term 'frivolous suit' without defining it, as if the meaning were obvious to all. But the concept is quite slippery."); see also *infra* Part II.

guage for further efforts at arriving at a more effective application of Rule 11.

II. THE LACK OF UNIFORMITY AND PREDICTABILITY

Scholars have documented the lack of uniformity among courts that have attempted to set a standard for frivolous claims. For example, Professor Carl Tobias has observed that “[n]umerous courts encountered difficulty defining the term, articulating consistent standards for identifying it, and providing clear guidance to counsel and litigants.”⁵

Similarly, Professor Charles Yablon laments “the fact that many lawyers writing about Rule 11 say that the standards for determining whether a claim is frivolous are vague and uncertain.”⁶ In fact, he cites empirical studies which “support[] the vagueness of the Rule 11 standard . . . show[ing] widely different sanction rates being applied in different districts and circuits,”⁷ including an often cited “study of judges conducted in the early 1980s, in which it was shown that, on the same set of facts, 60.3% of the judges would have awarded sanctions and the others would not.”⁸ In short, as Professor Yablon writes, “claims which appear frivolous and baseless in the eyes of one judge may seem respectable losers to others.”⁹ Thus, as Professor Stephen

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5. Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 196 (1994) [hereinafter Tobias, *The 1993 Revision*]. For examples of “[t]he problems of defining and applying the term ‘frivolous,’” see *id.* at nn.169-182 and accompanying text.
 6. Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 94 (1996).
 7. *Id.* at 94-95 (citing studies documented in Marshall et al., *supra* note 1, at 982 and FEDERAL JUDICIAL CTR., *RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 9 (1991)); see also STEPHEN B. BURBANK, *RULE 11 IN TRANSITION, THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF PROCEDURE 11* (1989); Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1987); Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1485 (1996) (referring to “[t]he simple inability of courts to agree on the standard of frivolousness.”); Ellen P. Quackenbos, Note, *Rule 11 and Papers Not Warranted by Law*, 58 FORDHAM L. REV. 1085 (1990); Alan E. Untereiner, Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).
 8. Yablon, *supra* note 6, at 94 (citing SAUL M. KASSIN, *AN EMPIRICAL STUDY OF RULE 11 SANCTIONS* 17 (1985)); cf. Meyer, *supra* note 7, at 1474 (“The splits among the courts of appeals over how to articulate and apply Rule 11’s ‘objective standard’ are shown to be inevitable, since the future law that Rule 11 affects is never an object that stands still.”).
 9. Yablon, *supra* note 6, at 94.

Burbank put it, "Rule 11 fails the historic tests of simplicity and predictability."¹⁰

According to many scholars, the lack of consistent application of Rule 11 has yielded a number of unfortunate results. One such result has been an improper chilling effect on the types of claims brought by plaintiffs and their attorneys.¹¹ Indeed, some scholars point out, this effect contradicts the declaration of the Federal Rules Advisory Committee that Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."¹²

In addition, scholars have suggested, the lack of predictability in application of Rule 11 is particularly troublesome in light of the powerful and "penal consequences"¹³ that are likely to follow the imposition of sanctions. Such consequences, the result of "a public rebuke by

10. Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941 (1989).

11. See, e.g., *id.* ("The costs of unpredictability . . . can include over-deterrence . . ."); Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383 (1990); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89) [hereinafter Tobias, *Civil Rights Litigation*]; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988).

As Professor Tobias has noted, however, not all commentators agree that Rule 11 has had a chilling effect. See Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1777 (1992) [hereinafter Tobias, *Civil Rights Plaintiffs*] (citing *Judicial Conference of the U.S. Comm. on Rules of Practice and Procedure, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 344, 345-48 (1990), as "suggesting that whether Rule 11 actually has chilled plaintiffs is controversial"); see also William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 36 (1994) [hereinafter Schwarzer, *Entering a New Era*] ("It is difficult to evaluate the chilling argument: Is it that lawyers have been deterred from asserting claims or defenses for which they had no sufficient factual support, or to assert a legal argument rejected by courts in the jurisdiction and not supported by logic or analogous authority? Or is it that lawyers are deterred from filing actions designed to extract nuisance settlements? At what point should society become concerned that the assertion of legitimate interests is being frustrated?"); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017 (1988) [hereinafter Schwarzer, *Rule 11 Revisited*] ("Whether th[e] unpredictability [of Rule 11] has chilled advocacy . . . is less clear My own experience has disclosed no anecdotal evidence of chilling. The question probably can never be resolved other than on an intuitive level.").

12. See, e.g., Burbank, *supra* note 10, at 1934 n.49 (quoting FED. R. CIV. P. 11 advisory committee note). Conversely, Professor Burbank has posited that, due to the lack of uniformity, Rule 11 does not serve as a deterrent because "[f]aith in general deterrence must assume an actor who calculates the benefits and costs of behavior in advance Unless he or she understands that the sanction was tailored to the circumstances of the violation and the sanctioned individual, it may be no deterrent at all, indeed quite the reverse." *Id.* at 1943.

13. See Schwarzer, *Rule 11 Revisited*, *supra* note 11, at 1017.

the courts,”¹⁴ may include “a loss of standing among colleagues at the bar and the loss of patronage by clients,”¹⁵ “investigation by state bar associations, and adverse effects on malpractice insurance coverage.”¹⁶ Thus, one scholar reasoned, although “[s]uch consequences may well be appropriate in particular cases, . . . fairness requires that those cases be defined with reasonable certainty and predictability.”¹⁷

Moreover, professors and practitioners have not been alone in expressing concern over inconsistency in the application of Rule 11. Judges themselves have long noted the lack of judicial consistency in Rule 11 decisions and some of the problems that have followed. For example, in a 1988 case, the United States Court of Appeals for the Fifth Circuit observed that “Rule 11 decisions by courts have not always been consistent, producing confusion among the bench and bar, as well as inequitable results.”¹⁸ Relying on a national study conducted by the Center for Constitutional Rights, the court listed a number of “complaints” documenting such confusion and inequity.¹⁹ At least one complaint appears to relate directly to the difficulty courts face in attempting to define the vague standard of frivolousness: “when faced with an identical set of facts, federal judges are in disagreement as to whether or not a Rule 11 violation has occurred.”²⁰

In a dissenting opinion, Judge Pratt, of the United States Court of Appeals for the Second Circuit, was more explicit and direct in his criticism of what he saw as inconsistent application of Rule 11: “If rule 11 is to fulfill its purpose of deterring frivolous litigation, it is critical that courts articulate clear, objective standards by which attorneys can reliably measure their conduct and that we avoid the corrosive effect of arbitrary, seemingly contradictory applications of the rule.”²¹ Specifically, Judge Pratt found that “identical arguments asserted in the same district were held in one case not to violate rule 11, but to

14. See Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 518 (1986).

15. *Id.*

16. See Schwarzer, *Rule 11 Revisited*, *supra* note 11, at 1017.

17. *Id.*; see also Cavanagh, *supra* note 14, at 536 (arguing that “mandatory sanctions unquestionably have a punitive aspect, and are therefore akin to criminal penalties. The magnitude of these penalties dictates that the standards necessary to comport with Rule 11 must be clearly defined”).

It should be noted that not all scholars lament the relative lack of determinacy in the application of Rule 11. See, e.g., Meyer, *supra* note 7.

18. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 871 (5th Cir. 1988).

19. See *id.* at 871 n.4.

20. *Id.* (quoting George Cochran, *Recent Developments in Response to Rule 11 Problems*, 9 CORNERSTONE 1 (Nov./Dec. 1987)); see also *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1986) (warning of an increase in the “danger of arbitrariness” and the decline in “the probability of uniform enforcement” of Rule 11 (citing KASSIN, *supra* note 8, at xi)).

21. *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 395 (2d Cir. 1989) (Pratt, J., dissenting).

'egregious[ly]' violate it in the next," even though "the same body of appellate and statutory law was available to both courts."²² Thus, he urged, rather than adding to the confusion surrounding the application of Rule 11, courts must instead contribute to the "evolution of comprehensible and fair standards for applying rule 11."²³

Perhaps the bluntest judicial criticism of the courts' inconsistent application of Rule 11 was issued not in a judicial opinion but in a law review article. In an influential 1988 piece in the *Harvard Law Review*, Judge William Schwarzer termed the courts "a veritable Tower of Babel" in their interpretation and application of Rule 11.²⁴ After citing a number of different formulations that courts have offered for Rule 11 standards, Judge Schwarzer allows for the possibility that "[p]erhaps they are all saying the same thing in different words."²⁵ Nevertheless, he concludes, "[i]n the logic of the law . . . the use of different words at least raises an inference that a different meaning is intended."²⁶ Moreover, he adds, in practice, courts "have not applied the rule in the same way," because "what a judge will find to be objectively unreasonable is very much a matter of that judge's subjective determination."²⁷

Judge Schwarzer's reference to a "Tower of Babel" is an apt one, as it seems that courts have too often been unable even to operate under a common language in their interpretation of Rule 11. Indeed, even a brief survey of some of the standards articulated by the courts in a number of circuits reveals broad differences in formulation that betray both a lack of uniformity among courts and a more general lack of a clearly defined standard for frivolous activity. In 1985, in *Eastway Construction Corp. (I) v. City of New York*²⁸—in many ways a landmark Rule 11 case—the United States Court of Appeals for the Second Circuit held that Rule 11 has been violated when "it is patently clear that a claim has absolutely no chance of success."²⁹ Relying in part on *Eastway*, the Third Circuit³⁰ ruled that "Rule 11 should be applied only in 'exceptional circumstances'³¹ or where the document 'is patently unmeritorious or frivolous.'"³² The Ninth Circuit referred to

22. *Id.*

23. *Id.*

24. Schwarzer, *Rule 11 Revisited*, *supra* note 11, at 1015.

25. *Id.* at 1016.

26. *Id.*

27. *Id.*

28. 762 F.2d 243 (2d Cir. 1985).

29. *Id.* at 254.

30. See *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994).

31. *Id.* at 1281 (quoting *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987)).

32. *Id.* (quoting *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988)). The ambiguous nature of such a definition of frivolousness may be indicated by a minor but potentially significant discrepancy between the language of the court in *Garr*, in quoting standards from earlier cases, and the

the term “frivolous” as “a shorthand that this court has used to denote a filing that is both baseless and made without a reasonable and competent inquiry.”³³ Finally, the Eleventh Circuit held that “Rule 11 is intended to deter claims with *no* factual or legal basis at all.”³⁴

The standards articulated in these and other cases are problematic because they differ significantly and substantially from one another. Moreover, as a close look at the terms used by the courts suggests, these terms are often too vague to effectively provide the kind of concrete guidance necessary for parties to formulate arguments, for lower courts to adjudicate Rule 11 issues, and even for circuit courts themselves to review the decisions of the lower courts.

actual language of the court in one of those cases. The court in *Garr* stated that sanctions should be applied “in ‘exceptional circumstances’ or where the document is ‘patently unmeritorious or frivolous.’” *Id.* (emphasis added). It is possible to read the conjunctive language of *Garr* as thus setting forth two separate standards for Rule 11 sanctions, prescribing sanctions either in some generally exceptional circumstances or when the document is patently unmeritorious or frivolous.

The more likely reading of *Garr* would probably suggest that the standard of a “patently unmeritorious or frivolous” document modifies the same, single standard of “exceptional circumstances” under which sanctions are applicable. Indeed, such a reading is supported by the court’s actual language in *Doering*, which calls for sanctions “only in the ‘exceptional circumstances’ . . . where a claim or motion is patently unmeritorious or frivolous.” *Doering*, 857 F.2d at 194 (citations omitted); see also *Garr*, 22 F.3d at 1282 (Roth, J., dissenting) (quoting *Doering* verbatim). Nevertheless, the fact that the same court articulated the grounds for sanctions through potentially different standards is indicative of some of the problems posed by such vague language and definitions.

33. *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1140 (9th Cir. 1990).

A look at *Townsend* in the context of earlier Ninth Circuit opinions demonstrates that the Ninth Circuit is another example of a single court that, in different cases, articulated different formulations of a standard for Rule 11 sanctions. In 1986, the court stated that “we affirm that Rule 11 sanctions shall be assessed if the paper filed in district court and signed by an attorney or an unrepresented party is frivolous, legally unreasonable, or without factual foundation.” *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986). In 1987, in *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987), the court articulated the same standard. However, in deciding not to impose sanctions, the court used a different formulation, finding that the complaint was not “so ‘baseless’ or ‘lacking in plausibility’ as to warrant sanctions.” *Id.* (quoting *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987)).

The different formulations offered by the Ninth Circuit following *Townsend* is somewhat ironic in light of the court’s insistence in *Zaldivar* that, even though “no combination of abstract words may correctly apply to every case,” nevertheless, “[w]e believe an acceptable degree of certainty over a subject matter which is inherently uncertain will be best achieved by applying [this] test in Rule 11 sanctions cases.” *Zaldivar*, 780 F.2d at 831.

34. *Davis v. Carl*, 906 F.2d 533, 538 (11th Cir. 1990).

The Second Circuit's prescription to examine whether "it is patently clear that a claim has absolutely no chance of success"³⁵ ostensibly prescribes a single, cohesive standard for considering Rule 11 frivolousness. Yet, a parsing of the standard reveals several different components that are each less than clear, both in their own meaning and in how they interact with one another. As a result, a number of basic and fundamental questions must first be addressed by judges, expressly or at least implicitly, in order to arrive at a proper understanding, interpretation, and application of the court of appeals' standard. The phrase "patently clear" connotes a fairly high level of certainty, but it is not obvious to what degree, if any, a "patently clear" conclusion differs from a merely "clear" conclusion. Similarly, the court's language would seem to imply, though not explain in any way, a difference between a claim's having "no chance of success" and its having "absolutely no chance of success." Finally, the court's standard combines these two undefined variables, resulting in an even greater level of uncertainty in how to apply the standard as a whole.³⁶

35. *Eastway Constr. Corp. (I) v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

36. It should be noted that the articulation of a standard, albeit a somewhat vague one, by the Second Circuit in *Eastway*, did still present a clarification for the lower courts in that circuit, which had been applying standards that appear to differ substantially from each other.

In the year before *Eastway* was decided, in the United States District Court for the Southern District of New York alone, judges articulated a number of different formulations to describe frivolous claims under Rule 11, including: "obviously groundless actions," *United States ex rel. U.S.-Nambia Trade & Cultural Council, Inc. v. African Fund*, 588 F. Supp. 1350, 1352 (S.D.N.Y. 1984); "[c]learly . . . even minimal investigation . . . by a prudent attorney would have revealed from the onset that no real factual basis existed to support it," *Steinberg v. St. Regis/Sheraton Hotel*, 583 F. Supp. 421, 426 (S.D.N.Y. 1984); "a frivolous lawsuit, completely lacking in merit," *Dore v. Schultz*, 582 F. Supp. 154, 158 (S.D.N.Y. 1984); and "so devoid of basis or so obviously designed for harassment purposes that it justifies departure under Rule 11, F.R.Civ.P., from the general American rule that each party should bear his own counsel's fees." *Gold v. Blinder, Robinson & Co., Inc.*, 580 F. Supp. 50, 55 (S.D.N.Y. 1984). Moreover, similar to the circuit court standards cited in the text, district court standards at times not only differ from each other substantially in formulation; the standards themselves sometimes suffer from a similar, if not more pronounced, sense of vagueness, consisting of a number of components, which in turn require further definition, both individually and in conjunction with each other.

Even subsequent to *Eastway*, however, district courts were unable to rely on a clear standard for frivolousness. Adding to the ambiguity in the Second Circuit's standard in *Eastway* is the second half of the court's formulation, which requires that "no reasonable argument can be advanced to extend, modify or reverse the law as it stands." *Eastway Constr. Corp. (I) v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). In apparent reaction to the ambiguity in the court's standard, one court in the Southern District of New York relied on its own modified version of the standard, concluding that "[t]he Court will therefore impose sanctions only if it is patently clear that the complaint was filed without reasonable inquiry into whether it was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *International Shipping Co. v. Hy-*

The Third Circuit's standard, requiring, for Rule 11 sanctions, "exceptional circumstances" or that the claim be "patently unmeritorious or frivolous,"³⁷ is similarly open to basic questions of interpretation. If the term "exceptional circumstances" were intended to be read as providing independent grounds for sanctions, it would prove unworkably vague. Thus, it is presumably to be read as a component of a broader standard, together with the requirement that a document must be "patently unmeritorious or frivolous."³⁸ This second requirement, itself consisting of a number of components, raises a number of questions.

In particular, it is somewhat unsettling that a proper understanding of these components would apparently involve defining and distinguishing between "unmeritorious" and "frivolous." After all, it is the very term "nonfrivolous" in the text of the rule that courts seek to interpret; it seems less than helpful to provide a standard that contains the same vague term. In addition, similar to the Second Circuit's standard, this standard implies a comprehensible difference between a document that is "patently unmeritorious or frivolous" and one that is merely "unmeritorious or frivolous." Finally, if the term "exceptional circumstances" is indeed to be read as the first of two requirements, together with "patently unmeritorious or frivolous," it remains for the interpreter to uncover the precise relationship between these requirements, in order to determine precisely what each component contributes to the overall standard.

Perhaps the most striking example of the difficulties involved in applying abstract terms to define frivolousness under Rule 11 is the Seventh Circuit case of *Szabo Food Service, Inc. v. Canteen Corp.*³⁹ Judge Easterbrook, joined by Judge Posner, wrote the *Szabo* majority opinion, and imposed Rule 11 sanctions, stating that the plaintiff's theory was "wacky, sanctionably so."⁴⁰ In a dissenting opinion, Judge Cudahy found the majority's "'wackiness' conclusion . . . not so blindly obvious as to bring it reasonably within the ambit of Rule 11."⁴¹ Instead, analogizing the claim to a law school examination, Judge Cudahy "rate[d] it an 'incomplete' rather than a solid 'flunk.'"⁴² While Judge Cudahy alluded to the problematic nature of applying a "wackiness" standard to Rule 11 cases, it is not much clearer how to deter-

dra Offshore, Inc., 675 F. Supp. 146, 150 (S.D.N.Y. 1987). This version contains virtually all of the undefined terms present in the Second Circuit's formulation, but, as a result of the lower court's modification of the standard, it requires even further interpretation.

37. *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1281 (3d Cir. 1984).

38. *See supra* note 32.

39. 823 F.2d 1073 (7th Cir. 1987).

40. *Id.* at 1080.

41. *Id.* at 1085 (Cudahy, J., concurring in part and dissenting in part).

42. *Id.* (Cudahy, J., concurring in part and dissenting in part).

mine when a legal conclusion is “blindingly obvious.”⁴³ Nor are the terms “incomplete” or “flunk” particularly easy to define or apply in deciding the frivolous nature of a claim. Indeed, as the Ninth Circuit candidly conceded, despite its best efforts to articulate a standard for frivolousness, it was “fully aware that no combination of abstract words may correctly apply to every case.”⁴⁴

Like the courts they analyze, scholars who have discussed the lack of consistency in the application of Rule 11 standards have offered numerous and widely varying approaches. Some scholars have looked at Rule 11 sanctions in the context of a variety of broader legal issues, such as the scope of judicial discretion,⁴⁵ legal indeterminacy,⁴⁶ and game theory and the law.⁴⁷ Other scholars, in suggesting guidelines for courts to follow to achieve a more consistent application of Rule 11, have produced a similarly wide variety of approaches, ranging from mathematical models⁴⁸ to general and specific sanction schemes.⁴⁹ While consistency among legal theorists is neither to be expected nor particularly desirable, it may be useful to identify a common language through which scholars who rely on very different frameworks might find grounds for more fruitful dialogue.

Thus, the next Part of this Essay aims to find a common language for discussions and application of the concept of a frivolous claim under Rule 11. Relying on a common theme running through the work of a number of scholars as well as the opinions of some judges, this search for a common language also aims to facilitate more effective judicial recognition and application of some of the insights provided by these scholars.⁵⁰

43. See *id.* (Cudahy, J., concurring in part and dissenting in part).

44. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).

45. See Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677 (1996) [hereinafter Armour, *Practice Makes Perfect*]; Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493 (1997) [hereinafter Armour, *Rethinking Judicial Discretion*].

46. See Meyer, *supra* note 7.

47. See Bone, *supra* note 4; Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal With a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7 (1987).

48. See Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 680-86 (1997); Yablon, *supra* note 6.

49. See Cavanagh, *supra* note 14; Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994); Tobias, *The 1993 Revision*, *supra* note 5.

50. The relationship between legal scholarship or theory and judicial decisions is a complex one. The fact that courts have not applied the theories of scholars looking for a more uniform approach to Rule 11 may be, to many, neither surprising nor even disappointing. As one scholar candidly conceded after offering his own framework for sanctions, “Are the decisionmakers likely to follow this advice . . . ? I’d have to say it looks like a long shot.” See Yablon, *supra* note 6, at 107; cf. Schwarzer, *Entering a New Era*, *supra* note 11, at 10-11 (citing theoretical views

III. THE SEARCH FOR A COMMON LANGUAGE

While the terms “incomplete” or “flunk” may, on their own, lack the kind of precision that might provide clearer guidance and increase consistency in the application of Rule 11 sanctions, Judge Cudahy’s analogy to law school examinations is valuable.⁵¹ First, the very comparison to examinations helps illustrate the importance of a clear and comprehensible standard as well as a consistent application by the courts in Rule 11 cases. After all, fair administration of an examination requires both that students taking the exam have a clear understanding of what is expected of them and that the teacher grading the exam does so in a uniform fashion, consistent with the course requirements.

Second, and perhaps more importantly, Judge Cudahy elaborates on the analogy, explaining that, “the submissions of the parties are to be marked on a scale of ‘A’ through ‘F.’ Anything falling on the far side of ‘C’ merits not only the loss of one’s case but loss of one’s shirt as well.”⁵² As Judge Cudahy’s analogy suggests, claims, like exams, can be graded on a continuum, which would include, at certain fixed points along the line, some claims that are particularly meritorious, others not quite as impressive but nevertheless acceptable, and still others that do not merit any credit.

Judge Cudahy’s observation that claims, like exams, can be plotted along a continuum is significant, in that it represents a willingness to examine carefully the dynamics of identifying a frivolous claim. As a number of scholars have emphasized, whether a claim is in fact to be deemed frivolous is often a very close decision for courts. Scholars have documented numerous cases in which courts have applied Rule

regarding purpose of Rule 11, but concluding that “[c]ourts, for the most part, did not subscribe to such lofty goals and generally adopted a much more modest rationale geared toward eliminating abusive litigation practices.”).

Nevertheless, it would seem that in an area in which so much scholarship has addressed a common problem that appears to exist so widely, and one that courts themselves have acknowledged, it would be helpful for courts to aim to resolve this problem by reference to some of the suggestions offered by scholars.

51. Judge Cudahy may, in principle, disagree with the notion that judging Rule 11 is similar to grading exams, as he raises this analogy for the purpose of describing the majority’s approach, from which he is dissenting. Nevertheless, while he faults the majority approach for “effectively transform[ing] Rule 11 from a protector against frivolous litigation . . . into a fomenter of derivative litigation,” *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part), Judge Cudahy does decide the issue of Rule 11 sanctions by extending further the analogy to law school examinations. In any event, at the very least Judge Cudahy’s analysis insightfully brings out an important feature underlying the approach adopted by the Seventh Circuit, and his observation may be applied more generally to the way courts view Rule 11 cases.

52. *Id.* (Cudahy, J., concurring in part and dissenting in part).

11 sanctions despite acknowledging that the situation involved a "close case."⁵³ The problems that may result from the imposition of sanctions in these close cases have been noted not only by scholars, but by the Ninth Circuit, which stated that "when mandatory sanctions ride upon close judicial decisions[, t]he danger of arbitrariness increases and the probability of uniform enforcement declines."⁵⁴ A more effective approach to the question of whether a claim is frivolous might recognize the complexity involved in these decisions. The recognition of a continuum, an approach consistent with those proposed by some judges and scholars, may demonstrate more clearly some of the difficulties involved in deciding whether a claim is frivolous, while at the same time it may help set the framework for a common language for courts, practitioners, and scholars to more effectively discuss and understand the concept of frivolousness.

Judge Cudahy was not the first among the judiciary to depict the potentially frivolous nature of claims as falling along a continuum; nor was he the strongest proponent of such an approach. Those characterizations would appear to apply to Judge Jack B. Weinstein, of the United States District Court for the Eastern District of New York, a judge known for applying innovative ideas to complex areas of law,⁵⁵ who introduced the notion of a continuum for Rule 11 in the case of *Eastway Construction Corp. (II) v. City of New York*.⁵⁶

When the case first came before then Chief Judge Weinstein, he granted the defendant's motion for summary judgment but denied the defendant's request for attorney's fees, finding that the plaintiff's claim was not frivolous.⁵⁷ The United States Court of Appeals for the Second Circuit reversed the latter part of Judge Weinstein's decision, finding that the plaintiff's claim was frivolous under the standard that "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argu-

53. See Armour, *Rethinking Judicial Discretion*, *supra* note 45, at 537-44 & 539 n.188 (discussing the "conundrum of the close case" and citing case law); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 303 & n.203 (1989).

54. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1541 (9th Cir. 1986).

55. See generally *A Special Issue Dedicated to Judge Jack B. Weinstein*, 97 COLUM. L. REV. 1947 (1997).

56. 637 F. Supp. 558, 574 (E.D.N.Y. 1986). The *Eastway* "case" actually consists of a series of court decisions, from 1984 through 1987, including an initial 1984 decision by Judge Weinstein, a 1985 decision by the United States Court of Appeals for the Second Circuit, reversing and remanding the case in part, *see Eastway Constr. Corp. (I) v. City of New York*, 762 F.2d 243 (2d Cir. 1985), Judge Weinstein's subsequent decision in 1986, and the Second Circuit's 1987 affirmance and modification of Judge Weinstein's decision; *see Eastway Constr. Corp. (II) v. City of New York*, 821 F.2d 121 (2d Cir. 1987).

57. *See Eastway (I)*, 762 F.2d at 248-49.

ment can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated.”⁵⁸

On remand, Judge Weinstein offered a thoughtful, candid, and extensive analysis of the concept of frivolousness. His analysis begins with the observation that “[c]ourt opinions on attorney’s fees speak easily of cases being either frivolous or nonfrivolous, as if all cases fit easily into one or the other category.”⁵⁹ Contrary to this assumption, Judge Weinstein noted, “[r]eality is more complicated.”⁶⁰ Instead, “[i]n the legal world, claims span the entire continuum from overwhelmingly strong to outrageously weak. Somewhere between these two points, courts draw a line to separate the nonfrivolous from the frivolous, the former category providing safe shelter, the latter subjecting attorney and client to sanctions.”⁶¹ Thus, Judge Weinstein insisted on “frank recognition of the fact that rather than being adequately described by the frivolous-nonfrivolous dichotomy, cases really do lie along a continuum. Some are clearly frivolous, some clearly nonfrivolous, and some are difficult to call.”⁶² He then concluded that, though he was “bound by the Court of Appeals’ characterization of frivolousness,” nevertheless, “we cannot say that Eastway’s antitrust claim was more than marginally frivolous.”⁶³

Though he relied in part on the concept of the continuum in setting the level of sanctions,⁶⁴ Judge Weinstein did not elaborate further on the structure of the continuum or fully explain its use in the determination of whether a claim is frivolous. In addition, on appeal, while acknowledging that “Judge Weinstein has thoughtfully considered a variety of factors,” the Second Circuit nevertheless refused to “endorse[e] the pertinence of each factor” and increased the amount awarded by 900%.⁶⁵ Despite the Second Circuit’s refusal to adopt Judge Weinstein’s framework, some courts have cited the notion of a continuum for Rule 11 cases.⁶⁶ Still, most courts continue to rely on

58. *Id.* at 254.

59. *Eastway (II)*, 637 F. Supp. at 574.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 581.

64. *See id.* at 584.

65. *See Eastway (II) Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir. 1987).

66. *See, e.g., Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 197 n.6 (3d Cir. 1988) (“Other mitigating factors which a district court may consider in the context of Rule 11 include . . . the degree of frivolousness, recognizing that cases do lie along a continuum, rather than neatly falling into either the frivolous or non-frivolous category. . . .” (citing *Eastway (II) Constr. Corp. v. City of New York*, 637 F. Supp. 558, 574 (E.D.N.Y. 1986))); *Northern Trust Bank of Calif. v. PRMCO Ltd.*, No. C-93-0055-DLJ, 1994 WL 567826, at *7 (N.D. Cal. May 9, 1994) (“The decision to file . . . was therefore not objectively reasonable . . . and must be

the more vague standards articulated by the Second Circuit and others, and, notwithstanding Judge Weinstein's criticism, courts seem to continue to classify cases too easily into the categories of frivolous or nonfrivolous.

The notion of a continuum has likewise gained some prominence in scholarship. Scholars have discussed various methods, both normative and descriptive, for analyzing Rule 11 frivolous standards that have incorporated, implicitly or expressly, the concept of a continuum. In 1986, Professor Edward Cavanagh suggested that the reasonableness of a legal claim be examined under a "three-zone analysis,"⁶⁷ recognizing the existence of: 1) a clearly reasonable zone; 2) a clearly unreasonable zone; and 3) mid-spectrum conduct, which can be further categorized into "presumptive standards," which include: a) presumptively reasonable; and b) presumptively unreasonable.⁶⁸ In offering this framework, Professor Cavanagh argues that "[t]he bright line presumptions proposed in this Article provide a much needed element of certainty to guide attorney conduct, and to help courts in deterring frivolous litigation tactics without chilling legitimate claims."⁶⁹

found to violate Rule 11. However, on the unreasonable decision continuum from decisions which are fairly close to reasonable to flat out frivolous decisions, plaintiff's decision . . . was at the fairly close end rather than the frivolous end."); *Temple v. WISAP USA in Texas*, 152 F.R.D. 591, 604 (D. Neb. 1993) ("I next examine the degree of 'frivolousness' of the offending conduct. As Judge Weinstein has observed, Rule 11 cases are not 'adequately described by the frivolous-nonfrivolous dichotomy'; rather, these cases 'really do lie along a continuum.'" (citations omitted)); *Total Television Entertainment Corp. v. Chestnut Hill Village Assocs.*, 145 F.R.D. 375, 385 (E.D. Pa. 1992) ("The courts have suggested a number of factors that may be considered in determining what the appropriate sanction should be for a particular Rule 11 violation. These factors include . . . the degree of frivolousness involved, recognizing that cases lie along a continuum, and do not always fall neatly into the frivolous or non-frivolous category.").

Similarly, in a number of other cases, although they did not cite *Eastway* or explicitly refer to a continuum, courts did acknowledge varying degrees of frivolousness, basing their Rule 11 decisions in part on a determination of whether a claim was "extremely frivolous." See, e.g., *Becton Dickinson & Co. v. District 65, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO*, 799 F.2d 57, 59 (3d Cir. 1986) (quoting United States District Court for the District of New Jersey); *Jackson v. Refined Sugars, Inc.*, 24 F. Supp. 2d 322, 325 (S.D.N.Y. 1998); *Walker v. Walker*, 854 F. Supp. 1443, 1463 (D. Neb. 1994); *Nichols v. Firestone Tire & Rubber Co.*, 127 F.R.D. 525, 526 (D. Neb. 1989); *Booker v. City of Atlanta*, 586 F. Supp. 340, 341 (N.D. Ga. 1984) (holding show cause order "was designed to insure that the city was not asserting . . . a patently frivolous claim"), *aff'd* 827 F.2d 775 (11th Cir. 1987); *American State Bank v. Pace*, 124 F.R.D. 641, 648-49 (D. Neb. 1987); cf. *Fredrick v. Clark*, 587 F. Supp. 789, 794 (W.D. Wis. 1984) (describing complaint as "utterly frivolous and groundless").

67. Cavanagh, *supra* note 14, at 543.

68. See *id.* at 543-46.

69. *Id.* at 546; cf. Armour, *Rethinking Judicial Discretion*, *supra* note 45, at 545 (describing theoretical model of a "zone of possibilities," which "helps define the

Other scholars have been more explicit in evaluating Rule 11 reasonableness along a continuum. In defending the practical use of the concept of frivolousness, Mark Stein offers a realistic description of the act of judging Rule 11 cases.⁷⁰ Rejecting the argument that “the concept of frivolousness has no meaning, that a judge’s decision as to whether a legal position is frivolous is purely subjective,” Stein explains that “[a]s applied under Rule 11, the concept of frivolousness accepts that a legal position is generally not true or false in the same sense as an assertion of fact.”⁷¹ Rather, he continues, “the concept of frivolousness posits a sort of continuum, in which some positions are more correct and some are less correct. At the far end of the continuum there fall positions that are so incorrect as to be frivolous and sanctionable.”⁷²

grey area of the close cases as those sanction cases where reasonable, knowledgeable lawyers, as members of the interpretive community, could disagree”).

70. See Mark S. Stein, *Of Impure Hearts and Empty Heads: A Hierarchy of Rule 11 Violations*, 31 SANTA CLARA L. REV. 393, 398 n.13 (1991).

71. *Id.* According to Stein, “[i]ntegral to the concept of frivolousness is the belief that judges and lawyers can perceive that a position is so incorrect as to be frivolous and sanctionable, just as they can perceive that an assertion of fact is true or false.” *Id.*

The notion that a legal argument may not be “true” or “false” in the same sense as a statement of fact or a mathematical proof is a complex one. See, e.g., Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993); Anthony D’Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84 (1995); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). For discussions of this concept in the context of Rule 11, see Armour, *Practice Makes Perfect*, *supra* note 45; Armour, *Rethinking Judicial Discretion*, *supra* note 45; Meyer, *supra* note 7. For a discussion of the concept more generally and in the context of Jewish law, see Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 471-74 & nn.164-80 (1997).

72. See Stein, *supra* note 70, at 398 n.13; cf. Crystal, *supra* note 48, at 686 (“[S]et[ting] a five percent chance of success as the level for distinguishing frivolous from nonfrivolous claims.”). Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 605 (1987) (“From the perspective of counseling a client on the prospects of success, such refined line-drawing suggests that at some point on the continuum (perhaps at a point below five on a scale of one to a hundred as to prospects of success) a case would be frivolous and the attorney would be subject to Rule 11 sanctions Such an analysis would call for a sophisticated and detailed Rule 11 evaluation by any federal court making a Rule 11 assessment” (citations omitted)); William G. Swindal, *Frivolity in Court: New Rule 11*, 13 LITIG., Summer 1987, at 3, 4. (“There is a range of attorney conduct, from heroically exemplary to absolutely ridiculous or cravenly dishonest. The question is where along this continuum the lawyer’s conduct will lead to sanctions.”); Yablon, *supra* note 6, *passim* (discussing probabilities of success for claims in relation to Rule 11); Marc P. Goodman, Note, *A Uniform Methodology for Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public and Private Legal Resources*, 63 S. CAL. L. REV.

If, as Judge Weinstein and others have posited, the degree of frivolousness of a particular claim can indeed be plotted along a continuum, perhaps judges would improve the predictability of Rule 11 rulings by relying more explicitly on such a continuum in their decisions. Under this framework, a judge might delineate a threshold of reasonableness that a claim must meet. The threshold could be articulated through a percentage, corresponding to the minimal degree of success that, in the view of the judge, a claimant should reasonably expect before bringing a claim. In evaluating a particular claim, the judge would assign to that claim its own percentage, according to the reasonable degree of success that could have been expected. If the claim falls below the judge's threshold, it would be deemed frivolous, in a violation of Rule 11.⁷³

1855, 1895 (1990) ("A court should recognize that the degree of frivolousness of a particular paper exists on a continuum . . .").

73. Some scholars have questioned the ability and likelihood of courts and attorneys evaluating claims on the basis of such a detailed continuum. *See, e.g.,* Bone, *supra* note 4, at 568 n.140 ("Parties make choices within the limits of bounded rationality . . . and so they might have trouble figuring out what to do with a continuum of suits. A natural response would be to reduce the continuum to a few discrete categories, such as 'strong cases,' 'moderate cases,' 'weak cases' and 'frivolous cases.'"); Grosberg, *supra* note 72, at 606 (stating that placing a claim between five and ten, on a continuum ranging from one to one hundred as to prospects of success, involves "extremely difficult distinctions to make, even for the best of judges").

However, contrary to these concerns, the continuum approach would, in fact, both require and enable judges to engage expressly in the kind of nuanced evaluations necessary for effective Rule 11 decisionmaking, rather than allowing them to rely on vague classifications. *Cf. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 339 (1991) (stating that, in advising clients, "[v]ague terminology is more likely to create misimpressions than inform. If you tell a client that she has a 'pretty good shot' at winning, she may think that she has a 90% chance of success. Meanwhile you . . . meant that she had a 40% chance of winning. Hence . . . you can enhance client understanding by describing legal outcomes in percentage terms," and providing such examples as advising a client that "There's a small chance, about 10%, that if we go to trial you'll recover punitive damages" in place of "There's a small chance that if we go to trial, you'll recover punitive damages," or that "I'm 90% certain that the Board will approve the request for a variance," instead of "I'm reasonably certain that the Board will approve the request for a variance."); Jacob Weisberg, *Keeping the Boom From Busting*, N.Y. TIMES MAGAZINE, July 19, 1998, at 24, 29 (quoting aide to then Secretary of the Treasury, Robert Rubin, stating, that "[o]ne of the first times I met with [Rubin], he asked me if a bill would make it through Congress, and I said, 'Absolutely' . . . He didn't like that one bit. Now I say the probability is 60 percent—and we argue about whether it's 59 or 60.").

Moreover, such a method of evaluating claims would not necessarily differ substantially from the implicit decisions often made by judges, attorneys, and others. *See* Crystal, *supra* note 48, at 681 ("While a contention's probability of success cannot be determined with mathematical precision, lawyers commonly make such probabilistic estimates of chances of success in evaluating their clients' legal positions."); Yablon, *supra* note 6, at 73 ("On the basis of what she

Such a framework might address a number of the concerns raised by the lack of consistency in Rule 11 decisions. The standards for Rule 11 violations will be more comprehensible to parties, articulated through the use of a percentage, which, unlike the vague term “frivolous,” provides more meaningful and specific guidelines. As a result, Rule 11 will likely not have the same chilling effect as currently described by scholars and practitioners.⁷⁴ In addition, assigning percentages will allow district courts to engage more easily and more effectively in evaluating a claim in a way that is consistent with the court’s decisions in other cases. Likewise, parties will better understand a court’s ruling when it is explained through the more concrete framework of percentages.

Finally, under this system, circuit courts play a more clearly designed as well as a more helpful role. Instead of defining frivolousness by articulating vague standards that are difficult to interpret and apply,⁷⁵ the court of appeals for a particular circuit can set the threshold percentage for all the courts in that circuit. As the district courts would be bound by that standard, appellate review would then consist of reviewing the district court’s decision in assigning a specific percentage to reflect the reasonable degree of success that the district court attributed to a particular claim.⁷⁶

This use of a continuum as a scale for measuring frivolousness is also consistent with Judge Weinstein’s suggestion that the sanctions imposed in Rule 11 cases correspond, in part, to the degree of frivolousness of a claim.⁷⁷ Under Rule 11, if a court finds a claim to be frivolous, it may impose sanctions, including “an order directing pay-

knows and does not know, the lawyer forms some probabilistic judgment about the case’s likelihood of success. We make such judgments all the time. Will my train be late? Will my Corporations professor call on me today? Will Clinton be reelected? We assume that we are competent to make such judgments and plan our lives in accordance with them.”).

74. *See supra* Part II. Even under the continuum approach, standards may not be completely uniform, in either the threshold percentage delineated by different courts or in how courts evaluate and assign percentages to claims. Indeed, all legal standards require some interpretation, which by its very nature will differ among interpreters. Nevertheless, the continuum approach allows for a more consistent Rule 11 adjudication than current standards. *Cf. BINDER ET AL., supra* note 73, at 339 n.10 (acknowledging that interpretations of “a 70% chance” may vary, because “language is inherently ambiguous,” and therefore “[u]sing percentages can reduce, not eliminate, ambiguity”).

75. *See supra* Part II.

76. Alternatively, a circuit court might allow individual district courts to set their own threshold percentages. The circuit court could then review the district court’s evaluation of a particular claim in relation to the district court’s threshold.

77. *See Eastway Constr. Corp. (II) v. City of New York*, 637 F. Supp. 558, 574-75 (E.D.N.Y. 1986).

ment . . . of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."⁷⁸

In *Eastway (II)*, Judge Weinstein instructed that "[a]ttorney fee awards of the full market value of services rendered should be reserved for extremely frivolous cases, while more moderate awards should be given for frivolous filings near the border."⁷⁹ The benefit of such an approach, he explained, is that it

harmonizes with the deterrent approach of the Rule [because it] penalizes more severely conduct that society seeks more strongly to deter. But it penalizes only lightly filings in that zone where the bar's imagination and creativity assert themselves most strongly, thus helping to insulate attorneys from the chill of the Rule.⁸⁰

Applying these principles to the facts of the case, having first calculated the maximum allowable fee in the case at \$52,912.50,⁸¹ Judge Weinstein then held that "because the pleading was only marginally frivolous, and for other reasons set forth in this opinion, attorney's fees in the amount of \$1,000 . . . are sufficiently punitive."⁸² In concluding his opinion, Judge Weinstein insisted that "[c]ourts must take care not to use their almost unlimited Rule 11 powers to punish in a vindictive and excessively harsh manner."⁸³

A number of courts have recognized the effectiveness of Judge Weinstein's prescription for allocating sanctions in proportion to the degree of frivolousness of a claim. In *Eastway* itself, on appeal, the Second Circuit modified Judge Weinstein's fee award, but acknowledged that "a fee substantially less than the lodestar amount is permissible."⁸⁴ Dissenting from the majority opinion, Judge Pratt faulted the majority's conclusion for being "no less arbitrary in principle" than Judge Weinstein's,⁸⁵ arguing that "I do not agree that the amount of 'a reasonable attorney's fee' imposed as a sanction under rule 11 should be measured by the severity of an adversary's misconduct."⁸⁶

Other courts have been more explicit in adopting Judge Weinstein's approach to the allocation of attorney's fees. For example, in

78. FED. R. CIV. P. 11(c)(2).

79. *Eastway (II)*, 637 F. Supp. at 574.

80. *Id.* at 574-75.

81. *Id.* at 577.

82. *Id.* at 584. At other points in the opinion, Judge Weinstein characterized the claim in a similar manner, finding that "we cannot say that Eastway's antitrust claim was more than marginally frivolous," *see id.* at 581, and that "this court cannot say that Eastway's due process claim was extremely frivolous." *See id.* at 582.

83. *Id.* at 584.

84. *See Eastway Constr. Corp. (II) v. City of New York*, 821 F.2d 121, 123 (2d Cir. 1987).

85. *Id.* at 126 (Pratt, J., dissenting).

86. *Id.* at 124 (Pratt, J., dissenting).

Doering v. Union County Board of Chosen Freeholders,⁸⁷ the United States Court of Appeals for the Third Circuit cited Judge Weinstein's reference to the degree of frivolousness as a mitigating factor, which the court found "relevant . . . to the extent of the monetary award."⁸⁸ Similarly, in *American State Bank v. Pace*,⁸⁹ the United States District Court for the District of Nebraska relied on Judge Weinstein's approach in concluding that "as the court finds this action not extremely frivolous or at the most on the borderline of being frivolous, while the analysis of this factor points to the imposition of sanctions, those sanctions should be light."⁹⁰

Indeed, perhaps even more significantly than in the area of identifying frivolous claims, it may be useful for judges to adopt and expand Judge Weinstein's approach to the allocation of sanctions through the use of a continuum. In deciding sanctions, because the claim has already been determined to be frivolous, the only relevant portion of the continuum to be considered is that segment below the judge's reasonableness threshold. Within that segment, the continuum can be used to chart, by means of percentages, the degree of frivolousness for a particular claim, corresponding to the extent to which the judge finds it unreasonable for a claimant to have expected success for that claim. The continuum is thus important because, unlike the framework described by Judge Cudahy, which groups "[a]nything falling on the far side of 'C'" in the broad and vague category of a "flunk" or frivolous,⁹¹ the continuum allows for distinguishing among frivolous claims, based on degree of frivolousness.

Such an approach will allow courts to follow Judge Weinstein's prescription to reserve harsh attorney fee awards for claims that are extremely frivolous, and to allocate more moderate awards for claims that, although frivolous, are not as far from being seen as reason-

87. 857 F.2d 191 (3d Cir. 1988).

88. *Id.* at 197 n.6. Without citing *Eastway*, but relying on Judge Weinstein's ideas as presented in *Doering*, the United States District Court for the Eastern District of Pennsylvania noted that:

[t]he courts have suggested a number of factors that may be considered in determining what the appropriate sanction should be for a particular Rule 11 violation. These factors include . . . the degree of frivolousness involved, recognizing that cases lie along a continuum, and do not always fall neatly into the frivolous or non-frivolous category.

Total Television Entertainment Corp. v. Chestnut Hill Village Assocs., 145 F.R.D. 375, 385 (E.D. Pa. 1992) (citing *Doering*, 857 F.2d at 197 n.6).

89. 124 F.R.D. 641 (D. Neb. 1987).

90. *Id.* at 649 (citing *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 574 (E.D.N.Y. 1986)); cf. *Kunstler v. Britt*, 914 F.2d 505, 524 (4th Cir. 1990) (stating that when a monetary award is issued the court may consider "the severity of the violation").

91. See *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part).

able.⁹² Thus, those claims coming close to but still falling short of the judge's reasonableness threshold will be subject to more moderate sanctions, corresponding to the judge's view of the percentage of reasonable success for the claim. Claims that are even less reasonable, falling further from the threshold, would be subject to proportionately harsher sanctions.⁹³

Because the continuum acknowledges and accounts for degrees of frivolousness, through a system that minimizes the amount of sanctions when the claim is closer to the reasonableness threshold, this approach may also help resolve the problem of close cases.⁹⁴ If a court finds a claim to be nearly reasonable but, on balance, frivolous, the court will likely impose rather minor sanctions.⁹⁵ Similarly, this ap-

92. See *Eastway Constr. Corp. (II) v. City of New York*, 637 F. Supp. 558, 574 (E.D.N.Y. 1986).

93. In fact, this approach may allow for a formula to help determine the fee award. Working within the segment of the continuum which falls below the reasonableness threshold, the reasonable degree of success of claims may again be expressed in terms of a percentage, with the threshold in this case representing 100%, or a claim that is indeed reasonable, even if marginally so, and thus free of any sanctions, and the claim rated in relation to minimal reasonableness.

If L represents the lodestar amount, T represents the reasonableness threshold, or 100%, and D represents, in terms of a percentage, the claim's reasonable degree of success, then the calculation of sanctions, or S , may be $S = L \times (T - D)$.

Thus, if a claim is near the reasonableness border, rating, for example 90%, of minimal reasonableness, the sanction will be $S = L \times (100 - 90)\%$, or only 10% of the lodestar amount. In contrast, for an extremely frivolous claim, rating, for example, 0% of even minimal reasonableness, the sanction will be $S = L \times (100 - 0)\%$, or the entire lodestar amount.

Such a formula might also help courts follow the dictates of the United States Court of Appeals for the Fifth Circuit, that when "sanctions are 'substantial in amount' they 'must be quantifiable with some precision' and explained by the court with appropriate specificity." *Smith Int'l, Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1202 (5th Cir. 1988) (quoting *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 883 (5th Cir. 1988) (en banc)).

Of course, it should be noted that, as this formula relates to degree of frivolousness, it addresses only one of the factors courts use in considering the amount of the fee award, and it must be considered together with and, at times, balanced against other factors listed by courts. For example, Judge Weinstein discussed seven different mitigating factors relevant to a determination of the amount of sanctions. See *Eastway (II)*, 637 F. Supp. at 571-84; see also *Kunstler v. Britt*, 914 F.2d 505, 522-525 (4th Cir. 1990) (enumerating four factors relevant to determination of sanctions (citing *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir. 1990))).

94. See *supra* text accompanying notes 53-54.

95. Thus, courts will be able to engage in a clear, coherent, and confident analysis of the frivolousness of a claim, without trying to avoid declaring a claim frivolous due to a reluctance to impose sanctions. Such a result would be in apparent contrast to the decision of at least one court, which stated, "though this is an extremely close case and our initial inclination is to assess costs and sanctions, defendants' legal theories are not so unreasonable nor the deposition testimony so devoid of their interpretation as to justify sanctions under Rule 11." *Marco Holding Co. v. Lear Siegler, Inc.*, 606 F. Supp. 204, 211 (N.D. Ill. 1985).

proach may help allay the concerns of those who fear that sanctions will deter creative claims,⁹⁶ and have thus suggested that sanctions be imposed only in “the most extreme cases.”⁹⁷ While creative claims may still face the danger of being declared frivolous, if these claims in fact present fairly cogent legal arguments, it is likely that the sanctions will be minimal. Indeed, this approach is consistent with the view of Judge Weinstein, who expressed concern for “helping to insulate attorneys from the chill of the Rule” particularly for claims “in that zone where the bar’s imagination and creativity assert themselves most strongly,” and therefore prescribed that such claims should be “punished lightly.”⁹⁸

Finally, the continuum approach may be useful in trying to reconstruct some of the circuit court standards for Rule 11 that seem particularly vague or uncertain. For example, the Second Circuit’s standard, requiring that a court consider whether “it is patently clear that a claim has absolutely no chance of success,”⁹⁹ seemingly refers to a claim that, in some sense, is very frivolous. However, the court’s

It seems that the court did, in fact find the legal theory unreasonable, but not “so unreasonable” as to warrant substantial sanctions. If the court had allocated sanctions proportional to the degree of frivolousness, it could have declared the claim frivolous, as it fell short of the reasonableness threshold, while it could still have avoided assessing substantial sanctions, instead imposing only the minimal sanctions appropriate to an “extremely close case.”

96. See, e.g., Tobias, *Civil Rights Plaintiffs*, *supra* note 11.

97. See, e.g., Tobias, *The 1993 Revision*, *supra* note 5, at 214 (referring to “a heinous Rule 11 violation for which the offender expresses no remorse and which causes an opponent to incur enormous expense”).

98. See *Eastway Constr. Corp. (II) v. City of New York*, 637 F. Supp. 558, 574-75 (E.D.N.Y. 1986).

Professor Yablon has offered a candid, if provocative, depiction of what he terms “long shots,” cases with a relatively low chance of success. Yablon asks the reader to:

think about just how ugly a low-probability claim really is. To say that a case has only a 10% or even 20% chance of succeeding means that going into the case you know that either the theory of causation is dubious (like cancer-causing high voltage electrical lines), the witness’s credibility is questionable, the case law does not support your position, or maybe all of the above. Granted, every now and then a plaintiff’s lawyer lucks out and, with the help of a lenient judge and a sympathetic jury, actually manages to win one of these cases. But even if the Rule does deter some such “successful” cases, this is surely no great social loss.

Yablon, *supra* note 6, at 101. While this description is presumably not fully satisfactory to those who view close cases as unworthy of sanctions, or even to Yablon himself, who argues against imposing sanctions on long shots, like Judge Weinstein, Yablon seems to acknowledge the existence of some grounds for imposing at least minimal sanctions even in close cases. Moreover, unlike in Yablon’s analysis, which does not appear to prescribe varying sanctions depending on the reasonableness of a claim, under the continuum approach, the potential success of close cases can be accounted for in the reduced level of sanctions. See *supra* note 93.

99. *Eastway Constr. Corp. (I) v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

insistence that it be "patently clear," and not merely "clear" that a claim has "absolutely no chance of success," and not simply "no chance of success," increases the ambiguous nature of inherently uncertain terms, presenting difficulties for parties and courts attempting to interpret and apply the standard.¹⁰⁰

Nevertheless, looking at claims through a continuum of reasonableness may suggest that the Second Circuit did, in fact, intentionally rely on these subtle distinctions in formulating the standard. Indeed, there may be a difference between a claim that has "no chance of success" and one that has "absolutely no chance of success," a difference that is perhaps best illustrated through a continuum that measures reasonableness. A court may find that a claim has "no chance of success" based on a determination that the claim is highly unreasonable. While such a finding may place the claim near the lower end of the continuum, the claim may not fall below the Second Circuit's threshold for frivolousness. The Second Circuit's specification that a court must find it "patently clear" that there is "absolutely no chance of success" indicates that, to violate Rule 11, the claim must be found to be so unreasonable that it falls near the very end of the continuum.¹⁰¹

100. See *supra* notes 35-36 and accompanying text.

101. This system of measuring the reasonableness of a claim through a continuum based on percentages and probability is, I think, somewhat consistent with Professor Yablon's discussion of "long shots." See Yablon, *supra* note 6.

Yablon has described a "standard view" of Rule 11, under which "frivolous claims are baseless claims that no reasonable lawyer would ever have brought." *Id.* at 81. In contrast, Yablon suggests that "most cases now being sanctioned under the Rule are indeed long shots rather than baseless actions that had no possibility of success when filed." *Id.* at 68. He defines long shots as "cases with small but not negligible chances of success," *id.* at 81, and makes a "case for long shots," based in part on his belief in "important societal values inherent in maintaining a system of courts that is available and open to all sincerely brought claims for redress, even those with low probabilities of success." *Id.* at 105. Thus, he asserts that "[a] more honest and straightforward attack on Rule 11 would proclaim the right of lawyers to file even cases that are poorly investigated, badly thought out, and blatantly coercive, so long as they are brought with the good faith belief they might possibly succeed." *Id.* In short, according to Yablon, "the costs and controversy surrounding Rule 11, including the deterrence of long shots, meritorious and otherwise, far outweigh any putative benefits the Rule might be providing." *Id.* at 107. He proposes, instead, a rule prohibiting only "action brought in bad faith or for improper purposes." *Id.*

Yablon's theory of long shots, which he terms a "slightly heretical theory," *id.* at 81, appears, in fact, to offer a helpful, realistic, and somewhat descriptive depiction of the way some scholars, practitioners, and courts view the nature of claims. Indeed, like the continuum approach, Yablon's theory is premised on the recognition that claims are generally not properly categorized as simply frivolous or nonfrivolous; instead there are varying degrees of reasonableness to claims. Even those claims which have little chance of success are, at times, not baseless, in the sense of having absolutely no chance of success, but are, using Yablon's terminology, very long shots. However, unlike Yablon's theory, which calls for replacing Rule 11 with a rule that would allow all long shots that were brought

Thus, the Second Circuit's standard might be clearer if a percentage were used to indicate the court's threshold, in place of the current, rather ambiguous formulation of the court's standard.¹⁰²

IV. CONCLUSION

Legal standards, whether crafted by courts, legislatures, or administrative agencies, often contain vague or ambiguous components that require further interpretation. Sometimes this vagueness is intentional, for the purpose of allowing courts to develop and refine the standards over time. The United States Constitution is perhaps the best example of a legal code that intentionally and successfully articulates broad principles, leaving it to the courts to apply these principles over time to specific cases.

In contrast, the frivolousness provision of Rule 11 is a legal standard that, as documented by courts, scholars, and practitioners, has proved unworkable as a result of its vague and ambiguous nature. Though many have struggled to produce a more consistent and uniform approach to Rule 11 adjudication, these efforts have met with little success. It is hoped that the continuum approach proposed in this Article will at least help provide a common language for further efforts at arriving at a more effective application of Rule 11.

for proper purposes, the continuum approach acknowledges the positive purposes and effects of Rule 11, but provides for a more nuanced and effective application of the Rule.

102. Similarly, the continuum approach might help clarify other standards that, as a result of the use of vague and ambiguous terms, appear to raise difficulties in interpretation. Like the Second Circuit, the Third Circuit formulated a standard, requiring "exceptional circumstances" or that the claim be "patently unmeritorious or frivolous," *see* *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274, 1281 (3d Cir. 1994), that seemed to emphasize that sanctions would be imposed only in instances of a claim that is so unreasonable that it falls very close to end of the continuum. However, like the standard articulated by the Second Circuit, the words of the standard formulated by the Third Circuit contain a number of unclear terms. *See supra* notes 36-38 and accompanying text. Again, in place of its current formulation, it may be possible to help clarify the intention of the Third Circuit's standard through the use of a continuum, which could more clearly demarcate the court's threshold of reasonableness.