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Media Countersuits in Libel Law: A Statutory and Judicial Framework

by
Kyu Ho Youm*
and
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Introduction

Publication of defamatory falsehoods is recognized as a criminal offense or an actionable wrong, or both, in nearly every modern system of law. However, libel law frequently collides with freedom of the press.¹ In the United States, as in other democracies, libel is considered the principal legal threat to the press.²

A surge in libel lawsuits against the media in the early 1980s brought the dilemma into sharper focus.³ Judge Robert Bork, then of the United States Court of Appeals for the District of Columbia, argued in 1984: “It arouses concern that a freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion.”⁴

Faced with costly expenses of libel lawsuits,⁵ the American press during the past decade started resorting to counterclaims as an “aggressive-offense-is-the-best-defense” tactic in response to what it considered to be meritless libel actions. Journalist-turned-media attorney Bruce Sanford wrote recently that counterclaims have become “more prevalent” in libel cases as media defendants grow more resentful of the frivolous suits filed against them for publishing negative stories.⁶

The late Washington syndicated columnist Drew Pearson’s judicial aggressiveness in libel litigation, dating back more than a half-century, illustrates that journalists historically have been willing to play the role of plaintiffs in courts of law. During a career that spanned nearly four decades, Pearson’s columns resulted in the filing of more than one hundred libel actions.⁷ Extremely successful as a

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¹ Justice Brennan of the United States Supreme Court has noted that “[w]hatever is added to the field of libel is taken from the field of free debate.” Milkovich v. Lorain Journal Co., 497 U.S. 1, 36 (1990) (Brennan, J., dissenting) (citations omitted).
³ See generally RODNEY A. SMOLLA, SUING THE PRESS (1986) (analyzing recent lawsuits brought against the media).
⁵ See Bruce W. Sanford, Libel Suit, Countersuit, WASH. JOURNALISM REV., June 1985, at 16 (noting the “breathtaking cost of an adequate legal defense,” which ranged from $250,000 for a “simple” trial to eight figures for high-profile cases).
⁶ BRUCE W. SANFORD, LIBEL AND PRIVACY 696 (2d ed. 1994).
⁷ The suits were brought against Pearson himself or newspapers that published his column. Included in this figure are 68 actions brought by Ohio Congressman Martin L. Sweeney. Douglas A. Anderson, Drew Pearson: A Name Synonymous with Libel Actions, 56 JOURNALISM Q. 235, 235 n.1 (1979).
libel suit defendant, Pearson paid court-directed damages in only one action brought against him during his lifetime.  

Though he prided himself on being thick-skinned, Pearson did not take lightly some of the harsh criticism often directed at him. The columnist knew the odds against winning but nevertheless filed at least fifteen libel actions. A pioneer in Washington-based political reporting and a staunch defender of First Amendment freedoms, Pearson seemed to relish and take great delight in going on the offensive—a strategy that media outlets are using with greater frequency in today's legal climate.

Media countersuits have attracted more attention from journalists and scholars in recent years than ever before. Several journalism and legal commentators have examined the feasibility of media countersuits and other related issues. Thus far, however, the statutory and judicial status of media countersuits has rarely been analyzed. This is especially the case with often-cited treatises on libel law.

This study examines media libel countersuits to address the critical issue raised by some commentators in the mid-1980s about the uncertain value of the suits. Three questions provide the main focus of


9. ANDERSON, supra note 8, at 47, 236.

10. Id. at 244.

11. See discussion infra part II.B.


14. See Jay Cutting & Lee Levine, Fighting Back—Media Lawyers Are Developing New Tactics to Discourage Libel Suits, 3 COMM. LAW., Fall 1985, at 12-13 (stating that "[u]nfortunately, the law in this area [media countersuits] is so new, and the number of reported decisions so few, that it is difficult to draw any conclusions as to the efficacy of these related causes of action" such as abuse of process and malicious prosecution, as well as motions for attorney fees).
this study. First, why do American media organizations countersue? Second, what is the statutory and judicial status of media countersuits in the United States? And finally, what implications do media countersuits carry for American libel law?

I

Media Fighting Back: Why?

When compared to other legal systems, such as Great Britain’s, American libel law gives less respect to reputation than to press freedom. The contrast between English and American laws is derived not so much from the devaluing of reputation in America as from a “special position” of the press in the American system against inhibiting libel laws. Nevertheless, the United States Supreme Court has recognized the social value of a good name: “Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”

The primary objectives of American libel law are not limited to protection of the “relational interest” of an individual from unwarranted injury. The law provides a compensation mechanism for those who suffer economic loss or emotional distress from defamation. It further promotes human dignity by providing a civilized forum in which a court can declare that the libelous attack on the victim was unjustified. Libel law also serves two important societal interests. First, it deters the publication of false and injurious speech. Second, the law provides a check on the media’s power by opening up the media’s editorial processes to public scrutiny.

But what would result if libel law did not perform any of its assumed functions, relational or societal? In other words, is it possible for libel law to be misused to seek interests unrelated to the policy justifications underlying it? Professor Marc Franklin of Stanford Law School has argued that “perhaps half of all libel cases are ‘nuisance’ cases, in the sense that they have no plausible hope for ultimate success when measured by current legal standards.”

17. SMOLLA, supra note 13, at 1-16.
18. Id. at 1-16.1 to 1-17.
19. Id. at 1-17 to 1-18.
20. Id. at 1-17.
21. Id. at 1-17 to 1-18.
sor Sam G. Riley of Virginia Tech agrees. He claimed in 1982 that “60-65% of all libel suits are of the ‘nuisance’ variety.”

Media law scholar Donald Gillmor of the University of Minnesota wrote in 1992 that libel suits have become a “devastatingly effective” weapon against those who dare to question those in power. Immuno A.G. v. Moor-Jankowski, a 1991 libel case, exemplifies how libel litigation can be an effective means invoked by the powerful to silence a media organization. Jan Moor-Jankowski published a letter to the editor in his academic journal that criticized Immuno A.G., an Austrian multinational corporation, for its plan to establish a West African research facility.

In December 1984 Immuno A.G. sued Moor-Jankowski and seven others for libel, claiming $400 million in damages. The New York trial court in Manhattan denied Moor-Jankowski’s motion for summary judgment. A New York appellate court in January 1989, however, reversed the trial court’s decision on the ground that the statements in the letter were nonactionable as opinion. Significantly, the appellate court took note of Immuno’s attempt to employ a libel action as an instrument of harassment and coercion, which the court termed “inimical to the exercise of First Amendment rights.”

In December 1989 the New York Court of Appeals, the state’s highest court, affirmed the appellate division’s dismissal of Immuno’s libel action. In the meantime, the United States Supreme Court, ruled in Milkovich v. Lorain Journal Co. that there is no wholesale

23. Riley, supra note 12, at 566 (quoting Larry Worrall, President and General Counsel of Media Professionals Insurance Co.).
26. Immuno A.G. v. Moor-Jankowski, 14 Media L. Rep. (BNA) 1821, 1822-23 (N.Y. Sup. Ct. 1987). Immuno planned to use captured wild chimpanzees for medical research on hepatitis and then return them to the wild. Id. In the letter, Immuno’s plan was characterized as a violation of international policies protecting chimpanzees as an endangered species. Id. at 1825.
30. Id. at 137.
First Amendment exemption of opinion from libel suits. The Court subsequently vacated the Immuno decision of the New York Court of Appeals and remanded it for further consideration. In 1991 the New York Court of Appeals reaffirmed its earlier ruling, arguing that the letter to the editor was protected opinion under the New York Constitution and the common law of New York.

Moor-Jankowski, the victorious defendant in what columnist Anthony Lewis termed as perhaps “the single most outrageous libel case—the worst abuse of the legal process” in American law, wrote about the “real-life” impact of the Immuno action upon him:

The court victory may still not effectively protect me or other editors of small professional journals from the chilling effect of suits by wealthy corporations using our legal system to discourage criticism of their activities. We need a legal deterrent to prohibit costly, meritless libel suits that misuse the court system to undermine our First Amendment.

The Immuno case is strikingly similar to an increasing number of SLAPP (Strategic Lawsuits Against Public Participation) suits. A California appellate court characterized SLAPP suits as “an effort to punish political opponents for past behavior, an attempt to preclude their future political effectiveness, the desire to warn others that political opposition will be punished, the use of the judicial system as part of an economic strategy, or some combination of the above attributes.” According to a 1993 study the average SLAPP suit involves $9 million in damages and takes three years to litigate. About ninety percent of such suits end in the defendants’ favor “if they can hang on that long.”

Defamation is the most frequently used cause of action in SLAPP suits. In marked contrast with most libel actions, however, SLAPP suits are aimed at private individuals and organizations. To date, few

37. For a seminal discussion of SLAPP suits, see Penelope Canan & George W. Pring, Strategic Lawsuits Against Public Participation, 35 SOC. PROBS. 506 (1988).
40. Id.
41. Canan & Pring, supra note 37, at 511.
SLAPP suits have been filed against the media. While most media organizations retain legal counsel for libel advice and often maintain libel insurance policies, "most of the citizens caught up in SLAPP libel suits lack such resources and expertise."  

*Maple Properties v. Harris* typifies SLAPP suits. This $63 million libel action resulted from a letter to the editor published in the *Los Angeles Times* and an open letter to the mayor published in the *Beverly Hills Courier*, among others. In their letters Betty Harris, Chairperson of the Committee to Save Beverly Hills, and others criticized a proposed condominium development by Maple Properties and supported a referendum against the development. Two months after the development project was rejected in the referendum, Maple Properties sued Harris and others for libel. Neither the *Los Angeles Times* nor the *Beverly Hills Courier* was named in the libel suit. In a separate but related case, the California Supreme Court ruled that the letters could not be capable of a defamatory meaning. On remand the trial court dismissed the action. The California appellate court affirmed the dismissal.

Similarly, *Monia v. Parnas Corp.* started in 1980 when Parnas Corporation, a San Francisco real estate developer, sued Victor Monia and others for libel after they circulated a flier linking Parnas to alleged conflicts of interest involving the mayor of Fremont. Parnas asked for $40 million in damages. In early 1983, however, the libel suit was dismissed for lack of prosecution.

One of the most effective ways to fight SLAPP suits is to counter-sue through "SLAPP-backs" on the grounds that the original actions were filed from spite and maliciousness in violation of Rule 11 of the Federal Rules of Civil Procedure or state malicious prosecution laws. In 1991 for example, Monia won $260,000 in damages in his SLAPP-back suit against Parnas for its malicious prosecution action.

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42. THE FUND FOR FREE EXPRESSION, SLAPPING DOWN CRITICS: HARASSMENT LIBEL SUITS AND TORT ACTIONS AIM TO CHILL U.S. CITIZEN ACTIVISTS 3 (1991) [hereinafter SLAPPING DOWN CRITICS].
44. Id. at 536-37 nn.2-4.
46. Maple Properties, 205 Cal. Rptr. at 535.
47. Id. at 543.
49. Id. at 430.
50. Id.
51. For a discussion of Rule 11 and state malicious prosecutions laws, see infra notes 83-89 and accompanying text.
52. Monia, 278 Cal. Rptr. at 431.
Also, Harris and other defendants in *Maple Properties* were awarded $20,000 in attorney fees and court costs for a frivolous appeal. The California appellate court said: “[T]he practice of penalizing frivolous appeals reflects a fear that irresponsible litigants may abuse their right of access to the judicial system.” But the SLAPP-back approach carries several drawbacks because it can be “long and arduous” and courts often disfavor it because it places an additional burden on the judicial system.

Several states including California, New York, and Washington have enacted anti-SLAPP statutes to deter SLAPP filers since 1989. Other states such as New Jersey, Rhode Island, and Illinois have considered passing similar legislation. Under the New York anti-SLAPP statute plaintiffs must prove “actual malice” with “clear and convincing evidence.” The law also provides for SLAPP defendants’ recovery of damages including attorney fees.

In connection with the SLAPP-back suits, it is hardly a surprise that media libel countersuits, which started gaining favor in the early 1980s, are considered by an increasing number of journalists and media attorneys to be a valuable strategy against frivolous libel cases. Henry Kaufman, General Counsel for the Libel Defense Resource Center (LDRC), has noted the “psychological effect” that the threat of countersuits can have on plaintiffs who ponder whether to file frivolous libel actions.

No matter how time and money intensive fighting back in the courts might be, the mindset of some of the nation’s editors is apparent. David Hawpe, Editor and Vice President of *The Courier-Journal* in Louisville, Kentucky, said the threat of countersuits should have a chilling effect on potential plaintiffs who might consider filing meritless cases simply to harass and annoy the media. He said that the specter of “countersuits might penetrate the public consciousness

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54. *Id.* at 541 (citation omitted).
59. *SLAPPING DOWN CRITICS, supra* note 42, at 12.
61. *Id.* § 70-a.
even more, further chilling would-be plaintiffs who are considering filing groundless claims."\(^{64}\)

However, the road traveled by media organizations that pursue libel countersuits is rarely a smooth one. It is not an easy task to sue for meritless suits. David Bodney, media lawyer and former newspaper editor in Phoenix, said that the deck is stacked heavily against successful countersuits.\(^{65}\) "The desire to combat spurious libel and privacy litigation has increased," he emphasized.\(^{66}\) "But the ability to recover under the traditional statutes and theories is very limited."\(^{67}\) Media attorney Arthur Hanson cautioned: "Even if states allowed the media to sue for frivolous cases, errors in stories probably would weaken the law."\(^{68}\)

Nevertheless, a countersuit still can prove a viable option for the press to fight back in libel litigation insofar as an appropriate set of facts is presented. Indeed, Rodney Smolla has characterized countersuits as a "newly emerging technique for 'raising the ante' in antimedia litigation."\(^{69}\) Libel lawyer Robert Sack in 1985 offered a working road map for media companies exploring libel countersuits:

1. Proof that suit was brought for reasons of harassment, particularly if the plaintiff has been involved in a pattern of similar litigation.
2. A case that seems frivolous on its face, where what was published is obviously and clearly true or privileged . . . .
3. A situation where the case is not about the particular plaintiff. For example, a journalist suing for libel on the basis of the statement, "all journalists take bribes."
4. Something that is plainly a statement of opinion . . . .
5. A statement that is clearly not defamatory.
6. A plaintiff who refuses to discontinue the suit even when, during the course of litigation, it becomes certain there is not sufficient fault on which a verdict can rest.\(^{70}\)

Has this road map helped media organizations to cope with libel suits through the filing of countersuits? If so, to what extent and in what way? To answer these and related questions, an analysis of the

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\(^{64}\) Id.

\(^{65}\) Telephone Interview with David Bodney, attorney with the law firm of Steptoe & Johnson, Phoenix, Ariz. (Jan. 26, 1994).

\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) Ruhga, \textit{supra} note 62, at 9 (quoting Arthur B. Hanson, attorney with the law firm of Hanson, O'Brien, Birney & Butler, Washington, D.C.).

\(^{69}\) SMOLLA, \textit{supra} note 13, at 13-17.

statutory and judicial framework on media countersuits before and after 1985 is in order.

II

Statutory and Judicial Framework

Because meritless suits have been an issue in American courts since the early nineteenth century, statutes and courts at both the federal and state levels have devised several viable mechanisms against frivolous actions. Among the mechanisms to stop abusive libel litigation have been the statutorily or judicially recognized countersuits for abuse of process, malicious prosecution, and actions for attorney fees and costs. Equally significant are various procedural rules adopted by states as well as by the federal government. For example, the 1983 version of Rule 11 of the Federal Rules of Civil Procedure imposes sanctions of attorney fees on opposing counsel, law firms, or parties for frivolous litigation. One commentator wrote that the rule "finally begins to hold lawyers and litigants accountable for the candor and plausibility of the accusations" they file against others.

A. Statutes and Rules

Media organizations can rely on 42 U.S.C. § 1983 to counter non-meritorious libel litigation by public officials. Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 was enacted to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"

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72. FED. R. CIV. P. 11. For a detailed discussion of Rule 11, see infra notes 83-89 and accompanying text.
In invoking § 1983 in media countersuits, a plaintiff must prove that the defendant knew or reasonably should have known that his or her conduct would violate the plaintiff's right of freedom of the press under the First Amendment. While § 1983 may apply to anyone who violates the media organization's right to report freely, it is limited "almost without exception, [to] state or local officials."77

"As a general rule" in American law, the West Virginia Supreme Court noted, "each litigant bears his or her own attorney fees absent express statutory, regulatory, or contractual authority for reimbursement."78 But the American rule, as distinguished from the English rule,79 has been subject to a number of statutory as well as common law exceptions.80 For example, 28 U.S.C. § 1927 imposes "excess costs, expenses, and attorney's fees" against any attorney who "so multiplies the proceedings in any case unreasonably and vexatiously."81 Section 1927 is directed only at attorneys, but courts can exercise their "inherent power" to impose fees against either or both the plaintiff and his or her counsel.82

The most widely known avenue to media countersuits has been a motion under Rule 11 of the Federal Rules of Civil Procedure, as revised in 1983.83 Rule 11 provides in pertinent part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law 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.84

79. The English rule requires that the "losing party ... pay the winner's legal expenses ..." and finds its genesis in a thirteenth century English statute that permitted successful plaintiffs to recover "costs," including attorney fees. Synanon Found. v. Bernstein, 517 A.2d 28, 35 n.4 (D.C. 1986).
80. The United States Supreme Court, recognizing a bad faith exception to the American rule in 1975, stated that a prevailing defendant is entitled to an award of attorney fees if a plaintiff brings or maintains an action without adequate factual basis and in bad faith. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975).
82. Cutting & Levine, supra note 14, at 12.
83. This Section focuses on the 1983 version of Rule 11 in that it has been applied in various media libel countersuits. It should be noted, however, that Rule 11 was amended in April 1993 and went into effect in December 1993. For a discussion of the newly revised Rule 11 and its implications for media countersuits, see infra notes 251-58 and accompanying text.
84. FED. R. CIV. P. 11.
Rule 11 is intended to "discourage frivolous or dilatory litigation, to punish abusive litigants, and to compensate opposing parties whose expenses have been driven up or who have been otherwise prejudiced." It serves the court's objective of "streamlining court dockets and facilitating case management." 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." Until 1993, once a court determined that Rule 11 was violated, the imposition of appropriate sanctions had been mandatory. Included in the sanctions were the other party's "reasonable" costs and attorney fees incurred as a result of the frivolous filing.

Thus far, the 1983 version of Rule 11 has been adopted by several states, with few or various modifications. Maine and Rhode Island, for example, have borrowed almost verbatim from the federal rule. The Alabama and South Carolina versions of Rule 11, however, provide for "appropriate disciplinary action" against an attorney for a willful violation of the rules or "if scandalous or indecent matter is inserted." In addition to sanctions for improper pleadings, almost every state implements rules authorizing the award of attorney fees for unmerited litigation tactics. For example, the Litigation Accountability Acts of Alabama and Mississippi provide for attorney fees if an action is "without substantial justification," and "for delay or harassment," or if an attorney expands the proceedings by other improper con-

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


duct. In Arizona the award of attorney fees in frivolous actions is mandated: “Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith.”

Tennessee law allows costs to prevailing parties, but attorney fees are not recoverable in civil actions except as authorized by statute. At present, there is no statutory recognition of the award of attorney fees in defamation actions. In South Dakota while costs will “automatically” be awarded to prevailing defendants in libel cases, attorney fees cannot be recovered after a successful defense in libel litigation.

Arkansas and Oklahoma are specific in limiting the recovery of attorney fees. Under Arkansas law a prevailing party may recover attorney fees not exceeding $5,000 or ten percent of the amount in dispute, whichever is less, where the action or defense is filed or continued “in bad faith” solely for harassment or malicious injury of the other party. Conversely, a 1986 Oklahoma statute limits the amount of “reasonable” costs and attorney fees for meritless actions to no more than $10,000.

The South Carolina Frivolous Civil Proceedings Sanctions Act of 1988 allows the award of attorney fees and costs for malicious prosecution. Washington is another state that permits counterclaims for malicious prosecution. Section 4.24.350 of the Revised Code of Washington reads:

In any action for damages . . . a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part

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of a conspiracy to misuse judicial process by filing an action known
to be false and unfounded.\footnote{Id. For any frivolous civil action, the Washington statute allows the prevailing party to recover attorney fees as well as costs. \textit{See id.} \S 4.84.185.}

Kansas and several other states have taken steps to ensure that
sanctions against frivolous suits will not discourage potential litigants
from pursuing genuine legal actions.\footnote{Id.} A 1982 Kansas statute states:
"The purpose of this section [on assessment of costs of frivolous
claim] is not to prevent a party from litigating bona fide claims or
defenses, but to protect litigants from harassment and expense in clear
cases of abuse."\footnote{Id.} Indeed, the Revised Statutes of Nebraska disallow
assessment of attorney fees or costs so long as a claim or defense is
asserted by an attorney or party "in a good faith attempt to establish a
new theory of law" or a "[v]oluntary dismissal is filed as to any claim
or action within a reasonable time after the attorney or party filing the
dismissal knew or reasonably should have known that he or she would
not prevail on such claim or action."\footnote{Id.}

B. Judicial Interpretations

Bruce Sanford noted an "accelerating" trend among media de-
defendants to seek counterclaims in libel suits.\footnote{Sanford, \textit{supra} note 5, at 17.} In 1985 he stated,
"Much more realistic than a wholesale change in the rules of the litiga-
tion game may be the accumulation of a case-by-case body of law
that establishes the appropriateness of nailing plaintiffs for pursuing
meritless claims."\footnote{Id.}

Have enough media countersuits to date been accumulated to
provide the "publishing 'rules of the road' which, if followed, will
shield prudent publishers" from libel actions?\footnote{Id.} The latest count of
media countersuits in libel law indicates that the answer to the ques-
tion should be in the affirmative. Research for this study has found at
least fifty libel countersuits that have involved journalists and media
organizations since the early 1980s.\footnote{For a list of media libel countersuits, contact the authors.}
1. Media Countersuits Prevail

[Nemeroff v. Abelson], which legal commentators have characterized as "perhaps the most celebrated and authoritative" media countersuit, illustrates how a media defendant can prevent frivolous litigation from being misused as a weapon to harass the media. Although not a libel action, Nemeroff resulted from publication of several articles in Barron's Business and Financial Weekly in 1976 and 1977, which criticized the stock of Technicare Corporation. Following publication of the articles written by Alan Abelson, a columnist for Barron's, the price of Technicare stock dropped.

Robert Nemeroff, a shareholder of Technicare, sued Abelson, the editor and the publisher of Barron's, and several investors, claiming that they had conspired to short-sell stock in his company in violation of the Securities and Exchange Act. Nine months after the complaint was filed, Nemeroff amended it to charge that the investors induced Abelson to write negative stories about Technicare. More than one year after filing the original action, Nemeroff agreed to dismiss the action voluntarily and the defendants moved for attorney fees.

In its initial decision in Nemeroff, the district court concluded that Nemeroff and his lawyers acted "with malice" against the publishing defendants, but not against the investors. The court agreed with the publisher that the objective of Nemeroff's suit was to force Barron's to stop publishing negative articles about Technicare. "[W]hile this is not a First Amendment case," the court stated, "it is not inappropriate for the publishing defendants to argue that the court should not allow a party to misuse judicial processes as a vehicle for restricting the exercise of defendants' First Amendment rights." The court awarded the publisher $50,000 in attorney fees from Nemeroff and his lawyers. The court reasoned that at the time the complaint was filed,
Nemeroff and his lawyers had "no hard facts but only rumor and gossip" in support of the charges.\textsuperscript{119}

On appeal, however, the Court of Appeals for the Second Circuit held that Nemeroff and his attorneys had an adequate factual basis for commencing their suit.\textsuperscript{120} Thus, the publisher was not entitled to attorney fees under Rule 11. The court said that Rule 11 would be applicable only to complaints filed in bad faith.\textsuperscript{121} The court remanded the case, stating that attorney fees would be awarded to the defendants under 28 U.S.C. § 1927\textsuperscript{122} if Nemeroff's litigation was intentionally dilatory subsequent to filing or if he failed to withdraw the action even after facts available to him indicated that failure amounted to bad faith.\textsuperscript{123}

On remand the district court affirmed the award of $50,000 assessed against Nemeroff and his counsel on the basis of the plaintiff's dilatory conduct after filing, and his continuation of litigation after the alleged facts relating to the claim had proved unfounded.\textsuperscript{124} The court did not cite § 1927 or Rule 11. Instead, the court relied on case law for exercising its power to impose sanctions for bad faith litigation.\textsuperscript{125} The Second Circuit upheld the decision.\textsuperscript{126} While noting "the thinness of Nemeroff's case and the questionable origins of his suit,"\textsuperscript{127} the court of appeals said that the suit was continued in bad faith, which was "well supported by the particular circumstances" of the suit.\textsuperscript{128}

While Rule 11 was not applied in Nemeroff, it was applied by a federal district court in \textit{Braden v. News World Communications Inc.}\textsuperscript{129} The 1993 media countersuit followed the District of Columbia Superior Court's decision in favor of the defendant in a libel action.\textsuperscript{130} In 1991 Thomas Braden, former co-host of the CNN \textit{Crossfire} program, sued the media defendant for a defamatory story published in \textit{The Washington Times}.\textsuperscript{131} The article stated that the CNN decision to terminate Braden as co-host of CNN's \textit{Crossfire} was related to an illness

\textsuperscript{119} \textit{Id.} at 640.
\textsuperscript{120} \textit{Nemeroff}, 620 F.2d at 349.
\textsuperscript{121} \textit{Id.} at 350.
\textsuperscript{122} For a discussion of 28 U.S.C. § 1927, see \textit{supra} notes 80-81 and accompanying text.
\textsuperscript{123} \textit{Nemeroff}, 620 F.2d at 350-51.
\textsuperscript{124} \textit{Nemeroff}, 94 F.R.D. at 141, 145, 146.
\textsuperscript{125} \textit{Id.} at 145 (citations omitted).
\textsuperscript{126} \textit{Nemeroff}, 704 F.2d at 661.
\textsuperscript{127} \textit{Id.} at 659.
\textsuperscript{128} \textit{Id.} at 660.
\textsuperscript{131} \textit{Id.}
that had left him "at times, on air [not] lucid."\textsuperscript{132} The superior court granted summary judgment to the media defendant, arguing that Braden, a public figure, did not establish the "actual malice" of the defendant in publishing the article.\textsuperscript{133}

The media defendant moved for sanctions, arguing that Braden and his attorney had failed to conduct reasonable pre-filing factual and legal inquiries.\textsuperscript{134} The court concluded that their inquiries into the relevant facts were reasonable.\textsuperscript{135} However, the court held that Braden and his counsel had failed to investigate the applicable law governing the "public figure" and "actual malice" standards in a libel case and that Rule 11 sanctions were warranted against them.\textsuperscript{136}

The court rejected Braden's "particularly implausible" argument that his status as an all-purpose public figure changed to that of a private figure when he left \textit{Crossfire}.\textsuperscript{137} The court was especially critical of Braden and his counsel's inquiry of the "actual malice" standing in the case. Braden asserted that the subject article involved a matter of private concern\textsuperscript{138} and that CNN was a non-media defendant.\textsuperscript{139} The court dismissed Braden's contentions on the issue of private concern as "at best, a misreading of legal standards and, at worst, a total fabrication."\textsuperscript{140} Further, the court characterized Braden's attempt to label CNN a non-media entity as "unsupported and so unfathomable as to border on the frivolous."\textsuperscript{141} Finally, the court determined that Braden's "actual malice" claims\textsuperscript{142} were unsupported by law or a good faith effort to extend, modify, or revise law.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id. at 2220.
\item \textsuperscript{134} \textit{Braden}, 22 Media L. Rep. (BNA) at 1066.
\item \textsuperscript{135} Id. at 1067-68.
\item \textsuperscript{136} Id. at 1068-76.
\item \textsuperscript{137} Id. at 1070-72. The court maintained that Braden had continuing access to the media after his termination as co-host of \textit{Crossfire}. Id.
\item \textsuperscript{138} Id. at 1072-73.
\item \textsuperscript{139} Id. at 1074.
\item \textsuperscript{140} Id. at 1073. Braden argued that \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders}, 472 U.S. 749 (1985), should apply to his case, but the court disagreed, stating that \textit{Dun & Bradstreet} "does not address the standard that should apply to public figures." Id. (emphasis in original) (citation omitted).
\item \textsuperscript{141} Id. at 1074.
\item \textsuperscript{142} In support of his "actual malice" argument, Braden offered "evidence" such as the defendants' publication of the article notwithstanding Braden's denial of the source's statement, the defendants' reliance on a single, unnamed source, and the defendants' publication of the article without investigating the unnamed source's statement that Patrick Buchanan, Braden's co-host of \textit{Crossfire}, was "upset," among others. Id. at 1075.
\end{itemize}
A Louisiana federal district court in *Carr v. Times-Picayune Publishing* used Rule 11 and 28 U.S.C. § 1927 to dismiss a libel suit against a newspaper company and impose sanctions. Jacqueline Carr claimed that the Times-Picayune Publishing Co. conspired with various state officials to violate her civil right to seek public office and damaged her reputation. The court found no specific factual allegations of any conspiratorial actions of the Times-Picayune against Carr.

The court stated in *Carr* that the plaintiff's complaint, in violation of Rule 11, was grounded in no theory of law or factual interpretation and was aimed only at harassing the media defendant. The court further ruled that the plaintiff violated 28 U.S.C. § 1927 by "unreasonably" increasing litigation costs and clogging the judicial system with her suit, which the court termed no more than a duplication of a previously dismissed action.

In *Martocchio v. Chronicle Broadcasting Co.* the California Court of Appeal affirmed the decision of the California Superior Court to assess sanctions of $216,460 against the plaintiffs. The plaintiffs sued the media defendant for broadcasting a series of reports accusing them of committing arson for profit. The trial court dismissed the lawsuit for failure to prosecute, and the court ordered the payment of the defendant's attorney fees. The California Court of Appeal ruled that the trial court did not abuse its discretion in awarding sanctions against the plaintiffs. The appellate court emphasized that the facts underlying the challenged broadcast were "indisputably" true.

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145. *Id.* at 96.
146. *Id.* at 97. The court stated: " Plaintiff alleges only that The Times-Picayune conspired with state officials, at some unspecified time, in an unspecified location, and in an unspecified manner, to somehow violate unspecified civil rights." *Id.* See also *Murphy v. Plain Dealer Publishing Co.*, 19 Media L. Rep. (BNA) 1556 (N.D. Ohio 1991).
148. 619 F. Supp. at 98. In a prior dismissed civil action, the plaintiff alleged that various state officials conspired to prevent her from exercising her right to run for public office by changing a home rule charter in St. Tammany Parish, Louisiana. *Id.* at 95.
150. *Id.* at 1735.
151. *Id.* Among other things, the California Court of Appeal called attention to the plaintiffs' "dogged resistance" to numerous discovery requests "without any good basis for that resistance," their apparent attempts to "prevent their own case from going to trial," and the filing of "a very brief, frivolous, untimely, and half-hearted opposition" to the defendants' motion for dismissal. *Id.* at 1736 (emphasis in original).
152. *Id.* at 1738-39.
153. *Id.* at 1735.
and that the plaintiffs offered no contrary evidence on the truth of the statement in question.\textsuperscript{154}

The "absolute privilege"\textsuperscript{155} and the "qualified privilege" were applied by the North Carolina Court of Appeals in affirming a trial court's ruling in a media countersuit.\textsuperscript{156} \textit{Ward v. Roy H. Park Broadcasting Co.}, a 1991 libel case, involved broadcasts about a malpractice action against Joseph Ward, medical director at University Nursing Center in Greenville, North Carolina.\textsuperscript{157} Ward claimed that the broadcasts were defamatory and that the defendants knew they were false.\textsuperscript{158} The trial court concluded that the broadcasts were privileged in that they were reporting on "a duly constituted judicial proceeding" and they were not made with "actual malice," which the public figure plaintiff failed to prove.\textsuperscript{159} The court imposed the sanction of attorney fees against the plaintiff.\textsuperscript{160} The North Carolina Court of Appeals, accepting the trial court's reasoning completely, concluded that the plaintiff's libel suit was improperly motivated\textsuperscript{161} and that the plaintiff did not investigate the relevant law of fact and the interpretations of law before filing his action.\textsuperscript{162}

Under Rule 11 the court can impose sanctions if a libel action is filed notwithstanding accurate quotations from the plaintiff.\textsuperscript{163} The district court in \textit{Willis v. Capital Cities Communications} ordered plaintiff James Willis and his counsel to pay the reasonable expenses including attorney fees.\textsuperscript{164} Willis claimed that he was defamed by

\begin{itemize}
\item \textsuperscript{154} \textit{Id.} at 1737-38.
\item \textsuperscript{155} Id. at 1737-38.
\item \textsuperscript{156} Under North Carolina libel law a defamatory statement is absolutely protected if made in the due course of a judicial proceeding. Burton v. National Bank of N.C., 355 S.E.2d 800, 802 (N.C. Ct. App. 1987) (quoting Jarman v. Offutt, 80 S.E.2d 248, 251 (1954)). Further, North Carolina libel law will not support a defamation action even if it is made with actual malice. \textit{Id.}
\item \textsuperscript{157} \textit{Id.} at 2312, 2316. The trial court applied North Carolina Rule of Civil Procedure 11 in awarding attorney fees of $13,450 to the media defendants. \textit{Id.} at 2319.
\item \textsuperscript{158} \textit{Id.} at 2316. The malpractice action was a matter of public record, and the media defendant offered Ward an opportunity for comment on the air "any time his name is mentioned" in the news broadcasts regarding the lawsuit. \textit{Id.}
\item \textsuperscript{159} \textit{Id.} See also Straitwell v. National Steel Corp., 905 F.2d 1530 (4th Cir. 1990).
\item \textsuperscript{160} \textit{Id.} at 2312, 2316. The appellate court cited the plaintiff's unsuccessful attempt to control future broadcasts relating to alleged abuses at his nursing home and his threat to sue if the media organizations did not retract the broadcasts in question before he filed the libel suit. \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Fed. R. Civ. P.} 11.
\item \textsuperscript{164} 13 Media L. Rep. (BNA) 1683, 1685 (D. Kan. 1986).
\end{itemize}
several statements published in the *Kansas City Star*. He denied making the statements that were attributed to him.

The defense attorney, after verifying the statements on the basis of the reporter's taped interview with Willis, suggested that Willis dismiss his lawsuit immediately. When the plaintiff refused to withdraw his libel action, the *Star* moved for summary judgment, which the district court granted. The *Star* then demanded sanctions against Willis and his attorney under Rule 11. The court concluded that neither Willis nor his attorney made a reasonable investigation into the facts prior to filing the libel complaint. It further said the plaintiff and his attorney continued with the lawsuit even after they were made aware of the truth of the statements upon which they had based their claim.

In *Lee v. Columbian, Inc.*, a 1991 libel case, a newspaper company won sanctions against Darrell Lee. Lee had sued the newspaper for publishing what was later found to be a truthful story, and he also asserted an outrage claim for a reporter's attempts to interview him by phone and in public places. The Washington Court of Appeals ruled that Lee's counsel filed the outrage complaint with no investigation beyond Lee's statement that he was "outraged" with the reporter. The court also stated that Lee's defamation claim was entirely misplaced because what was published in the defendant's paper was substantially accurate. The court argued that "[t]he most cursory investigation would have disclosed as much."

In *Mitchell v. Herald Co.* attorney fees were awarded to a newspaper company when Stephen Mitchell and his lawyer sued for libel for an article based on police reports. The article dealt with the plaintiff's argument with several neighbors and his arrest for assault and disorderly conduct. Mitchell claimed that the story was false and

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165. *Id.* at 1684.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 1685.
170. *Id.*
171. *Id.*
173. *Id.* at 219.
174. *Id.* at 220.
175. *Id.*
176. *Id.* See also McGhee v. Sanilac County, 934 F.2d 89 (6th Cir. 1991).
that the newspaper company was "grossly irresponsible" in publishing it. 178

The media defendant responded that Mitchell’s action lacked merit because he and his attorney should have known that the article was true and that the defendant was not grossly irresponsible in relying on sworn police reports. 179 The New York appellate court in Mitchell agreed that the plaintiff was collaterally estopped from contesting the truth of the story because of his criminal conviction for assault. 180 The court also noted that the bad faith of the plaintiff and his counsel was manifest in their failure to withdraw the action after being informed by the defense attorney that the claim was baseless. 181

In Beary v. West Publishing Co. the United States Court of Appeals for the Second Circuit imposed sanctions of double costs and damages against an attorney for filing a "frivolous" appeal of a summary judgment in a libel case. 182 The plaintiff, Patrick Beary, claimed that West’s advance sheet copy of a court opinion was defamatory because it falsely described him, an attorney, as a "deadbeat." 183 The district court ruled that the court opinion was not defamatory and that West was “absolutely privileged” in publishing the opinion. 184 On appeal the Second Circuit concluded that Beary’s appeal was completely frivolous and warranted double costs and $1,000 damages to West. 185

In Fisher v. Detroit Free Press, Inc. the Michigan Court of Appeals also granted sanctions against a plaintiff in a libel suit for taking "a vexatious appeal." 186 The libel suit resulted from a newspaper story that quoted a judge in another case as saying, “Fisher sought $15,000 for the equivalent of ‘loss of companionship of the sick tree.” 187 The trial court granted summary judgment to the media defendant but refused to impose sanctions. 188 On appeal the Michigan

178. Id. at 604.
179. Id.
180. Id. at 606.
181. Id. at 607. The court also noted, as further illustration of the bad faith of Mitchell and his counsel, that the complaint included the allegation that he was defamed by the headline, “Woman Raped,” of a separate article that had no relation to him. Id. at 606. The court stated: “No reader could reasonably conclude that the headline concerned plaintiff and no reasonable attorney could conclude other than that such allegation was frivolous.” Id. at 607.
182. 763 F.2d 66, 69 (2d Cir. 1985).
183. Id. at 68.
185. Beary, 763 F.2d at 69.
187. Id. at 767.
188. Id. The court ruled the article non-defamatory and privileged as an opinion. Id.
Court of Appeals imposed sanctions against the plaintiff because, as a licensed attorney, he could have had no "reasonable basis" to believe that his "frivolous" case would raise a meritorious issue to be determined by the appellate court.\(^{189}\)

2. **Media Countersuits Fail**

The news media have lost countersuits on at least sixteen reported occasions since 1980.\(^{190}\) Among the grounds for their losses have been failure to establish abuse of process or malicious prosecutions, failure to establish a violation of Rule 11 or similar state rules, and failure to establish a violation of federal or state statutes on frivolous litigation.\(^{191}\)

When Senator Paul Laxalt of Nevada was linked with organized crime in a series of articles published in the McClatchy newspapers in November 1983, he filed a libel suit.\(^{192}\) In *Laxalt v. McClatchy* the media defendant countersued, claiming violations of its First Amendment rights and abuse of process.\(^{193}\) McClatchy asserted that Laxalt had "used his power and influence as a United States Senator to punish [McClatchy] and to burden and chill the exercise of their first amendment rights."\(^{194}\)

The federal district court in Nevada dismissed the counterclaim, holding that Laxalt did not act "under color of law."\(^{195}\) Although Laxalt wrote a letter on Senate stationery demanding a retraction and the release to law enforcement agencies of the information and sources for the articles,\(^{196}\) the court said:

\(^{189}\) *Id.* at 769.


\(^{191}\) See cases cited *supra* note 190; see also discussion *infra* part II.B.2.


\(^{193}\) *Id.* at 739.

\(^{194}\) *Id.* at 746.

\(^{195}\) *Id.* at 747.

\(^{196}\) *Id.*
[A] public official must, to a certain extent, make demands that alleged libels be retracted. In that the official is required to do so, the simple fact that they are made emphatically and on official stationery does not indicate that they were also made under color of state or federal law.footnoteRef197

The court also rejected McClatchy's assertion that Laxalt's action was designed to harass the media defendant.footnoteRef198 Noting the "generous" Sullivan standards for libel defendants, the court held that to allow a countersuit under these circumstances would result in "exactly the form of 'double counting'" for the defendants that the Supreme Court has rejected.footnoteRef199

On McClatchy's abuse of process claim against Laxalt, the court said that "filing of a complaint alone cannot constitute the willful act necessary for the tort to lie."footnoteRef200 The court held that McClatchy had failed to establish any abusive measures Laxalt might have taken subsequent to filing the suit, such as minimal settlement offers and excessive motions filed to coerce a settlement.footnoteRef201

In Sallomi v. Phoenix Newspapers, Inc., a 1989 libel case, the Arizona Court of Appeals affirmed the trial court's denial of attorney fees for the media defendant.footnoteRef202 The Arizona Republic published stories on the basis of search warrants and a police booking slip relating to an investigation of a restaurant owned by the plaintiffs.footnoteRef203 The trial court, finding that the articles were a fair and accurate summary of the public records, applied the public records privilege to the stories.footnoteRef204 The Republic asked for attorney fees, arguing that the libel claim constituted harassment, was groundless, and in violation of Arizona law.footnoteRef205 The newspaper also maintained that the plaintiffs knew prior to filing their law suit that it would not be successful.footnoteRef206 The Arizona appellate court, however, ruled that the trial court's findings against

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footnoteRef197 Id. at 748.
footnoteRef198 Id. at 749.
footnoteRef199 Id. at 750 (relying on Calder v. Jones, 465 U.S. 783 (1984)).
footnoteRef200 Id. at 752.
footnoteRef201 Id.
footnoteRef203 Id. at 470-71. The articles described the restaurant as a "hangout for narcotics dealers and users." Id. at 470.
footnoteRef204 Id. at 472.
footnoteRef205 Id. at 473. The Republic used § 12-341.01, which reads in pertinent part: "Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith. In making such award, the court may consider such evidence as it deems appropriate." Ariz. Rev. Stat. Ann. § 12-341.01(C) (1993).
footnoteRef206 Sallomi, 771 P.2d at 474.
the Republic should be upheld because of the court's "personal contact" with the attorneys.\footnote{207}

In 1986 the United States Court of Appeals for the Second Circuit rejected Rule 11 sanctions in the case of \textit{Hansen v. Prentice-Hall, Inc.}\footnote{208} The media countersuit in that case grew from an allegedly libelous sentence published in the advance sheet edition of Prentice-Hall's court report on a case in which Lorentz Hansen was both trial and appellate counsel.\footnote{209} When Hansen sued Prentice-Hall for libel, the publishers moved for summary judgment and sanctions.\footnote{210} The district court granted summary judgment but denied sanctions.\footnote{211}

On appeal the Second Circuit dismissed as meritless Hansen's argument that the slip opinion in question was not a "fair and true report" of a court proceeding because the court opinion had been revised prior to its publication.\footnote{212} The Second Circuit, however, affirmed the district court's ruling that sanctions against Hansen were not warranted because he reasonably believed that his complaint was well grounded in fact and in existing law.\footnote{213} In denying sanctions to Prentice-Hall, the district court accepted Hansen's assertion that he had notified Prentice-Hall that he was attempting to have the defamatory sentence removed from the court opinion.\footnote{214}

More recently, the New York Supreme Court, Appellate Division, held in \textit{McGill v. Parker}:

While sanctions for prosecuting a frivolous action are available to a defendant in a defamation action where application of the dispositive privilege is so obvious that the action is clearly without any basis in fact or law, it is not enough that the action be meritless; it must be brought or continued in bad faith. What is required, in effect, is a showing that the plaintiff and counsel knew or should have known that the action lacked merit.\footnote{215}

\textit{McGill} involved several defamatory letters to the editor and one flyer.\footnote{216} One of the letters was published in the \textit{New York Times}.\footnote{217}
The subject of the letters and the flyer was a criticism of the plaintiffs' operation of stables for carriage horses.\textsuperscript{218} The New York appellate court found that the statements were not actionable because the plaintiffs failed to challenge their falsity.\textsuperscript{219} The court further held that the writings at issue were constitutionally protected opinion under the New York law.\textsuperscript{220} However, the court ruled that the plaintiff's suit was not "so blatantly" frivolous as to warrant sanctions nor was it an "improper" burden on the court's time.\textsuperscript{221} Accordingly, the court rejected the defendants' argument that the action was a "clear" illustration of a SLAPP suit.\textsuperscript{222}

In \textit{Oklahoma Publishing Co. v. Miskovsky} the Oklahoma Supreme Court affirmed the trial court's decision to deny the newspaper defendant's motion for sanctions.\textsuperscript{223} \textit{Miskovsky} arose from publication of editorials and cartoons criticizing the campaign tactics of George Miskovsky, an Oklahoma candidate for the United States Senate.\textsuperscript{224} Miskovsky filed suit in a county district court against Oklahoma Publishing but withdrew it without prejudice.\textsuperscript{225} He then filed a second suit in a different county.\textsuperscript{226} While the second suit was still pending, the newspaper publisher countersued and demanded attorney fees and costs from Miskovsky for his first libel action.\textsuperscript{227} It claimed that Miskovsky had sued and used the discovery process to prevent the news media from criticizing him and from supporting his opponent.\textsuperscript{228}

The trial court in \textit{Miskovsky} denied the request, arguing that the defendant was not "substantially" damaged by the plaintiff's dismissal.\textsuperscript{229} The Oklahoma Supreme Court, affirming the trial court's ruling, held that the action lasted for a relatively short time, that it was dismissed during the discovery and before the actual trial, and that

\begin{itemize}
\item \textsuperscript{218} \textit{Id.}.
\item \textsuperscript{219} \textit{Id.} at 98.
\item \textsuperscript{221} \textit{McGill}, 582 N.Y.S.2d at 99.
\item \textsuperscript{222} \textit{Id.} at 100.
\item \textsuperscript{223} 654 P.2d 596, 597 (Okla. 1982).
\item \textsuperscript{224} \textit{See Press Bites Back at Libel Suits, NEWS MEDIA & L., June/July 1981, at 24 [hereinafter Press Bites Back].}
\item \textsuperscript{225} \textit{Miskovsky}, 654 P.2d at 597.
\item \textsuperscript{226} \textit{Id.} In his second suit Miskovsky won a one million dollar verdict against the newspaper publisher. \textit{See Press Bites Back, supra} note 224.
\item \textsuperscript{227} \textit{Miskovsky}, 654 P.2d at 597.
\item \textsuperscript{228} \textit{Id.} at 598.
\item \textsuperscript{229} \textit{Id.} at 599.
\end{itemize}
"the expenditures were not wasted" because the parties could use the depositions taken in the action against another libel case.\textsuperscript{230}

The United States Court of Appeals for the Sixth Circuit also rejected sanctions against a plaintiff in \textit{Perk v. Reader's Digest Association, Inc.}\textsuperscript{231} In that 1991 media libel case, Ralph Perk, a former Cleveland mayor, sued the Reader's Digest Association for an article in which he was criticized for his financial mismanagement of the city.\textsuperscript{232} The district court granted summary judgment to Reader's Digest on the ground that Perk, as a public figure, could not prove "actual malice" on the part of the defendant in publishing the story.\textsuperscript{233} Nevertheless, the court refused to impose Rule 11 sanctions upon the plaintiff or his counsel.\textsuperscript{234} The court claimed that the plaintiff's failure to prove "actual malice" did not necessarily mean that his action was commenced or continued in bad faith.\textsuperscript{235} In affirming the district court's ruling, the Sixth Circuit briefly noted that the pleadings were not unmerited.\textsuperscript{236}

In the 1988 case of \textit{Walsh v. Bronson}, three newspaper reporters sued for malicious prosecution against the attorneys who represented the plaintiff in a libel action against them.\textsuperscript{237} The California Court of Appeal affirmed the trial court's summary judgment in favor of the attorneys because the reporters failed to pass the malicious prosecution test.\textsuperscript{238} \textit{Walsh} was an outgrowth of a libel suit that stemmed from a series of articles published in the \textit{Fresno Bee}.\textsuperscript{239} Edward Bronson and two other lawyers were retained by Edward Kashian, who was described as a member of the "Fresno Mob" in the stories.\textsuperscript{240} While the libel suit was settled between Kashian and McClatchy Newspapers, publishers of the \textit{Bee}, Denny Walsh and other reporters chose not to participate in the settlement.\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{230} Id.
\item \textsuperscript{231} 931 F.2d 408 (6th Cir. 1991).
\item \textsuperscript{232} Id. at 409.
\item \textsuperscript{233} Perk v. Reader's Digest Ass'n, 17 Media L. Rep. (BNA) 1115 (N.D. Ohio 1989).
\item \textsuperscript{234} Id. at 1120-21.
\item \textsuperscript{235} Id. at 1121.
\item \textsuperscript{236} Perk, 931 F.2d at 413.
\item \textsuperscript{237} 245 Cal. Rptr. 888 (Ct. App. 1988).
\item \textsuperscript{238} Id. at 894-95. The California Court of Appeal set forth the malicious prosecution test as follows: "To sustain an action for malicious prosecution of a civil proceeding the plaintiff must establish that the prior action: (1) terminated in his or her favor, (2) was filed without probable cause and, (3) was initiated by the defendant(s) with malice." Id. at 890.
\item \textsuperscript{239} Id. at 889.
\item \textsuperscript{240} Id. at 891.
\item \textsuperscript{241} Id. at 889-90.
\end{itemize}
In their malicious prosecution action, the reporters asserted that the lawyers could not have had probable cause to believe that the reporters "actually" published the defamatory stories complained of because their names did not appear in by-lines on the articles.242 The California appellate court rejected the assertion on the ground that the lawyers' pre-filing investigation established probable cause to believe the reporters' participation in the publication of the stories and to believe the stories were false and not privileged.243

III
Implications of Media Countersuits

As illustrated by the early legal battles of Drew Pearson, one of Washington's pioneer investigative reporters and columnists, journalists have been fighting back as plaintiffs throughout much of this century. The contemporary surge can be traced in large part to a 1983 watershed case, Nemeroff v. Abelson.244 Noting the publishing defendants' argument that judicial processes should not be misused as a vehicle for restricting freedom of the press,245 the federal district court in New York, to an extent, opened the door for and indirectly encouraged subsequent media countersuits. In essence, Nemeroff sent a message to the media: Make no mistake, it is difficult to take the offensive and win, but it is possible.

Clearly, the courts have become increasingly intolerant of those plaintiffs whose main goal in litigation is not to right a wrong—and win—but is simply to harass and hurt. The Supreme Court of Appeals of West Virginia held, "Although there is an undeniable interest in the maintenance of unrestricted access to the judicial system, unfounded claims or defenses asserted for vexatious, wanton, or oppressive purposes place an unconscionable burden upon precious judicial resources already stretched to their limits in an increasingly litigious society."246

Buoyed by judicially and statutorily recognized avenues, media outlets are becoming noticeably aggressive in their efforts to fight back in the courts. Since 1980 they have resorted to various statutes and rules, both federal and state, as well as case law on abuse of process and malicious prosecutions to countersue libel plaintiffs. Thus far, the case law on media libel countersuits has set useful parameters

242. Id. at 891.
243. Id. at 890-92.
244. 704 F.2d 652 (2d Cir. 1983).
for determining if and when media organizations can fight back with a reasonable likelihood of winning.

First, a countersuit most likely will prevail when a libel action is filed notwithstanding the plaintiff’s awareness that the precipitating statement is true and thus nonactionable. Second, a media organization probably will win its countersuit against a party that files a libel action that arises from privileged statements from judicial or legislative proceedings. Third, the media organization has a good chance of successfully countering the plaintiff when a libel suit is filed even though the statute of limitations has already run. Finally, the media can successfully invoke Rule 11 or similar state rules when countering in libel actions in which the plaintiff attorney fails to make a pre-filing “reasonable inquiry” about the status of his or her client relating to the “actual malice” requirement.

As the headline that appeared over an article published in the mid-1980s noted, “Countersuing: It’s not a ‘silver bullet’ against bloodthirsty plaintiffs, but it can be a useful weapon in your legal arsenal.” Indeed, media victories in cases examined in this study might well provide the impetus to enter the legal arena for those newspapers and broadcast stations that feel outrage over what they consider to be truly meritless or frivolous suits filed against them.

On the other hand, the United States Court of Appeals for the Second Circuit made it clear that Nemeroff did not create “an easy test” for passing the bad faith exception to the American rule against fee-shifting. The court stated,

Plaintiffs who have a colorable basis for a claim and who act in good faith need not apprehend that defeat on the merits of their lawsuit will require them to pay their adversaries’ legal fees. Nor do we mean to imply that a litigant is entitled to attorney’s fees whenever an opponent fails to conduct discovery at full speed.

In this context, the implication of the recently amended Rule 11, which went into effect on December 1, 1993, is that the revised rule will lead to fewer sanctions for filing a frivolous claim or pleading in the future than in the past.

For example, sanctions under the new Rule 11 are discretionary, whereas those under the 1983 version of Rule 11 were mandatory.

248. Nemeroff, 704 F.2d at 660.
249. Id.
Justice Antonin Scalia took issue with the change in the issuance of sanctions under Rule 11: “Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession.”

The revised rule also contains a three-week “safe harbor” provision, in which the motion for sanctions cannot be filed with the court unless the opposing party fails to withdraw or correct the challenged pleading within twenty-one days. The provision will allow individuals to file “thoughtless, reckless, and harassing pleadings,” fully aware that “they have nothing to lose: If objection is raised, they can retreat without penalty.”

Furthermore, the new rule will reduce the likelihood that “frivolousness will even be challenged,” because it limits the award of compensation to “unusual circumstances,” with monetary sanctions “ordinarily” to be payable to the court. A court may order payment for some or all of the “reasonable” attorney fees and other expenses incurred as a “direct” result of the violation of Rule 11 only when it is warranted for “effective deterrence.” The revisions converted Rule 11 “from a means of obtaining compensation to an invitation to throw good money after bad,” according to Scalia.

Regardless of how the revised Rule 11 will affect future media countersuits, lawyers and editors agree that there can be merit in the media fighting back in court. Paul McMasters, Executive Director of the Freedom Forum First Amendment Center at Vanderbilt University and President of the Society of Professional Journalists (SPJ), said he supports selective efforts by the press “to be aggressive in taking the initiative to head off intrusions in the editorial process.” He elaborated, “Countersuits often should be pursued. Journalists should resist efforts to be pushed around in the editorial process.”

Nevertheless, media countersuits do carry a downside. Editor Hawpe summarized one drawback:

253. FED. R. CIV. P. 11.
254. Amendments to Federal Rules, supra note 252, at 508 (Scalia, J., dissenting).
255. Id. (emphasis in original).
256. Id. at 508-09.
257. FED. R. CIV. P. 11(e)(2).
258. Amendments to Federal Rules, supra note 252, at 509 (Scalia, J., dissenting).
259. Interview with Paul McMasters, Executive Director of the Freedom Forum First Amendment Center, Vanderbilt University, in Cocoa Beach, Fla. (Feb. 22, 1994).
260. Id.
People already view us as too powerful, too arrogant and too independent. If in fact we created another kind of protection for ourselves [by successfully countersuing and recovering attorney fees], it simply would reinforce the notion that we are too powerful, too arrogant and too independent.\footnote{Hawpe, supra note 63.}

Hawpe noted, however, that the press “could mitigate the consequences of that by using the device only in really outrageous instances in which somebody clearly is trying to punish us by taking us to court without any real prospect of victory.”\footnote{Id.} Media attorney Richard Schmidt has pointed out, too, that media countersuits sometimes backfire because they “could cause the original plaintiffs to stay [with the action] when they might have been considering dropping the case. But if they are sued, they might find it difficult to drop the case and may actually extend it.”\footnote{Telephone Interview with Richard Schmidt, attorney with the law firm of Cohn \& Marks, Washington, D.C. (Jan. 26, 1994).}

Clearly, the expenditure of time, money, and energy (which usually are in short supply) required when filing countersuits is a strong deterrent to many media outlets that contemplate such action. And, even when successful, the fees they recover are often only a fraction of their actual costs.

\section*{IV

Summary and Conclusions}

Without doubt, libel law has been abused through the years by plaintiffs whose primary motive has not been to clear their good names but to merely harass, irritate, vex, punish, annoy, or—even worse—silence the press. Public person plaintiffs and their attorneys know full well that they have virtually no chance of winning most libel suits.

Interestingly, however, media defendants in recent years have done more than merely breathe a sigh of relief when a judgment is handed down in their favor. They are backing up their tough talk about those who file frivolous suits against them by using statutory and judicial methods to fight back. In mounting numbers media defendants are attempting to calm their anger and soothe their frustrations by seeking to recover costs and attorney fees from those who they claim have filed meritless actions against them.

The seeds were sown in cases handed down in the early 1980s as well as through the passage of federal and state laws during that dec-
ade making it increasingly possible for media outlets to successfully countersue plaintiffs who have brought frivolous actions. The media countersuits, which gained notoriety in the early and mid-1980s as another weapon in the media's legal repository, became increasingly common later in that decade and in the early 1990s. The majority (thirty-four) of the fifty-one countersuits examined in this Article have been decided since 1986. It is especially significant that media countersuits have been successful seventy percent of the time between 1980 and 1994. That is, the countersuits have prevailed in thirty-five of the fifty-one libel cases during the period under study. The press seems to be sending a message to parties who seek merely to stifle them: Sue at your peril because we are going to come back after you.

Courts at both the federal and state levels have been consistent in holding that plaintiffs cannot bring suits merely to harass media defendants. Courts have looked with disdain on such conduct because, in addition to diluting the First Amendment rights of media defendants, such actions simply further clog an already overloaded judicial system.

Because media countersuits have been based on the 1983 version of Rule 11 more often than on any other statutes or rules, the now "toothless" revised Rule 11 of 1993 is not expected to act as a strong incentive to media organizations who contemplate countersuing in what they consider to be frivolous libel suits. However, the revised Rule 11 will have little impact on media organizations that base countersuits on abuse of process, malicious prosecutions, state laws and rules, or common law.

Clearly, more media defendants are willing to fight back now than ever before. Their often bold rhetoric, however, is tempered by the sobering realization that even if they emerge victorious, their tangible rewards might pale in comparison to the time, money, and energy they would have to expend. As media attorney Bruce Sanford noted, "Any libel defendant will still have to avoid the knee-jerk reaction to countersue, counterclaim or move for costs simply because it has meritorious defenses to a libel claim."²⁶⁴

²⁶⁴ Sanford, supra note 5, at 17.