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Stephen K. Christiansen

Inherent Sanctioning Power in the Federal Courts After *Chambers v. NASCO, Inc.*

I. INTRODUCTION

Litigants in federal court are seeing an increased emphasis on sanctions to curb litigation misconduct. Various Federal Rules of Civil Procedure have been amended to include sanctions,[1] and an important federal sanctioning statute has been amended to give it more "teeth."[2] The Advisory Committee on Civil Rules has advocated increased use of sanctions to control litigation abuse,[3] as have other judges and scholars.[4] In response, federal courts have interpreted sanctioning provisions broadly to help effectuate their stated purposes.[5]

Yet the most potent sanctioning power might not be embodied in any set of rules or statutes, but rather embedded in the institution of the judiciary itself: the inherent power of a federal court to shift attorney's fees as sanctions for bad-faith litigation. In *Chambers v. NASCO, Inc.*,[6] a divided Supreme Court upheld the use of this power to sanction a party for near-

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1. *E.g.*, FED. R. CIV. P. 11 (1983 amendment) (sanctions for filing groundless paper); FED. R. CIV. P. 16(f) (1983 amendment) (sanctions for violating pretrial order); FED. R. CIV. P. 26(g) (1983 amendment) (sanctions for violating good-faith discovery procedures).

2. 28 U.S.C. § 1927 (1988) (1980 amendment) (allowing recovery of excess attorney's fees and expenses against opposing counsel who have "multiplie[d] the proceedings in any case unreasonably and vexatiously").

3. *See* FED. R. CIV. P. 11 advisory committee's note to the 1983 amendment ("The new language is intended to reduce the reluctance of the courts to impose sanctions . . . ."); FED. R. CIV. P. 26(g) advisory committee's note to the 1983 amendment ("Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it." (citations omitted)).

4. *See, e.g.*, William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 181-84 (1985).

5. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (encouraging liberal application of discovery sanctions); Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 n.5 (9th Cir. 1986) (noting "recent general effort" by courts and Congress to encourage use of sanctions); *cf.* FEDERAL PROC. COMM., A.B.A., SANCTIONS: RULE 11 AND OTHER POWERS 3 (1st ed. 1986) [hereinafter SANCTIONS] (noting increased frequency of sanctions).

6. 111 S. Ct. 2123 (1991).

ly one million dollars, holding that express sanctioning provisions do not limit use of the inherent sanctioning power.

This Note examines the ramifications of *Chambers* on sanctions jurisprudence and on the other inherent powers of federal courts. Part II provides the background for the case, exploring the evolution and interplay of the inherent and textual powers at issue. Part III summarizes the case and the competing opinions. Part IV examines the impact of the holding, analyzing the inherent sanctioning power that emerged from *Chambers* and critiquing the Court's methodology. Part V concludes that *Chambers* forged a new inherent power for the federal courts to use in the war against litigation misconduct, but that it did so at the expense of clarity and faithfulness to precedent.

II. BACKGROUND

A. General Recognition of Inherent Powers

Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[7] Inherent in the concept of judicial power are

> [c]ertain implied powers [that] must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute . . . .[8]

These implied or "inherent" powers are generally institutional powers of control that allow a court to maintain the integrity of its proceedings.[9] Included in these powers are those originally possessed by the English equity courts and vested in federal district courts upon their creation, subject to modifications by Congress.[10]

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7. U.S. CONST. art. III, § 1.

8. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

9. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947) (power to dismiss a case for inconvenient forum); *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 530 (1824) (power to discipline attorneys); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) (power to impose silence and respect in court's presence).

10. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-65 (1939).

B. Assertion of Inherent Power to Allow Attorney's Fees as Costs

One of the powers purportedly possessed by the English courts and, consequently, inherent in every federal district court, is the power to impose attorney's fees as costs if a losing party litigates in bad faith.[11] Ordinarily, a losing party in federal court must pay the prevailing party's costs.[12] "Costs" comprise the expenses of litigation,[13] such as court fees, court reporter fees, and copies,[14] but generally do not include attorney's fees.[15]

Congress controls the costs available to prevailing parties[16] and has specified by statute instances in which attorney's fees may be included as costs.[17] The federal judiciary, however, has asserted an inherent power to tax attorney's fees as costs in several additional instances, including litigation in which a losing party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[18] Because of its penal nature, exercise of this inherent power to shift fees has sometimes been viewed as a sanction.[19]

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11. *See* Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 631-32 n.123 (1983); Joan Chipser, Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 324 (1977).

12. FED. R. CIV. P. 54(d) ("Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .").

13. *See* Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 849 (1929).

14. *See* 28 U.S.C. § 1920 (1988) (listing items that may be taxed as costs).

15. *See* 10 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2675 (2d ed. 1983 & Supp. 1992); C. Dallas Sands, *Attorneys' Fees as Recoverable Costs*, 63 A.B.A. J. 510, 510 (1977) ("The American rule . . . generally withholds from successful litigants the right to recover attorneys' fees from the losers as an item of costs . . . ."). The American Rule differs from the traditional English Rule that regularly includes attorney's fees as costs. *See* Goodhart, *supra* note 13, at 856 (costs in the English courts may include "necessary" attorney's fees).

16. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 251-57 (1975).

17. *See* 28 U.S.C. § 1923 (1988) (attorney's docket fees recoverable as costs). Congress has also allowed recovery of attorney's fees under various statutes granting or protecting certain federal rights. *See Alyeska*, 421 U.S. at 260 & n.33 (listing examples).

18. F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974).

19. *See generally* SANCTIONS, *supra* note 5 (surveying sanctions in each of the federal circuits, including sanctions imposed under courts' "inherent power").

C. Sanctions in the Federal Rules of Civil Procedure

In 1938, the Federal Rules of Civil Procedure began governing procedure in the federal courts.[20] In recent years, the Rules have been amended to allow, and in some cases mandate, sanctions for certain procedural abuses.[21] Furthermore, the Rules now allow fee shifting as a sanctioning option.[22] Perhaps the most notable of these provisions is Rule 11, which mandates sanctions for signing a pleading, motion, or other paper that is frivolous or imposed for an improper purpose.[23] Various statutory enactments also include fee shifting mechanisms.[24]

D. Interplay Between Inherent Powers and Textual Sanctioning Powers

Several important cases dealing with the interplay between inherent powers and statutory or rule-based sanctioning powers set the stage for the *Chambers* dispute. In *Societe Internationale v. Rogers*,[25] the Supreme Court considered the authority of a district court to dismiss a complaint for failure to comply with a discovery order. The Court held that Rule 37 specifically addressed the situation at hand[26] and rejected the lower court's consideration of Rule 41 or inherent powers.[27] Consideration of these other sources, the Court explained,

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20. *See generally* PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 759-61 (3d ed. 1988) (discussing the Rules Enabling Act, the subsequent promulgation of the Federal Rules, and the combining of law and equity). The Rules united the procedures for cases in equity with those at law. FED. R. CIV. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . .").

21. *See* rules cited *supra* note 1.

22. *See, e.g.*, FED. R. CIV. P. 16(f) (for violating pre-trial order); FED. R. CIV. P. 26(g) (for violating good-faith discovery procedures); FED. R. CIV. P. 37 (for failing to cooperate in discovery).

23. FED. R. CIV. P. 11 (including a reasonable attorney's fee in the amount that may be awarded as sanctions).

24. *E.g.*, 28 U.S.C. § 1927 (1988) (allowing sanctions against attorneys who multiply litigation unreasonably and vexatiously); *see also supra* note 17 and accompanying text.

25. 357 U.S. 197 (1958).

26. FED. R. CIV. P. 37(b) (authorizing sanctions for failure to comply with discovery orders).

27. The Court held that Rule 41 governed only dismissals *at trial*. 357 U.S. at 207.

would "only obscure analysis of the problem."[28]

Four years later, however, *Link v. Wabash Railroad Co.*[29] upheld a district court's inherent power to dismiss a suit on its own motion, despite the existence of Rule 41 governing dismissals.[30] The Court held that the power to dismiss for lack of prosecution had long been recognized as inherent in federal courts and that Rule 41 alone was insufficient evidence of congressional intent to abrogate this inherent power.[31]

In *Alyeska Pipeline Service Co. v. Wilderness Society*,[32] the Court considered a request for attorney's fees by a prevailing party who had brought suit to vindicate important statutory rights affecting all citizens. The Court declined to fashion a new exception to the American Rule,[33] putting a stop to innovative judicial fee shifting without congressional approval. However, the Court noted three narrow exceptions from the cases which could justify fee shifting in certain circumstances: litigation to preserve a common fund, willful disobedience of a court order, and bad faith.[34]

Finally, in *Roadway Express, Inc. v. Piper*,[35] the Court upheld fee shifting against an attorney for "uncooperative behavior"[36] based on a federal sanctioning statute.[37] The Court remanded the case for additional consideration of sanctions based on Rule 37 and the district court's inherent powers.[38]

III. *Chambers v. NASCO, Inc.*

A. *History*

Chambers entered into a contract with NASCO, Inc. to sell his TV station, but subsequently refused to perform. When

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28. *Id.*

29. 370 U.S. 626 (1962).

30. FED. R. CIV. P. 41(b) ("For failure of the plaintiff to prosecute or to comply with these rules or any order of court, *a defendant may move for dismissal* of an action or of any claim against him." (emphasis added)).

31. 370 U.S. at 630-32. The Court distinguished *Societe Internationale* on its facts. *Id.* at 636.

32. 421 U.S. 240 (1975).

33. *See supra* note 15.

34. 421 U.S. at 257-59 (dicta).

35. 447 U.S. 752 (1980).

36. *Id.* at 754.

37. 28 U.S.C. § 1927 (1976) (allowing sanctions against counsel who "unreasonably and vexatiously" multiply litigation, but not including attorney's fees) (amended 1980).

38. *See* 447 U.S. at 767-68.

NASCO prepared to file suit in federal district court, Chambers and his attorneys began a series of tactics to harass and delay NASCO, to deprive the court of jurisdiction, and to frustrate specific performance.[39] Despite repeated warnings, contempt sanctions, and injunctions by the court, the tactics continued over several years.[40] Shortly before trial on the merits, Chambers stipulated that the contract was enforceable and that he had breached.[41] The trial court subsequently granted NASCO specific performance.[42] The Fifth Circuit dismissed Chambers's subsequent appeal as frivolous, imposed appellate sanctions, and remanded with instructions to the trial court to consider further sanctions.[43] On remand, the district court considered sanctions under Rule 11, 28 U.S.C. § 1927, and the court's "inherent powers."[44] The court determined that Rule 11 was "insufficient for [its] purposes" and that § 1927 applied only to attorneys.[45] Reasoning that "[c]ourts possess the inherent power to levy sanctions in response to abusive litigation practices,"[46] the court assessed all of NASCO's attorneys' fees against Chambers personally—$996,644.65.[47] The Fifth Circuit affirmed.[48]

B. The Holding

In the Supreme Court, Chambers argued that a court must exhaust the express sanctioning provisions of the federal rules and statutes before it can resort to inherent fee shifting pow-

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39. *See* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 127 (W.D. La. 1989).

40. The conduct included fraudulently conveying the TV station to preclude specific performance; withholding information from the court; violating temporary restraining orders and injunctions; blocking discovery attempts; filing baseless motions, charges, and counterclaims; taking needless depositions; repeatedly seeking continuances and extensions to delay the proceedings; filing to recuse the trial judge; removing the TV station's equipment from service before going through with the sale; and engaging in other similar actions. *See id.* at 125-30 (detailing the sanctionable conduct).

41. *Id.* at 128.

42. NASCO, Inc. v. Calcasieu Television & Radio, Inc., 623 F. Supp. 1372 (W.D. La. 1985).

43. *See* 124 F.R.D. at 137.

44. *Id.* at 138.

45. *Id.* at 138-39.

46. *Id.*

47. *Id.* at 143. The court also invoked its inherent power to disbar one attorney and suspend two others. *See id.* at 144-46.

48. NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696 (5th Cir. 1990).

ers.[49] Justice White, writing for the majority, rejected this argument, holding that the textual sanctioning scheme does not displace inherent powers.[50] The Court recognized the sanction in this case as a proper exercise of the *Alyeska* inherent power to shift fees for bad-faith litigation,[51] and cited *Link* and *Roadway Express* for the proposition that this inherent power coexists with textual provisions absent contrary congressional intent.[52] The Court found no such intent in the amendments to Rule 11 or to § 1927, amendments enacted after *Roadway Express* was decided.[53] The Court also rejected analogy to *Societe Internationale* because the Rule in that case specifically addressed all the conduct at issue.[54]

Justice White noted that a court should ordinarily rely on the Rules, but that it may rely on inherent power to impose sanctions if the Rules are inadequate.[55] He reasoned that the express provisions are supplements to, not substitutes for, inherent power.[56] In circumstances in which all of a litigant's conduct is deemed sanctionable, as here, a Rule-by-Rule approach would merely foster satellite litigation and thus further derail the normal functioning of the courts.[57]

C. *The Dissenters*

Justice Kennedy dissented, maintaining that the district court erred in using its inherent sanctioning power "without prior recourse to controlling rules and statutes."[58] He listed numerous express sanctions that could have been used to

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49. *See* Brief of Petitioner on the Merits at 9, Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991) (No. 90-256).

50. *Chambers*, 111 S. Ct. at 2134. Justices Marshall, Blackmun, Stevens, and O'Connor joined the majority opinion. Justice Kennedy dissented, joined by Chief Justice Rehnquist and Justice Souter. *Id.* at 2141 (Kennedy, J., dissenting). Justice Scalia wrote a separate dissenting opinion. *Id.* at 2140 (Scalia, J., dissenting).

51. *See id.* at 2133; *see also supra* text accompanying notes 32-34.

52. *Chambers*, 111 S. Ct. at 2135; *see also supra* text accompanying notes 29-31 & 35-38.

53. *Chambers*, 111 S. Ct. at 2134.

54. *See id.* at 2135 n.14; *see also supra* text accompanying notes 25-28.

55. *Chambers*, 111 S. Ct. at 2136.

56. *Id.* at 2134.

57. *Id.* at 2136. The Court also rejected the suggestion that reliance on inherent powers by a federal court exercising diversity jurisdiction in a state that does not recognize the bad-faith exception violates the *Erie* doctrine. *Id.* at 2136-37. The Court reasoned that *Erie* governs only substantive conflicts not at issue here. *Id.* at 2137.

58. *Id.* at 2141 (Kennedy, J., dissenting).

achieve a similar result and reasoned that Congress, not the courts, has the power to reallocate litigation expenses.[59] Absent an express provision to the contrary, the American Rule controls. Allowing courts to resort to their inherent powers when not absolutely necessary will discourage use of the Rules and encourage findings of bad faith.[60] Using the inherent power in this manner, he argued, threatens uniformity in the courts, may cause due process problems, and could chill vigorous advocacy.[61] He allowed for the existence of inherent power, but maintained that the Rules limit its use.[62]

IV. ANALYSIS

"[T]he notion of inherent power has been described as nebulous, and its bounds as 'shadowy.' "[63] The source of the power has been questioned,[64] and its use frequently criticized.[65] Nevertheless, courts in every circuit have used the power to impose sanctions.[66] Courts and commentators agree it is potent; some argue it may be nearly "boundless."[67] "No court, however, has adequately defined the inherent power."[68]

Chambers is the latest in a sparse series of Supreme Court decisions[69] that attempt to grapple with the inherent power

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59. *Id.* at 2141-42.
60. *Id.* at 2143.
61. *Id.* at 2145.
62. *See id.* at 2142-43. Justice Kennedy also objected that some of the sanctions in this case penalized prelitigation conduct in violation of the *Erie* doctrine. *See id.* at 2141. Justice Scalia agreed, objecting further that Chambers was sanctioned for conduct that took place beyond the confines of the court. *See id.* (Scalia, J., dissenting).
63. Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) (footnote omitted).
64. Inherent power has been generally defined as "authority possessed without its being derived from another." BLACK'S LAW DICTIONARY 782 (6th ed. 1990). Some scholars, however, have pointed to a 14th century English statute as the basis of the sanctioning power. *See* Goodhart, *supra* note 13, at 854. "The better view seems to be that the power was inherent, and it is clear that the courts have acted on this view." *Id.*
65. *See, e.g.*, Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 SW. L.J. 1011 (1989); Adam Behar, Note, *The Misuse of Inherent Powers when Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1786-87 (1988); Joseph J. Janatka, Note, *The Inherent Power: An Obscure Doctrine Confronts Due Process*, 65 WASH. U. L.Q. 429 (1987).
66. *See* Behar, *supra* note 65, at 1791.
67. Cogan, *supra* note 65, at 1013.
68. Janatka, *supra* note 65, at 443.
69. *See supra* part II.D.

concept in this context. Analysis of the decision leads to two conclusions. First, the *Chambers* Court did more than reaffirm existing powers—it created a new sanctioning power.[70] Second, the Court used inherent powers precedents indiscriminately, thereby further obscuring the scope and limitations of the new power.[71]

A. *Transformation of the Equity Power into a Roving Sanctioning Power*

The Supreme Court arguably decided correctly the question it presented itself in *Chambers*: whether various textual sanctioning provisions reflect a legislative intent to displace the inherent power of a federal court to shift fees for bad-faith litigation.[72] Without exception, commentaries on textual fee shifting provisions illustrate that those provisions were not designed to displace inherent equity powers.[73] But the Court's decision altered the assumptions upon which the stated question was based. The Court's dicta transformed the historic equity power to shift fees for bad-faith litigation into a roving sanctioning power. A look at the cases demonstrates that *Chambers* takes an extremely revisionist view of the federal judiciary's traditional powers.

Before *Chambers*, the bad-faith exception to the American Rule had certain characteristics: (1) it was an exception to the manner in which costs were calculated, (2) it was available only against a losing party, and (3) it was generally used to redress bad-faith conduct. After *Chambers*, a new sanctioning power emerged, with a very different set of characteristics. The new inherent power: (1) is as readily available as any of the

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70. *See infra* part IV.A.

71. *See infra* part IV.B.

72. *See* Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2131-32 (1991).

73. *E.g.*, FED. R. CIV. P. 11 advisory committee's note to the 1983 amendment (Amended Rule 11 "build[s] upon and expand[s] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith."); Schwarzer, *supra* note 4, at 206 ("While adopting a formidable array of statutes authorizing awards of attorney's fees to prevailing parties, Congress has not repudiated the judicially created bad-faith exception . . . ."); *cf.* FED. R. CIV. P. 26(g) advisory committee's note to the 1983 amendment ("Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it."); SANCTIONS, *supra* note 5, at 14 ("[F]ederal courts have always had inherent power to impose sanctions apart from any rule or statute. Indeed, the recent amendment to Rule 11 is not the source of sanctions power, but rather confirmation that it must be used." (citation omitted)).

Rules, regardless of whether costs are involved; (2) may be used against either party, regardless of the merits of the case; and (3) may be used to impose sanctions for discrete conduct within the course of litigation, even when a suit is initiated or otherwise conducted in good faith.

1. Alyeska *to* Chambers*: Where did the costs go?*

When *Alyeska* was decided in 1975, the opinion included an exhaustive discussion of judicially awarded costs, contrasting the English approach with the historical approach in this country and exploring the inclusion of attorney's fees as costs.[74] The *Alyeska* Court thus made clear that an award of fees against a bad-faith litigant was merely an exception to the general rule of systematic exclusion of fees in determining costs.[75]

Chambers, in contrast, is notable for its lack of discussion about costs. The decision considers the inherent power to shift fees to be merely another form of sanctions. This conclusion is somewhat understandable: the district court approached the issue in this manner.[76] It is not understandable, however, in light of the Court's own precedents.

In both *Alyeska* and *Roadway Express*, the question of attorney's fees arose when the prevailing litigant presented its bill of costs to the district court, including in its costs the attorneys' time spent on the litigation.[77] The district courts in those cases thus considered the request for attorney's fees in the proper context and with the appropriate frame of reference for addressing the issue.

In *Chambers*, however, the question of attorney's fees arose when the district court considered sanctions against Chambers for his conduct in litigation.[78] The district court thus considered the request for attorney's fees in a very different context than did *Alyeska* and *Roadway Express*. Although this approach could have led to a resolution consistent with precedent,

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74. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-57 (1975).

75. *See id.* at 257-59.

76. *See* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 138 (W.D. La. 1989).

77. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 755 (1980); *Alyeska*, 421 U.S. at 245 & n.14.

78. *See* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 138-39 (W.D. La. 1989).

it ultimately led only to conceptual problems. No longer was the issue the applicability of an equitable exception to the American Rule; at issue now was the scope of a court's inherent power to impose sanctions in the face of textual sanctioning provisions, quite a different question.

Had the district court considered the attorney's fees in their proper context, as part of a cost determination, the only question would have been which Rule controlled.[79] This would have been a more manageable question and ultimately would have avoided much needless discussion of nebulous inherent powers.

Instead, the question framed by the Court led to the formation of a power independent of the cost determination, a power which stands side-by-side with the sanctions in the Federal Rules. Some of the problems that attend this new inherent sanctioning power can be seen immediately. First, the Rules and the case law interpreting the Rules control the imposition of textual sanctions. They dictate certain procedures, lay down a clear standard, and minimize due process problems.[80] The new power, however, falls outside that body of law.[81] Further-

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79. Societe Internationale v. Rogers, 357 U.S. 197 (1958), could have been instructive on this point. *Societe Internationale* considered the propriety of using two different Federal Rules to dismiss a case for failure to comply with a discovery order. The Court noted that Rule 41 falls under the "Trials" section of the Rules and held that only Rule 37 governed dismissal of actions in the discovery phase. *Id.* at 207. The Court refused to consider inherent powers in making its determination. *Id.*

In *Chambers*, a determination of costs would have been governed by Rule 54(d), making available the bad-faith exception without need for considering the provisions of other Rules or statutes. Because the district court here was not engaged in a cost determination, *Societe Internationale* would instruct that Rule 54 was inapplicable. Thus, consideration of issues associated with costs, such as the bad-faith exception, would not have been addressed.

80. *See* Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2145 (1991) (Kennedy, J., dissenting) ("The Federal Rules establish explicit standards for, and explicit checks against, the exercise of judicial authority."). *See generally* SANCTIONS, *supra* note 5 (surveying the vast body of Rule 11 case law).

81. *See* Marcia Coyle, *The High Court Gives Judges Greater Powers*, NAT'L L.J., June 17, 1991, at 3, 31 ("The [*Chambers*] justices do not require notice or other limiting provisions contained in Rule 11 and elsewhere."); *id.* (remarks of NASCO counsel, Joel I. Klein) ("I don't think the court has set down a framework here. They're satisfied now to establish the power, and much like Rule 11, they will wait and see how it is played out."); Cornelia H. Tuite, *Sanctions Standards Still Murky*, A.B.A. J., Jan. 1991, at 84 ("Ironically, if conduct falls outside Rule 11, but is motivated by a similar species of bad faith as a Rule 11 breach, complete fee-shifting without consideration of [limiting case law factors] may be possible if the court relies on inherent sanctioning powers."); *cf. id.* (in hearing Chambers's intermediate appeal, the 5th Circuit "did not discuss the factors a court should employ

more, because the *Chambers* power is in many respects inconsistent with the fee shifting powers recognized in prior Supreme Court cases, it arguably falls outside the strictures that apply when shifting fees as part of litigation costs. At a minimum, the applicability of the precedents is unclear. As it stands, the new power is a sanctions power that has been defined but which has no readily ascertainable boundaries. Thus, the new power runs squarely into the criticisms often leveled at inherent powers in general.[82]

The *Chambers* Court itself best sums up the transformation, although oblivious that it is breaking new ground: "The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself."[83] The ramifications of this departure remain to be seen.

2. *The losing party requirement*

The Court's own precedents point out unequivocally that a bad-faith fee shift may only be assessed against a *losing* party.[84] This makes analytical sense, since costs are to be taxed

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when awarding fees under *Alyeska*").

82. *See, e.g.*, Janatka, *supra* note 65, at 439-40 (no precise procedural requirements for inherent powers); Behar, *supra* note 65, at 1807 ("[D]espite greatly increased sanctioning powers, a basic problem still remains inherent in the system: judges' confusion over which power to use, which sanction to impose, when to impose it, and by what standard sanctionable conduct is to be evaluated."); *cf.* Cogan, *supra* note 65, at 1015 (Allowing sanctions to be reviewed under an abuse of discretion standard "give[s] no notice to the profession as to what the court[s] truly deem[] to be sanctionable conduct."); *id.* at 1017-18 ("A district court that need not explain its decisions in detailed findings of facts and conclusions of law, and a district court that is reviewed under an abuse of discretion standard only, is powerful indeed.").

83. 111 S. Ct. at 2133.

84. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (Courts may assess attorney's fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' "); *see also* Hutto v. Finney, 437 U.S. 678, 689 (1978) (It is a "settled rule that a losing litigant's bad faith may justify an allowance of fees to the prevailing party."); F.D. Rich Co. v. United States *ex rel.* Industrial Labor Co., 417 U.S. 116, 129 (1974) ("We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith . . . ."); Hall v. Cole, 412 U.S. 1, 5 (1973) ("[I]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' "); Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.4 (1968) ("[I]t has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' ").

to the losing party.[85] *Chambers* builds upon that traditional equity power in forging its new power: "[T]he imposition of sanctions under the bad-faith exception depends *not* on which party wins the lawsuit, but on how the parties conduct themselves during the litigation."[86]

This development flies in the face of precedent. In *Alyeska*, the Court reeled in the lower courts' fee awards, identifying the boundaries of judicial discretion and emphasizing that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."[87] The *Alyeska* Court further recognized that "Congress has not . . . extended any roving authority to the Judiciary to allow counsel fees as costs *or otherwise* whenever the courts might deem them warranted."[88] *Chambers* seems to grant that roving authority—still without an act from Congress—and thus ignores the rule enunciated by the *Alyeska* Court.

Although the *Chambers* Court makes its move without citing authority,[89] some authority can be found in the lower courts.[90] The question then becomes whether the Court should affirm the practice of the lower courts or stand by its own precedents. The Court decides to do both, approving of the powers developed in the lower courts while attempting to square its decision with prior Supreme Court cases. Precedent bending is the inevitable result.[91]

3. *The discrete conduct departure*

Generally, the bad-faith exception has been invoked to assess fees against a party when litigation is initiated or con-

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85. *See* FED. R. CIV. P. 54(d).

86. 111 S. Ct. at 2137 (emphasis added).

87. 421 U.S. at 262.

88. *Id.* at 259 (emphasis added); *cf.* William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1020 (1988) ("[F]ee shifting ought not to be undertaken without clear authority.").

89. *See* 111 S. Ct. at 2137.

90. *E.g.*, Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975) ("[E]ven a winner may have to pay obstinacy fees . . . ."); *see also* Lipsig v. National Student Marketing Corp., 663 F.2d 178, 182 (D.C. Cir. 1980) (quoting *Wright*); *cf.* Batson v. Neal Spelce Assoc., 805 F.2d 546, 548 (5th Cir. 1986) (citing *Lipsig*) (bad faith in conduct of litigation distinct from bad faith in filing and maintaining action), *cited with approval in* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 139 (W.D. La. 1989).

91. For a discussion of the Supreme Court's indiscriminate use of precedents in *Chambers* and other inherent powers cases, see *infra* part IV.B.

ducted completely or substantially in bad faith.[92] Consequently, the cases usually involved all or substantially all the attorney's fees.[93]

Chambers appears to be such a case, one "in which *all* of [the] litigant's conduct is deemed sanctionable."[94] The *Chambers* dicta, however, seem to modify this facet of the inherent power cases. After *Chambers*, a court might not be limited to shifting fees only when a party has engaged in a bad-faith *course of conduct*; it might also shift fees upon a finding of bad faith in discrete conduct within a normal suit.[95] Under this approach, even a party engaged in good-faith litigation may have inherent power sanctions imposed if some of the conduct is undertaken in bad faith, raising again the specter of the roving sanctioning power.[96] If the Court's dicta indeed justify this conclusion, the inherent sanctioning power runs squarely into the criticisms leveled by the *Chambers* dissenters.[97]

In sum, the power that emerges from the *Chambers* dicta is not the traditional inherent equity power. Clearly it is not the *Alyeska-Roadway Express* power. The Court reshapes its precedents to forge a new power that gives the federal courts roving authority to impose fee-shifting sanctions.

B. Indiscriminate Use of Precedents

The departures from precedent in *Chambers* are not so much new developments as they are a product of jumbled pre-

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92. *See* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.78[3], at 54-507 (2d ed. 1992) ("In many of these cases the bad faith, vexation, or oppression relates to the entire proceeding . . . .").

93. *E.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 756 (1980); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 & n.13 (1975).

94. 111 S. Ct. at 2136. *Chambers* also involved the entire amount of attorney's fees. *Id.* at 2130.

95. As the Court noted,

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the rules.

111 S. Ct. at 2135-36.

96. *See supra* part IV.A.1.

97. *See supra* part III.C (summarizing the dissents). *See generally* 111 S. Ct. at 2141-47 (Kennedy, J., dissenting) (criticizing the inherent sanctioning power).

cedents. This fact is troubling for three reasons. First, it calls into question the legitimacy of the power itself. Second, it calls into question the means the Court used to devise that power. Third, it obscures the law in breach of the Supreme Court's duty to clarify the law. In short, "[w]hether a court acts legitimately in seeking to achieve just, speedy, and inexpensive results is itself an important issue of justice."[98]

In arguing his case to the Supreme Court, Chambers attempted to classify the various inherent powers,[99] relying on *Eash v. Riggins Trucking Inc.*[100] In *Eash*, the Third Circuit undertook an extensive survey of inherent powers from the major federal cases and attempted a rational categorization of those powers.[101] The Supreme Court rejected Chambers's overture, noting that "this Court has never so classified the inherent powers, and we have no need to do so now."[102]

The Court was perhaps correct in its assessment that determination of the *Chambers* case did not demand adoption of the *Eash* classifications. Nor should *Eash*'s conclusions necessarily be adopted wholesale by the Supreme Court, despite the Third Circuit's persuasive and somewhat thorough treatment of the subject. The Supreme Court's rejection of a rational classification of inherent powers, however, highlights one of the most troubling aspects of *Chambers* and other Supreme Court decisions in this area: the indiscriminate use of inherent powers precedents.

Eash is helpful at this point because it condenses persuasive commentary on the inherent powers, identifying three recurring criticisms of the inherent powers cases: (1) the lack of guidance from the cases, (2) the use of the term "inherent power" to describe distinguishable powers, and (3) the reliance on cases involving one inherent power to support the use of another. *Chambers* is replete with examples of each.

1. *Lack of guidance from the cases*

"[P]erhaps because federal courts infrequently resort to

98. Cogan, *supra* note 65, at 1011.
99. *See* 111 S. Ct. at 2134 n.12.
100. 757 F.2d 557 (3d Cir. 1985) (en banc).
101. *See id.* at 561-64 (distinguishing between inherent powers beyond the reach of Congress, those subject to congressional modification but not defeasance, and those subject to complete congressional override).
102. 111 S. Ct. at 2134 n.12.

their inherent power or because such reliance most often is not challenged, very few federal cases discuss in detail the topic of inherent powers."[103] This is especially true of Supreme Court cases, of which only a handful exist.[104]

The Court has not been without its opportunities, however. In *Guardian Trust Co. v. Kansas City Southern Railway*,[105] for example, the Eighth Circuit traced the history of the inherent power to shift fees for bad-faith litigation, detailing the development of the power in the English courts and its subsequent recognition in the federal courts. On review, the Supreme Court assumed the existence of the power for argument's sake, but "express[ed] no opinion" as to its existence in reversing on other grounds.[106]

The Supreme Court cases that do touch on inherent powers offer little more than magic phrases; they are lacking in substance. The *Chambers* dissent laments the fact that no standards exist for finding bad faith or for assuring due process,[107] and with good reason: the Court barely mentions these "standards" in passing.[108] Concrete standards are crucial in this nebulous area of the law, however, because so much is at stake, as evidenced by the million-dollar fee shift in *Chambers*.[109]

Perhaps the reason prior cases provide such little guidance is because none actually held a party liable under the bad-faith exception. *Alyeska* recognized exceptions to the American Rule in dicta, but noted that "none of the exceptions is involved here."[110] *F.D. Rich Co. v. United States ex rel. Industrial La-*

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103. *Eash*, 757 F.2d at 561.

104. *See supra* part II.D.

105. 28 F.2d 233, 241-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930).

106. Kansas City S. Ry. v. Guardian Trust Co., 281 U.S. 1, 10 (1930).

107. 111 S. Ct. at 2145 (Kennedy, J., dissenting).

108. *See, e.g.*, Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2136 (1991) ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees . . . ."); *cf.* Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) ("[T]he trial court did not make a specific finding as to whether counsel's conduct in this case constituted bad faith, a finding that would have to precede any sanction under the court's inherent powers."); *id.* ("[A]ttorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.").

109. *See supra* text accompanying notes 46-47; *cf.* Cogan, *supra* note 65, at 1021 ("The imposition of a sanction often is a serious deprivation of property and liberty.").

110. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975).

bor Co.,[111] the case *Alyeska* relied on to enunciate the bad-faith exception, also stated the rule in dicta, relying on a federal admiralty case[112] and several circuit court cases.[113] *Roadway Express* remanded for a determination of the inherent powers issue.[114] It is no wonder, then, that the *Chambers* Court had little more to work with than a worn-out phrase, passed from case to case, with no substance: fees can be shifted when a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."[115]

In fact, *Chambers* is the first Supreme Court case to squarely address the inherent power of a court to assess fees against a party for bad-faith litigation.[116] Despite its ultimate lack of guidance, "[t]he *Chambers* decision represents the most elaborate treatment to date of the inherent power concept."[117] Given the opportunity again, the Court should concentrate on enunciating concrete standards to guide the lower courts, attorneys, and litigants.[118]

2. *Use of the term "inherent power" to describe distinguishable powers*

"[T]hose cases that have employed inherent power appear to use that generic term to describe several distinguishable court powers."[119] The *Chambers* opinion is guilty of this transgression as well. In fact, the Court pits the textual sanc-

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111. 417 U.S. 116, 129 (1974).

112. Vaughan v. Atkinson, 369 U.S. 527 (1962) (allowing attorney's fees as part of the *damages* remedy). *But see* 6 MOORE ET AL., *supra* note 92, at 54-506 ("The [bad-faith] exception is an exception to the general rule on costs, not a theory of damages.").

113. *See* 417 U.S. at 129 & n.17.

114. *See* 447 U.S. at 767.

115. 111 S. Ct. at 2133.

116. The assertion of the Court in *F.D. Rich Co.* that "[w]e have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith," 417 U.S. at 129 (dictum), is an exaggeration at best.

117. Coyle, *supra* note 81, at 31 (summarizing remarks of Professor Carl Tobias).

118. "By its silence, the Supreme Court has left to the lower courts the development of a standard for finding bad faith." Michael C. Lamb, Comment, *Awards of Attorneys' Fees Against Attorneys:* Roadway Express, Inc. v. Piper, 60 B.U. L. REV. 950, 968 (1980). The same can be said of other important criteria. Numerous courts and commentators, however, have thoughtfully suggested appropriate standards to be applied in these cases. *See, e.g.*, 6 MOORE ET AL., *supra* note 92, at 54-501 to 54-503 (and cases cited therein); Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 25 (1987); Lamb, *supra*, at 968.

119. Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 (3d Cir. 1985).

tioning powers not against any particular inherent power, but against "the inherent power."[120] It is not surprising that the Court found no legislative intent to displace a power so described.[121]

As already noted, the inherent power to shift fees as part of costs is not necessarily the same as the inherent power to impose sanctions,[122] yet the two become blurred when referred to merely as "the inherent power." Discussion of various other inherent powers only confuses the issue further.

The Court has no excuse for this hodgepodge. Numerous commentators have analyzed the cases and defined the powers.[123] Even individual powers have been examined and subdivided.[124] In short, the Court has no legitimate reason to lump distinguishable powers together.

3. Reliance on cases involving one inherent power to support the use of another

"To compound this lack of specificity, courts have relied occasionally on precedents involving one form of power to support the court's use of another."[125] The *Chambers* Court began its discussion of the exceptions to the American Rule by noting that "in narrowly defined circumstances federal courts have inherent power to assess attorney's fees *against counsel.*' "[126] This was *not* the issue in *Chambers*, but the Court nevertheless proceeded on the assumption that attorney sanctions cases—namely *Roadway Express*—controlled imposition of sanctions on litigants.

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120. 111 S. Ct. at 2131-32.

121. *Cf.* A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 33 (1958) ("[W]henever courts have felt themselves too tightly pressed by legislative regulation they have found in the doctrine of judicial independence a large reservoir of integral supremacy.").

122. *See supra* part IV.A.1.

123. *See, e.g.*, 6 MOORE ET AL., *supra* note 92, at 54-493 to 54-509; 10 WRIGHT ET AL., *supra* note 15, § 2675, at 257-310; Mallor, *supra* note 11; Maute, *supra* note 118; Tyrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459 (1937); Chipser, *supra* note 11.

124. *See, e.g.*, Mallor, *supra* note 11, at 630-52 (distinguishing between bad-faith exception cases based on prelitigation misconduct, substantive bad faith, procedural bad faith, and attorneys' personal liability); *cf.* 6 MOORE ET AL., *supra* note 92, at 54-499 to 54-509 (discussing and distinguishing the bad faith exception cases).

125. Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 (3d Cir. 1985).

126. 111 S. Ct. at 2133 (quoting *Roadway Express*, 447 U.S. 752, 765 (1980)) (emphasis added).

This loose use of precedent is nothing new in inherent powers cases. "[T]he Court itself was confused in *Roadway Express*, relying on cases such as . . . *Alyeska Pipeline Service v. Wilderness Society*, [a] case[] involving judicial power indisputably subject to congressional override, for the content of a judicial power 'shielded from direct democratic controls.' "[127]

One example from *Chambers* illustrates the consequences of this approach. The Court cites *Link v. Wabash Railroad Co.*[128] for the proposition that outright dismissal of a lawsuit is severe, yet within a court's discretion.[129] "Consequently, the 'less severe sanction' of an assessment of attorney's fees is undoubtedly within a court's inherent power as well."[130] Analytically, one might tend to agree with this statement.[131] Yet as applied to the facts of this case, the comparison makes no sense. Had Chambers merely been dismissed out of court, he would have been in far better shape than he was after he lost on the merits and was assessed one million dollars in attorney's fees. Reliance on an inherent *dismissal* power to support an inherent *fee shifting* power causes the precedent to lose much of its force and leaves one wondering whether it was really "precedential" at all.

Before *Chambers* the Supreme Court had never approved an inherent power to shift fees as a sanction for bad-faith conduct apart from the inherent power to award fees as part of the costs to the prevailing party.[132] Why, then, did the Court hold as it did in *Chambers*? Unquestionably, the Court is concerned about conduct by parties such as Chambers in the federal courts. All the Justices agreed that Chambers should have been sanctioned;[133] they merely disagreed about the proper judicial

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127. Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1005 (1983) (footnotes omitted).

128. 370 U.S. 626 (1962); *see supra* text accompanying notes 29-31.

129. 111 S. Ct. at 2133.

130. *Id.* (quoting *Roadway Express*, 447 U.S. at 765).

131. *But see* Cogan, *supra* note 65, at 1016 ("Tens of thousands of dollars [in sanctions] in many cases overwhelms the amount at stake in a plaintiff's case and becomes in effect a dismissal. Moreover, the mere possibility of such an award is so onerous for some plaintiffs that it becomes the *potential* case's death-knell just as assuredly as is dismissal of a filed case.").

132. Some circuit court decisions had, however, recognized such a power. *See* cases cited *supra* note 90.

133. *See* 111 S. Ct. at 2136 (deeming all of Chambers's conduct sanctionable); *id.* at 2141 (Scalia, J., dissenting) (noting that the court had power to sanction conduct under both the Rules and the inherent power); *id.* at 2149 (Kennedy, J., dis-

procedure. The outcome of the case indicates that a majority of the Court views curbing litigation misconduct as *the* overriding policy in this context, superior to other vitally important interests involved.[134] Holding otherwise would only further mire the courts in addressing mischief as it occurs.[135]

V. CONCLUSION

After *Chambers v. NASCO, Inc.*, federal district courts may shift attorney's fees as sanctions for bad-faith conduct in litigation. This is a substantial power, of which all involved—judges, attorneys, and litigants—ought to be aware.

The Supreme Court fashioned the new power out of inherent powers precedents, but went beyond traditional equitable powers thought to be inherent in the courts. In fact, the Court's use of its precedents is a concern in all of the inherent powers cases, as illustrated by *Chambers*. The Court needs to address and rectify this problem to provide clear guidance to federal court litigants and lawyers.

In the meantime, it is clear the Supreme Court has stepped up the war against litigation misconduct. *Chambers* provides the ammunition. Those who fail to heed the warning may ultimately pay dearly.

Stephen K. Christiansen

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senting) (There is "no question but that some sanctionable acts did occur in court.").

134. *Cf.* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 142 (W.D. La. 1989) ("Courts should not hesitate to address and sanction similar transgressions in whatever the judicial theater they may occur."); SANCTIONS, *supra* note 5, at 22 ("[W]here the conduct is sufficiently willful, obstructive or contumacious, it will be sanctioned, whether a specific rule exists or not.").

135. "Rules require sanctions. Sanctions require enforcement proceedings. These absorb resources of time, energy and money that is the very purpose of the rules to spare." Maurice Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243, 244 (1984).