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Civil Procedure—Towards Consistent Application of Rule 11 Sanctions—Uselman v. Uselman, 464 N.W.2D 130 (Minn.)

Matthew T. Boos

CASE NOTES

Civil Procedure—TOWARDS CONSISTENT APPLICATION OF RULE 11 SANCTIONS—*Uselman v. Uselman*, 464 N.W.2d 130 (Minn. 1990).

I. INTRODUCTION

Rule 11 governs frivolous pleadings, motions, or other papers filed in court. A violation of Rule 11 by an attorney or a party signing a filed document may result in the application of sanctions by the court.[1] Minnesota attorneys, to avoid sanctionable conduct, must understand the current application of Rule 11.

The Minnesota Supreme Court recently addressed, for the first time, the nature and scope of Rule 11.[2] In *Uselman v. Uselman*,[3] the court addressed the fundamental policy underlying Rule 11, the procedural requirements for imposing Rule 11 sanctions, and the question whether, under any circumstances, a party who has survived summary judgment with its major claims intact should be subject to sanctions after a trial predicated on those claims.[4]

The *Uselman* court held that the trial court abused its discretion[5] by

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1. FED. R. CIV. P. 11. The American Bar Association has formulated a variety of sanctions available to a court:
   a. a reprimand to the offender;
   b. mandatory continuing legal education;
   c. a fine;
   d. an award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;
   e. reference of the matter to the appropriate attorney disciplinary or grievance authority;
   f. an order precluding the introduction of certain evidence;
   g. an order precluding the litigation of certain issues;
   h. an order precluding the litigation of certain claims or defenses;
   i. dismissal of the action;
   j. entry of a default judgment;
   k. injunctive relief limiting a party's future access to the courts; and
   l. censure, suspension or disbarment from practicing before the forum court, subject to applicable rules or statutes.

Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 124 (1988).

2. Federal Rule of Civil Procedure 11 was amended in 1983. It is the amended version, or "new rule," that the supreme court addressed for the first time. Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990). *See infra* part II for a discussion of the history of Rule 11.

3. 464 N.W.2d 130 (Minn. 1990).

4. *Id.*

5. *Id.* at 145. The *Uselman* court also held that an appellate court should review

imposing sanctions without providing the sanctioned attorney with "minimum procedural safeguards."[6] In addition, the court determined that the dominant policy underlying Rule 11 is deterrence.[7] Finally, the court held that any claim surviving summary judgment cannot later be subject to Rule 11 sanctions.[8]

This Case Note approves of the supreme court's decision as to the primary policy underlying Rule 11. Furthermore, it applauds the court's clarification of the procedures required before imposing Rule 11 sanctions. However, this Case Note criticizes the supreme court's rigid holding that all claims surviving summary judgment will not be subject to Rule 11 sanctions following a trial predicated on those surviving claims.

II. History of the Law

A. *Overview*

In 1934, Congress passed the Rules Enabling Act, which empowered the Supreme Court to adopt rules of procedure.[9] In 1937, the Supreme Court adopted Rule 11 along with the other Federal Rules of Civil Procedure.[10] The rule, in its original form, contained two

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all Rule 11 rulings with an abuse of discretion standard. The court reasoned that this standard would afford the trial court the flexibility required to resolve Rule 11 issues and most effectively accomplish Rule 11's primary goal of deterrence. *Id.* This is significant because courts have not applied a consistent standard of review to Rule 11 issues. Some appellate courts have subjected certain Rule 11 issues to de novo review. *See, e.g.*, Threaf Properties, Ltd. v. Title Ins. Co. of Minn., 875 F.2d 831, 835 (11th Cir. 1989); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) ("[A] decision whether a pleading or motion is legally sufficient involves a question of law subject to de novo review by this court."). Recently, however, the United States Supreme Court held that appellate courts should apply an abuse of discretion standard for "all aspects of Rule 11." Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990).

6. *Uselman*, 464 N.W.2d at 145. The *Uselman* court's "minimum procedural safeguards" are not referred to, as such, in Rule 11. *See* MINN. R. CIV. P. 11. Rather, they are discussed in the context of due process rights afforded to those facing sanctions. *Uselman*, 464 N.W.2d at 145.

7. *Id.* at 142. To deter is defined as follows: "[t]o discourage or stop by fear. To stop or prevent from acting or proceeding by danger, difficulty, or other consideration which disheartens or countervails the motive for the act." BLACK'S LAW DICTIONARY 450 (6th ed. 1990).

8. *Uselman*, 464 N.W.2d at 144.

9. Pub. L. No. 73-415, 48 Stat. 1064.

10. *See* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004, at 25, 27 (1987).

Rule 11 was conceived as a guard against untruthfulness in pleading. The effect of the Rule was to place a moral obligation on attorneys to ensure that they had subjectively satisfied themselves that good grounds existed for the maintenance of the claim. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 190 (1986). *See generally* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking"*

primary elements.[11] First, an attorney's signature on a pleading constituted certification that the attorney had "read the pleading; that to the best of his knowledge, information and belief there was good ground to support it; and that it was not interposed for delay."[12] Secondly, Rule 11 contained provisions for striking "sham and false" pleadings,[13] and for subjecting a violator to "appropriate disciplinary action."[14]

Prior to the 1983 amendment, Rule 11 was essentially ignored.[15] Lawyers and judges were uncertain as to the appropriate standard of attorney conduct,[16] especially in regard to the extent of investigation

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Problems with Federal Rule of Civil Procedure 11, 61 MINN. L. REV. 1 (1976) (noting that enforcement of old Rule 11 involved attorney honesty).

11. Fed. R. Civ. P. 11, 28 U.S.C. app. at 540 (1982) (amended 1983, 1987). The following is the relevant text from Rule 11:

> 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 attorneys' fees.*

See FED. R. CIV. P. 11 (new version); Fed. R. Civ. P. 11, 28 U.S.C. app. at 540 (1976) (old version). Highlighted text represents the 1983 amendments to Rule 11.

12. Fed. R. Civ. P. 11, 28 U.S.C. app. at 540 (1982).

13. *Id.* "Sham and false" pleadings are those that were not signed, contained "scandalous or indecent material," or were insufficiently certified by an attorney. Vairo, *supra* note 10, at 190.

14. Fed. R. Civ. P. 11, 28 U.S.C. app. at 540-41 (1982).

15. *See* Risinger, *supra* note 10, at 34 (noting that parties sought sanctions in only 23 reported cases between 1938 and 1976); *see also* Vairo, *supra* note 10, at 191 ("Rule 11 . . . was largely ignored.").

16. *See* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment (discussing problems which the 1983 amendment would rectify). There were numerous other problems with old Rule 11. For example, attorneys tended not to use Rule 11 against one another. *See* Vairo, *supra* note 10, at 191. Moreover, the striking of "sham and false pleadings" tended to confuse the issue of attorney honesty with the merits of the claim. *See, e.g.*, Brown v. Cameron-Brown Co., 38 Fed. R. Serv. 2d (Callaghan) 1181, 1189 (E.D. Va. 1980), *rev'd on other grounds*, 652 F.2d 375 (4th Cir. 1981) (refusing to dismiss what it believed was a meritless claim because it could not say for certain that the pleadings were sham and false).

Another problem was that the "appropriate disciplinary action" language left it unclear as to which sanctions were available to courts. Specifically, courts disagreed as to whether or not Rule 11 allowed them to impose monetary sanctions. *See, e.g.*, United States v. Standard Oil Co., 603 F.2d 100 (9th Cir. 1979) (holding that Rule 11 provided no authority to impose monetary sanction); Orenstein v. Compusamp, Inc.,

required by an attorney and the precise conduct that would trigger sanctions.[17] In response to these uncertainties, Rule 11 was amended in 1983.[18]

Amended Rule 11 contained broader and more objective[19] standards of sanctionable conduct.[20] The amended rule established

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19 Fed. R. Serv. 2d (Callaghan) 466, 469 n.6 (S.D.N.Y. 1974) ("Rule 11 does not explicitly provide for the imposition of costs or attorneys' fees.").

Other courts, however, recognized that Rule 11 provided for the award of costs and attorney's fees. *See* Badillo v. Cent. Steel & Wire Co., 717 F.2d 1160, 1166-67 (7th Cir. 1983)("award of fees under Rule 11 can and should be utilized under . . . the proper circumstances"); Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1396 (7th Cir. 1983) (holding that monetary sanctions may be awarded).

17. *See supra* note 16.

18. *See* FED. R. CIV. P. 11; *see generally supra* note 10.

19. The Second Circuit was the first circuit court positively to embrace an objective standard. In *Eastway Constr. Corp. v. City of N.Y.*, 762 F.2d 243 (2d Cir. 1985), on the issue of whether the attorney's conduct warranted sanctions, the court held:

> The addition [to Rule 11] of the words "formed after a reasonable inquiry" demand that we revise our inquiry. No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new [amended] Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

Id. at 253 (citation omitted).

Thus, wilfulness is no longer a prerequisite to disciplinary action following the 1983 amendments. This is confirmed by the portion of amended Rule 11 stating "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." FED. R. CIV. P. 11 (emphasis added). Wilfulness is still relevant, however, when determining the appropriate sanction to be imposed. FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment; *see generally* Vairo, *supra* note 10, at 193 (discussing the advisory committee's debate on standards for imposing a range of appropriate sanctions).

20. Amended Rule 11 changed counsel's certification responsibility. Pre-amendment Rule 11 required bad faith by an attorney or party before sanctions could be imposed. Under amended Rule 11, an attorney or party is held to a reasonable attorney standard. Threaf Properties v. Title Ins. Co. of Minn., Ltd., 875 F.2d 831, 834-35 (11th Cir. 1989) (holding that attorney's filing of action was not subject to sanctions under Rule 11 where it was reasonable to believe that facts supported claim); Davis v. Crush, 862 F.2d 84, 89 (6th Cir. 1988) (concluding that there was room for reasonable disagreement as to whether attorney conducted a reasonable inquiry into the law); Kale v. Combined Ins. Co. of America, 861 F.2d 746, 759 (1st Cir. 1988) (holding plaintiff attorney's argument for equitable modification of the statute of limitations may have had some merit); Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987) (holding whether pleading or motion is legally sufficient involves a question of law subject to de novo review by court of appeals).

Thus, courts now determine whether or not the pre-filing investigation was objectively reasonable. The courts consider what a reasonable competent attorney or party would have done under similar circumstances. Considerations include:

> [H]ow much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the plead-

three bases for imposing sanctions: an insufficient legal basis, an insufficient factual basis, and an improper purpose.[21] Sanctions became mandatory where the rule was violated,[22] and judges were given great latitude with respect to the types of sanctions available.[23]

Nevertheless, problems remained after the 1983 amendments to Rule 11. First, courts applied Rule 11 inconsistently because of disagreement over the rule's underlying policy.[24] Second, pre-sanction procedures were vaguely defined.[25] Finally, critics believed that Rule 11 was responsible for suppressing legitimate claims and creative advocacy.[26]

B. Minnesota Law

Prior to *Uselman*, the Minnesota Supreme Court had not addressed the nature and scope of Rule 11.[27] Moreover, Minnesota's lower

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ing, motion or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

FED R. CIV. P. 11 advisory committee's notes to 1983 amendment.

21. *See supra* note 11 and accompanying text; *see also* Alan E. Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 904 (1988).

22. FED. R. CIV. P. 11 ("If a pleading, motion, or other paper is signed in violation of this rule, the court . . . *shall* impose . . . an appropriate sanction . . . .")(emphasis added).

23. FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment (stating that the court "has discretion to tailor sanctions to the particular facts of the case"); *see generally* Untereiner, *supra* note 21, at 909 (discussing the need for a uniform approach to imposing and calculating individual sanctions so as to not discourage legitimate lawsuits).

24. *See infra* notes 37 & 41 and accompanying text.

25. *See infra* notes 43-48 and accompanying text.

26. The potential of Rule 11 to deter legitimate claims has been widely recognized. *See, e.g.*, Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990) ("[W]hile some sanctionable conduct might under these circumstances escape discipline, that is preferable to deterring legitimate or arguably legitimate claims."); *see also* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment of Rule 11 ("The Rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."); Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 254 (2d Cir. 1985) ("[W]e do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law."); Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1159-60 (9th Cir. 1987) ("An award of Rule 11 sanctions raises two competing concerns: the desire to avoid abusive use of the judicial process and to avoid chilling zealous advocacy."); Michael A. Mack, *Rule 11—Myth v. Reality*, FOR THE DEFENSE, Apr. 1991, at 6-7 (arguing that the "chilling effect" caused by Rule 11 sanctions is unfounded).

27. *See Uselman*, 464 N.W.2d at 142 ("On this our first occasion to address the nature and scope of the new Rule . . . .").

Given the similarity between federal Rule 11 and Minnesota's Rule 11 as well as the lack of prior Minnesota cases on Rule 11, the *Uselman* court based much of its

courts had examined Rule 11 matters infrequently.[28] The *Uselman* court, therefore, did not draw upon existing Minnesota law when deciding the nature and scope of Rule 11.

The *Uselman* court looked instead to cases interpreting federal Rule 11 as a basis for its holdings.[29] The court used federal law because only "minor and insignificant differences" exist between Minnesota's Rule 11 and federal Rule 11 as amended in 1983.[30] Thus, the *Uselman* decision is based on nonbinding, federal authority.[31]

C. *Policy Foundations of Rule 11*

The policy underlying Rule 11 has been expressed as one or more of the following: compensation,[32] punishment,[33] and deterrence.[34]

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decision on federal authority. *Id.* ("[C]ases interpreting the federal rule are valuable guidelines in understanding [Rule 11's] purpose and application.").

Before *Uselman*, many Minnesota cases dealing with attorney misconduct could be brought under section 549.21 of the Minnesota Statutes. However, section 549.21 dealt only with awards of attorney's fees and costs, not sanctions. "An award under this section shall be . . . an alternative to any claim for sanctions that may be asserted under the rules of civil procedure." MINN. STAT. § 549.21 (1988).

28. *See supra* note 27 and accompanying text.

29. Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990) ("[W]hile not binding on this court, cases interpreting the federal rule are valuable guidelines in understanding its purpose and application.").

The *Uselman* court did not discuss prior Minnesota case law on Rule 11. The court treated the Rule 11 issue as an issue of first impression and relied on federal cases interpreting the federal version of Rule 11. Nonetheless, a discussion of prior Minnesota court decisions regarding Rule 11 issues prior to *Uselman* are relevant to the issues presented in this Case Note.

In Mears Park Holding Corp. v. Morse/Diesel, Inc., 426 N.W.2d 214, 217 (Minn. Ct. App. 1988), the appellate court examined the issues of Rule 11 policy, due process and appellate review standards. *Id.* at 217. The *Mears* court adopted the view of the Fifth Circuit that abuse of discretion was the proper standard of review for Rule 11 matters. *Id.* at 218.

Next, the *Mears* court indicated that it regarded the policy foundations of Rule 11 as deterrence, punishment and compensation. *Id.* at 219. The *Mears* court stated, "[w]hat constitutes 'reasonable expenses' and a 'reasonable attorney's fee' within the context of Rule 11 must be considered in tandem with the rule's goals of deterrence, punishment, and compensation." *Id.* (quoting Thomas v. Capital Security Servs., Inc., 836 F.2d 866, 869 (5th Cir. 1988)).

30. *Uselman*, 464 N.W.2d 130, at 142. There is a notable variation between the Minnesota and the Federal Rule 11 advisory committee notes. The Minnesota version mentions the policies underlying Rule 11 as compensation, punishment, and deterrence. MINN. R. CIV. P. 11 advisory committee notes. The federal version, however, mentions only deterrence as the policy goal underlying Rule 11. FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment.

31. *See supra* note 27.

32. Compensation is defined as: "[i]ndemnification; payment of damages; making amends; making whole; giving an equivalent or substitute of equal value." BLACK'S LAW DICTIONARY 283 (6th ed. 1990).

33. Punishment is defined as: "[a]ny fine, penalty, or confinement inflicted upon

Disagreement exists as to which policy should prevail in the application of Rule 11.

The United States Court of Appeals for the Ninth Circuit was the first circuit court to confront the issue of the underlying purpose of Rule 11.[35] In *In re Yagman*, the Ninth Circuit ruled that the "primary purpose" of Rule 11 is to "deter subsequent abuses" in that litigation.[36] A majority of judges and commentators also agree that deterrence is the primary purpose of the rule.[37] However, the Seventh Circuit in *In re TCI Ltd.*,[38] suggested that compensation is a major, if not the primary, rationale for Rule 11 sanctions.[39]

Because courts disagree on the primary policy underlying Rule 11,[40] they have applied the rule erratically.[41] Unfortunately, the

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a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law." BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

34. A number of authorities distinguish between specific and general deterrence. *See generally* Untereiner, *supra* note 20, at 908-09.

35. *See In re* Yagman 796 F.2d 1165, 1184 (9th Cir.), *amended and reh'g denied*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987).

36. *Id.* at 1183. The court held that deterrence was the "paramount" and "overriding" goal of Rule 11. *Id.* at 1184.

37. "When asked about Rule 11's primary purpose, 59.4% of district court judges answered deterrence, while 19.6% said punishment and 21% compensation." Untereiner, *supra* note 20, at 906 n.40.

For those favoring deterrence, see William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1020 n.31 (1988) (stating that most commentators seem to agree that deterrence of abuse is the overriding purpose of Rule 11); *see also* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment of Rule 11 (mentioning only deterrence as Rule 11's primary purpose); Untereiner, *supra* note 20, at 907 ("[J]udges should consider deterrence to be the primary goal of Rule 11.").

For an example of judges and commentators who argue that the rule's focus should be either compensation or punishment, see Eastway Constr. Corp. v. City of N.Y., 637 F. Supp. 558, 564 (E.D.N.Y. 1986), *modified and remanded*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S 918 (1987) (relying on compensation rationale); *see also* Neal H. Klausner, Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 331 n.228 (1986) (arguing that the purpose of Rule 11 is primarily punitive). *See generally* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1323-25 [hereinafter *Some "Chilling Problems"*] (arguing that two divergent views regarding Rule 11's purpose are compensation and punishment, both of which serve a deterrence function).

38. 769 F.2d 441, 446 (7th Cir. 1985).

39. *Id.*

40. *See supra* note 37.

41. *See* Untereiner, *supra* note 21, at 905-06 ("[N]onuniformity in sanctioning will persist unless consensus is reached over the Rule's overarching purpose.").

Disagreement over Rule 11's primary purpose "accounts for wide disparities in sanctioning practice." *See id.* at 907 n.43 (quoting NEW YORK BAR ASS'N, REPORT OF THE COMM. ON FEDERAL COURTS: SANCTIONS AND ATTORNEY'S FEES, 15 (1987)) ("Examination of the reported cases reveals a great deal of inconsistency as to whether there has been a Rule 11 violation, and if so, what sanction should be imposed. Part

wide disparities in sanctioning practices are likely to continue until the primary purpose of Rule 11 is uniformly determined.[42]

D. Procedural Requirements Under Rule 11

The procedures required for the imposition of Rule 11 are unclear. Those facing sanctions are protected by the Due Process Clause of the Fifth Amendment,[43] which ensures that those facing sanctions are given notice of possible sanctions and opportunity to respond.[44] Nonetheless, "[n]o set rule can be stated to govern all Rule 11 cases; the standard is necessarily flexible to cover varying situations."[45]

There are difficulties in trying to determine what procedures are necessary under the Due Process Clause. First, the federal Rule 11 Advisory Committee stated that those facing sanctions should receive notice promptly upon discovering a basis for imposing sanctions.[46] However, some federal courts regard the existence of Rule 11 itself to be sufficient notice.[47] Second, there is uncertainty as to

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of the reason for this seems to be that the courts have not yet agreed upon the purpose or purposes of Rule 11."); Vairo, *supra* note 10, at 203 (explaining that confusion over Rule 11's primary purpose has led to inconsistent results in Rule 11 cases).

42. *See supra* note 41.

43. Donaldson v. Clark, 819 F.2d 1551, 1558 (11th Cir. 1987). For example, where an attorney files a complaint with no basis in fact, the existence of the rule itself may be sufficient notice. *Id.* at 1560. *But see* Tom Growney Equip., Inc., v. Shelley Irrigation Dev., Inc., 834 F.2d 833, 836 n.5 (9th Cir. 1987)("[W]e distinguish ourselves from other courts that have found the 'notice' requirement satisfied by the mere presence of the rule.").

If, however, the issue is whether or not the attorney made a legally tenable argument, the court may require more specific notice as to possible sanctions. *See Donaldson*, 819 F.2d 1551, at 1560. *See generally* Nancy Burger-Smith, Note, *Avoiding Sanctions Under Federal Rule 11: A Lawyer's Guide to the "New" Rule*, 15 WM. MITCHELL L. REV. 607, 620 (1989) (discussing due process clause requirements when applying Rule 11 sanctions).

The *Donaldson* case explored in detail the process that was due on Rule 11 motions. It is, therefore, a helpful guide to the procedural guidelines for imposing Rule 11 sanctions. Furthermore, the *Uselman* court cited the *Donaldson* case with respect to Rule 11 and procedural issues. *See* Uselman v. Uselman, 464 N.W.2d 130, 143 (Minn. 1990).

44. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (entitling an attorney facing sanctions to a hearing on the record); Davis v. Crush, 862 F.2d 84, 88-89 (6th Cir. 1988) (holding that a hearing may not always be necessary but may be compelled if the case is dismissed without trial); Gagliardi v. McWilliams, 834 F.2d 81, 83 (3d Cir. 1987) (explaining that those facing sanctions should be given an opportunity to respond to the notice of possible Rule 11 sanctions).

45. *Donaldson*, 819 F.2d at 1558.

46. *See* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment ("A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so.").

47. *See supra* note 43. Authorities also disagree as to whether the court or the

whether the trial judge may determine the timing of imposition or whether judges must impose sanctions at the time of the sanctionable conduct.[48]

E. Post-Summary Judgment Sanctions

There is little authority regarding whether, under any circumstances, a party surviving summary judgment with its major claims intact ought to be subject to Rule 11 sanctions after a trial predicated on those claims. The existing authority suggests that to do so is generally unfair,[49] although there are times when sanctioning frivolous claims is appropriate despite the fact that the claims have survived summary judgment motions.[50]

Commentators argue that a party surviving summary judgment has no reason to believe that the court considers its claim or defense frivolous.[51] Furthermore, it has been argued that if a claim or defense is indeed frivolous, that fact should be apparent early in the litigation process.[52]

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party seeking sanctions should provide the notice. *Compare Donaldson*, 819 F.2d at 1560 (holding that notice can come from the party *or* the court) *with* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment (stating that a party, not necessarily the court, should give notice).

48. The federal Rule 11 advisory committee intended that the judge have discretion. *See* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment. A number of federal circuits, however, require that sanctions be imposed promptly at the time of the offending conduct rather than after trial, in order to promote deterrence. Prompt sanctions are believed to deter subsequent abuses. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 881 (5th Cir. 1988) ("A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions."); Brown v. Fed'n of State Medical Bds. of United States, 830 F.2d 1429, 1438 (7th Cir. 1987) (recognizing deterrence goals).

49. *See* 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, 391 (1990) [hereinafter *Chancellor Shot Himself*] (criticizing the award of sanctions for frivolity after a court has denied summary judgment); *see also* Schwarzer, *supra* note 37, at 1019 n.27 ("[I]t would be inequitable to permit a defendant to increase the amount of attorney's fees recoverable as a sanction by unnecessarily defending against frivolous claims.") (citing Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)).

50. *See supra* note 49 and accompanying text; *see also infra* note 100 and accompanying text.

51. *See Chancellor Shot Himself*, *supra* note 49, at 391.

52. *See* Schwarzer, *supra* note 37, at 1019. The author states:

> If a claim or defense is indeed frivolous, that fact should be sufficiently apparent, early in the litigation process, for the judge or opposing counsel to address it and, by motion or other appropriate measures, eliminate it with minimum expense.

Id.

III. *USELMAN v. USELMAN*

A. Facts

In *Uselman*,[53] the trial court judge imposed Rule 11 sanctions on the plaintiff's attorney following a judgment in favor of the defendants.[54] The court imposed sanctions after finding that the plaintiff's attorney had asserted frivolous and costly claims and thus had unnecessarily increased the cost of litigation.[55] The sanctions against the plaintiff's attorney included an $83,500 fine in favor of defendant Uselman and a $106,700 fine in favor of defendant Norwest.[56]

Two different judges presided over the pre-trial and trial stages of the suit.[57] In July 1986, both defendants filed notices with the pre-trial judge of their intent to claim fees and costs.[58] These notices did not contain any mention of Rule 11 sanctions.[59] In February 1988, defendants Uselman filed a motion for fees and sanctions pursuant to section 549.21 of the Minnesota Statutes and Rule 11.[60] In June 1988, after the trial, both defendants moved for Rule 11 sanctions as well as fees and costs.[61] This motion was made at the invitation of the trial court judge.[62]

The trial court judge awarded Rule 11 sanctions to both defend-

53. Uselman v. Uselman, 464 N.W.2d 130 (Minn. 1990). This suit was brought by plaintiff Mary Ann Uselman against defendants Norwest Bank of Minneapolis and Jerry and George Uselman. Plaintiff Uselman sought to obtain rescission of the sale of stock held by her late husband which had been transferred on his death to the trust administered by Norwest. Plaintiff claimed that defendant Norwest breached its fiduciary duty and was negligent in selling stock for less than its fair market value. *Id.* at 134.

Plaintiff further claimed that defendants Uselman were liable for conversion of corporate assets, misappropriation, breach of fiduciary duty and misrepresentation. Plaintiffs sought disgorgement of monies wrongfully taken or, as an alternative, compensatory damages as well as punitive damages. *Id.*

54. *Id.* at 136. *See also infra* note 63 for a description of the motions brought by both parties' attorneys prior to the imposition of sanctions.

55. *Uselman*, 464 N.W.2d at 140.

56. *Id.* at 136.

57. *Id.*

58. *Id.* at 144. The defendants' notices of intent to claim fees and costs were made pursuant to section 549.21 of the Minnesota Statutes, not Rule 11. *See* MINN. STAT. § 549.21 (1988). Section 549.21 allows attorneys to recover costs and fees incurred while defending frivolous claims. Section 549.21 does not, however, provide a basis for attorneys to recover sanctions beyond fees and costs. Rule 11 is the only provision that allows such punitive sanctions to be imposed.

59. *Uselman*, 464 N.W.2d at 144.

60. *Id.*

61. *Id.*

Defendants Uselman made their motion for fees and other sanctions on February 26, 1988. Then, on June 3, 1988, defendant Norwest filed a broader motion for more comprehensive fees and costs. *Id.*

62. *Id.*

ants based on a motion brought by the plaintiff's attorney during the pre-trial proceedings when a different judge presided.[63] During the pre-trial period, the plaintiff's attorney twice moved to amend the complaint.[64] The trial court judge awarded Rule 11 sanctions on the grounds that the second motion to amend was frivolous.[65] The trial court judge imposed sanctions despite the fact that neither he nor the pre-trial judge had warned plaintiff's counsel.[66] The judge, in making his determination, identified deficiencies in the pleadings as support for the imposition of sanctions.[67] Moreover, the judge denied a request by plaintiff's attorney for a hearing on the issue of sanctions and for a continuance until the transcript of the trial was completed.[68]

B. The Court's Holding and Reasoning

The Minnesota Supreme Court determined that deterrence is the primary purpose of Rule 11.[69] The court also held that the trial court abused its discretion by imposing sanctions without providing certain minimum procedural safeguards to the plaintiff's attorney.[70] The supreme court premised these holdings on three factors.[71]

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63. *Id.* at 136. The motions brought by the parties included: plaintiff's two attempts to amend their complaint to include the Uselman children as plaintiffs, Norwest's motion for a stay, and numerous motions by defendants for dismissal or summary judgment. Later, after the trial issues had been narrowed, defendants moved to dismiss the Uselman children as plaintiffs. Finally, defendants' summary judgment motions were denied on the grounds that genuine issues of material fact still remained with respect to claims of misrepresentation, breaches of fiduciary duty, failure to activate buy-sell agreements, and failure to seek outside purchases. *Id.*

After the trial judge was assigned, defendants unsuccessfully renewed their motion for summary judgment. Then, shortly before trial, defendants Uselman filed a motion to deny the plaintiff's demand for a jury trial with regard to any claims against them specifically. Norwest also filed its third motion for summary judgment and sought to exclude any expert testimony. *Id.*

During trial, plaintiffs moved the trial court to recuse or declare a mistrial because of the attitudes and comments of the court. After the court returned a verdict in favor of the defendants, plaintiffs moved for a new trial or in the alternative for amended findings. *Id.*

64. *Id.* Plaintiffs filed their original complaint on April 3, 1984. Thereafter, Plaintiff amended their complaint twice. The second amended complaint was filed on April 6, 1987. *Id.* at 140 n.5.

65. *Id.*

66. *Id.* at 136, 144.

67. *Id.* at 144. These deficiencies are not detailed but presumably refer to the trial judge's conclusion that the Uselman children were unnecessary parties.

68. *Id.* The court believed that no transcript was necessary. *Id.*

69. *Id.* at 142.

70. *Id.* at 141, 145.

71. *Id.* at 144. The supreme court based its decision on a fourth factor as well. Namely, that the trial court was incorrect in criticizing plaintiff's attorney for advising her clients to retain separate counsel. *Id.* It is difficult to predict how courts will

First, the court held that the plaintiff's attorney did not receive timely notice that Rule 11 sanctions were forthcoming.[72] The court reasoned that such notice is designed to provide an opportunity to correct future conduct, thereby advancing the policy of deterrence rather than punishment.[73]

Second, the court held that the pre-trial judge erred by failing to impose sanctions at the time of abuse and by failing to rule on any claimed violations that occurred while he presided.[74] Third, the supreme court held that the trial court erred by failing to comply with the sanctioned attorney's request to obtain and review the trial transcript.[75] The court reasoned that such safeguards would "facilitate an orderly and uniform approach to the imposition of sanctions."[76]

Finally, the supreme court held that a party who survives summary judgment with their major claims intact should not be subject to Rule 11 sanctions predicated on those surviving claims.[77] The court argued that to hold otherwise would encourage a "never say die" attitude toward sanctions. The court also expressed concern over an increase in the burden of satellite litigation resulting from the imposition of such sanctions.[78]

IV. ANALYSIS

A. Policy Foundations

In *Uselman*, the Minnesota Supreme Court wisely narrowed the policy objectives of Rule 11 by classifying the rule as a "mechanism

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apply this fourth factor. For example, it is unknown whether the supreme court would have censured the trial court for any criticism (even correct criticism).

72. *Id.* The court stated that defendants' references to sanctions in their briefs and memoranda were insufficient notice to plaintiff's counsel. *Id.*

In a recent opinion written by Judge Davies of the Minnesota Court of Appeals, the court interpreted and further defined the *Uselman* requirement of "fair notice" Radloff v. First American Nat'l Bank, 470 N.W.2d 154 (Minn. Ct. App. 1991). *See also infra* note 89.

73. *See Uselman*, 464 N.W.2d at 143. The court stated:

> A policy of deterrence "is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of the transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant sanctions."

Id. (quoting *In re* Yagman, 796 F.2d 1165, 1183, *amended and reh'g denied*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987)).

74. *Uselman*, 464 N.W.2d at 144.

75. *Id.*

76. *Id.* at 143 (citing Greenberg v. Hilton Int'l Co., 870 F.2d 926, 937, *vacated and remanded on other grounds*, 875 F.2d 39 (2d Cir. 1989)).

77. *Uselman*, 464 N.W.2d at 144.

78. *Id.* at 144-45.

for deterrence rather than a punitive or cost-shifting device."[79] The court adopted the views of both the Federal Rule 11 Advisory Committee[80] and the majority of judges and commentators.[81] Consequently, the court placed Minnesota courts on the path to a uniform[82] and orderly application of Rule 11 sanctions.[83]

B. Procedural Requirements

The *Uselman* court required that minimum procedural safeguards precede any imposition of Rule 11 sanctions. Specifically, *Uselman* required that an attorney or party have "fair notice of both the possibility of a sanction and the reason for its proposed imposition."[84] In so holding, the *Uselman* court promoted the deterrence of frivolous litigation, eliminated inconsistency in imposing sanctions, and limited Rule 11's inhibitive effects on legitimate claims.[85]

1. Timely Notice

While the *Uselman* court held that any imposition of Rule 11 sanctions must be preceded by "timely notice," it did not precisely define its meaning. However, the court's holding suggests that "timely notice" includes the requirement that notice of possible sanctions be given at the time of abuse. The defendants in *Uselman*, during the pre-trial proceedings, had given notice of an intent to seek fees and costs pursuant to section 549.21 of the Minnesota Statutes.[86] The defendants did not, however, give notice of an intent to seek Rule 11 sanctions.[87] Further, *the court* did not give notice that it was considering the imposition of sanctions until after judgment was entered in 1988.[88] Thus, in holding that the notice in *Uselman* was insufficient to sustain Rule 11 sanctions, the supreme court suggested that notice of a possible sanction must be given at the time of abuse.

Time-of-abuse notice advances the policy of deterrence. Upon receiving notice, those facing sanctions will have an opportunity to cor-

79. *Id.* at 142. For cases and commentators favoring deterrence as the primary policy of Rule 11, see *supra* note 37.

80. *See* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendment (mentioning only deterrence as Rule 11's policy goal).

81. *See supra* note 37 and accompanying text for discussion concerning the primary policy goals of Rule 11.

82. For a discussion of the problem of non-uniformity in sanctioning, see *supra* part II-C.

83. One of the court's stated goals in *Uselman* was "[t]o facilitate an orderly and uniform approach to the imposition of sanctions." *Uselman*, 464 N.W.2d at 143.

84. *Id.*

85. *See supra* part II-C.

86. *Uselman*, 464 N.W.2d at 144; *see also supra* part III-A.

87. *Uselman*, 464 N.W.2d at 144.

88. *Id.*

rect future conduct[89] because they will promptly understand the type of conduct which falls outside the scope of proper pleading. The opportunity for correction would not be present if notice were required only at the end of the litigation process.

Subsequently, however, the Minnesota Court of Appeals in *Radloff v. First American National Bank*,[90] discussed the issue of whether Rule 11 notice must be explicit, or may be implied. The *Radloff* court held that *Uselman* allowed implied notice, rather than explicit notice, where numerous adverse orders and motions, prior to the imposition of sanctions, provided sufficient warning that sanctions may be forthcoming.[91] *Radloff* exploits a possibility raised by *Uselman*, that in "very unusual circumstances" it could be "permissible for the trial court to wait until the conclusion of the litigation to announce that sanctions will be considered or imposed."[92] Although the court did not define those unusual circumstances, it suggested that implied notice, or perhaps no notice, will suffice in some circumstances. It may be said that *Radloff* specifies one unusual circumstance where implied notice is sufficient to impose Rule 11 sanctions: where the plaintiff suffered countless adverse rulings on motions and orders denying relief and had no claims remaining for trial.[93] To this extent, *Radloff* and *Uselman* may be reconciled with regard to the notice requirement.[94]

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89. *Cf.* Vairo, *supra* note 10, at 194 ("[T]he power to strike pleadings early in the litigation, pursuant to Rule 11, 12, 16 or 26, or to grant summary judgment under Rule 56, will enable the court effectively to control unnecessary discovery.").

90. 470 N.W.2d 154 (Minn. Ct. App. 1991).

91. *Id.* The notice discussion in *Radloff* was merely dictum. *Id.* at 159 ("Although appellants did not precisely appeal the notice issue under *Uselman*, it should be addressed by this court.").

In *Radloff*, the trial court sanctioned plaintiff's attorney under Rule 11 without explicit warning. Prior to the application of sanctions, eight of plaintiff's original seventeen claims were voluntarily dismissed, the court had dismissed a claim, the court had denied a motion to add a defendant, and summary judgment was ultimately granted on the remaining claims. *Id.* at 155.

The *Radloff* and *Uselman* outcomes are reconcilable. Both cases involved numerous adverse rulings in regard to the plaintiff's motions and orders. The plaintiffs in *Uselman*, however, had several claims that survived and were later adjudicated. The plaintiffs in *Radloff* had no claims survive to the trial stage. *Id.*

92. *Id.* at 157.

93. *Id.*

94. The discussion on the impact of *Radloff* assumes that the *Radloff* court referred to *Rule 11* notice, rather than to section 549.21 notice. *See* MINN. STAT. § 549.21 (1986). The court stated that "[e]xplicit warning was not required in this case, since unlike the pre-1986 version of Minn. Stat. § 549.21 relied upon by the *Uselman* court, the statute does not contain the provision which specifically required 'timely notice of intent to claim an award.'" *Id.* (quoting MINN. STAT. § 549.21 (1986)).

The *Radloff* court mistakenly applied the statutory notice requirement to Rule

2. *Time-of-Abuse Sanctions*

The *Uselman* court also prudently held that sanctions must be imposed at the time of abuse, and by the judge then presiding. Again, time-of-abuse sanctions will encourage the deterrence of frivolous claims and result in less frivolous litigation.[95] Moreover, in requiring that the judge presiding at the time of sanctionable conduct impose the sanctions, the *Uselman* court eliminates imprecise Rule 11 rulings. The holding is also consistent with time-of-abuse *notice*, as a judge not sitting at the time of abuse would not have occasion to notify a Rule 11 violator that sanctions may be forthcoming.

3. *Opportunity to Respond*

Finally, the *Uselman* court minimized the suppression of creative advocacy by holding that those facing sanctions be allowed to respond to notice of a possible Rule 11 sanction.[96] Those facing sanctions will now have an opportunity to review the transcript before the sanction ruling.[97] Without such an opportunity, attorneys would be less inclined to litigate claims that had even a remote chance of being viewed as frivolous. The fear of having no opportunity to respond or no chance to review the transcript would "chill" the filing of such borderline claims.[98]

C. *Post-Summary Judgment Sanctions*

The *Uselman* court held that claims surviving summary judgment are not subject to Rule 11 sanctions following a trial predicated on those claims.[99] This holding limits the effectiveness of Rule 11. To be sure, this writer recognizes that most claims surviving summary judgment will not be subject to Rule 11 sanctions. The supreme court's holding, however, is faulty to the extent that it *absolutely* insulates from Rule 11 those claims surviving summary judgment.[100]

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11. Rule 11 has its own notice requirement as evidenced by the *Uselman* court's independent treatment of § 549.21 and Rule 11.

95. The *Uselman* court held that it was "incumbent upon the first pre-trial judge to award sanctions at the time of the claimed abuse, and certainly, to rule itself on any claimed violation which occurred while that court presided." *Uselman*, 464 N.W.2d at 144.

96. *See id.*

97. *Id.*

98. Such claims are those claims that may be reasonably construed as either frivolous or legitimate. For example, a borderline claim would be one that seeks to break new ground in a given area of law, but that is perhaps not warranted by existing law. *See* FED. R. CIV. P. 11.

99. *Uselman*, 464 N.W.2d at 144.

100. The drafters of Rule 11 contemplated that, in the case of pleadings, the sanctions issue will often be determined at the end of litigation. *See* FED. R. CIV. P. 11 advisory committee notes to 1983 amendment. For cases involving sanctions against

Frivolous claims may survive a motion for summary judgment. For example, after a claim survives summary judgment, factual circumstances or the law may change, thus rendering the repeated assertion of the claim untenable.[101] Under *Uselman*, however, these frivolous claims are insulated from Rule 11 and may therefore be endlessly litigated.

The United States Court of Appeals for the Fifth Circuit has pointed out that "a determination of whether or not a pleading is well grounded in law and fact may not be feasible until after an evidentiary hearing on a motion for summary judgment *or even after the parties have presented their case at trial.*"[102] Thus, judges may inadver-

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parties previously surviving summary judgment, see Jennings v. Joshua Indep. Sch. Dist., 869 F.2d 870 (5th Cir. 1989) (upholding award of sanctions after claim survived summary judgment because attorney failed to make reasonable inquiry of minimal facts); Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) (refusing to uphold sanctions imposed after summary judgment where sufficient factual basis existed to bring malicious prosecution claim); Steinberg v. St. Regis/Sheraton Hotel, 583 F. Supp. 421, 424 (S.D.N.Y. 1984) (upholding sanctions imposed after summary judgment where no factual basis existed).

101. The *Uselman* court cited Greenberg v. Hilton Int'l Co., 870 F.2d 926, *vacated and remanded on other grounds*, 875 F.2d 39 (2d Cir. 1989), to support the proposition that a party surviving a summary judgment motion with its major claims intact should not be subject to sanctions following a trial predicated on the surviving claims. *Uselman*, 464 N.W.2d at 144. The *Greenberg* decision, however, did not stand for the proposition that claims surviving summary judgment are insulated from Rule 11. The Second Circuit recognized that frivolous claims may be endlessly litigated if a claim surviving summary judgment is insulated from Rule 11. *Greenberg*, 870 F.2d at 937. Accordingly, the *Greenberg* court suggested that sanctions were possible after the claim survived summary judgment.

The *Greenberg* case involved a Title VII claim brought by an employee against his former employer. The claim survived summary judgment. Subsequently, however, the law changed, rendering the claim frivolous. The point made by the *Greenberg* court was that the employee could not be sanctioned given her information at the time of the summary judgment. *Id.* The *Greenberg* court did not imply that, under all circumstances, claims surviving summary judgment would be insulated from Rule 11 sanctions. This, however, is what the *Uselman* court inaccurately implies.

The language in *Greenberg* explicitly provides that there *are* situations where a party could be sanctioned for claims that earlier survived summary judgment. The court stated:

> A [plaintiff] may not be sanctioned under Rule 11 . . . so long as: (i) the defeat of the [summary judgment] motion was not obtained by misleading the court; (ii) the adversary has not attempted through some means on the record to obtain withdrawal of that claim based on a change or clarification of existing law; and (iii) the claim has not been repeated in papers filed after the change or clarification of law.

Greenberg, 870 F.2d at 937. Thus, sanctions would be warranted if the either plaintiff misled the court or, following the change in the law, the party opposing the claim had unsuccessfully attempted to get the claim dismissed while the plaintiff repeatedly asserted it.

102. Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 881 (5th Cir. 1988) (emphasis added).

tently deny a motion for summary judgment.[103] Judges may be unsure whether, at the time the summary judgment motion is brought, a claim is frivolous. Moreover, judges may deny summary judgment believing that more discovery is necessary. These types of rulings should not insulate claims from Rule 11.

Parties surviving summary judgment may claim reliance on the judge's ruling. They may argue that the ruling caused them to disbelieve that there was any reason that their claim was frivolous. If, however, the claim that survived summary judgment (for example, due to want of discovery or judicial indifference) turns out frivolous, the sanctionable conduct should not be insulated from Rule 11. If it were, Rule 11 would, in effect, tie the court's hands from the time of summary judgment denial. In this way the *Uselman* decision imposes a deadline after which the party bringing the claim is insulated from Rule 11 regardless of whether the party's conduct merits sanctions. To an extent, the court's holding encourages parties to overcome summary judgment motions rather than deterring them from sanctionable conduct. The purpose of Rule 11, however, is not to limit judicial action but rather to govern attorney conduct.[104] Thus, attorneys who are deserving of Rule 11 sanctions should be sanctioned regardless of the summary judgment rulings.

V. Conclusion

Uselman v. Uselman is significant because it provides guidelines for future sanctions by establishing that deterrence is the primary policy underlying Rule 11.[105] These guidelines will facilitate a uniform procedural approach to the imposition of sanctions. After *Uselman*, those facing Rule 11 sanctions in Minnesota can rely on the following: timely notice of possible sanctions, an opportunity to respond to that notice, a prompt ruling on a motion for sanctions, and the assurance that Rule 11 sanctions will be imposed only by the judge presiding at the time of the offending conduct.[106]

This Case Note is critical, however, of the supreme court's decision to insulate parties who survive summary judgment from sanctions following a trial on those surviving claims. The rigid holding

103. *See* Schwarzer, *supra* note 37, at 1019 (acknowledging that, despite the numerous mechanisms for dismissing claims, including Federal Rules 12, 16, and 56, judicial indifference may be responsible for incorrect summary judgment rulings).

104. *See supra* part IV-A.

105. *See supra* part II-C for discussion of controversy regarding the underlying policy of Rule 11.

106. *See* Uselman v. Uselman, 464 N.W.2d 130, 144-45 (Minn. 1990) (holding that unless these guidelines are followed, it will be an abuse of discretion for a Minnesota trial court to impose Rule 11 sanctions); *see also supra* note 5 and accompanying text (discussing the abuse of discretion standard used in Rule 11 matters).

allows frivolous claims that survive summary judgment to be endlessly litigated regardless of knowledge that a particular factual or legal position is no longer tenable.

Matthew T. Boos