

Tulsa Law Review

Volume 27
Issue 4 *International Energy Law Symposium*

Summer 1992

Finding Limitations on the Federal Courts' Inherent Power to Sanction: *Chambers v. NASCO, Inc.*

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Recommended Citation

Jennifer M. Treece, *Finding Limitations on the Federal Courts' Inherent Power to Sanction: Chambers v. NASCO, Inc.*, 27 *Tulsa L. J.* 717 (2013).

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NOTES AND COMMENTS

FINDING LIMITATIONS ON THE FEDERAL COURTS' INHERENT POWER TO SANCTION: *CHAMBERS v. NASCO, INC.*

I. INTRODUCTION

Under the traditional “American rule,” the prevailing party in a lawsuit may not recover attorneys’ fees unless a statute or contract authorizes the party to obtain compensation.¹ Exceptions to the American rule exist, as when a litigant has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”² In addition, rules and statutes permit federal courts to assess attorneys’ fees against parties or their counsel as sanctions for the misconduct of either.³ The Supreme Court’s recent decision in *Chambers v. NASCO, Inc.*⁴ extends that authority too far, beyond even the boundaries of sanctioning statutes and rules.

In *Chambers*, the Supreme Court recognized the inherent power of federal courts to impose whatever sanctions they determine are appropriate in light of the circumstances of each case.⁵ Under this most recent definition of the inherent power of the federal courts, attorneys as well as litigants are exposed to severe sanctions for misconduct, subject only to minimal standards and the court’s discretion.⁶ The inherent power of the federal courts to award attorneys’ fees and other sanctions for bad faith

1. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 256-58 (1975).

2. *Id.* at 258-59. Other exceptions to the American Rule are the “common fund exception,” in which a court may award attorneys’ fees to a litigant whose suit directly aids others, and where a party willfully disobeys a court order. *Id.* at 257-58.

3. FED. R. CIV. P. 11, 16(f), 26(g), 37; 28 U.S.C. § 1927 (1988). *See infra* text accompanying notes 30-32.

4. 111 S. Ct. 2123 (1991).

5. Inherent powers are governed by the “control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 2132 (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962)).

6. Courts are advised to seriously consider the assessment of sanctions as severe as attorneys’ fees. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). In cases involving attorneys’ fees, a finding of bad faith is required. Other cases involving inherent power sanctions as severe as dismissal, however, have no requirement of bad faith. *Chambers*, 111 S. Ct. at 2140 (Scalia, J., dissenting).

conduct should not be so broad as to eclipse applicable Federal Rules.⁷ If the courts' inherent power is correctly defined in *Chambers*, the potential severity of those sanctions should require both a finding of subjective bad faith and a limitation on awards such as that applied to sanctions under the Federal Rules.

II. STATEMENT OF THE CASE

A. *Facts*

Chambers, the director and only shareholder in Calcasieu Television and Radio, Inc., contracted to sell a television station to NASCO, Inc.⁸ Six weeks after entering into the purchase agreement, Chambers, through his attorney, informed NASCO that he had decided not to sell and would not file papers with the Federal Communications Commission (FCC) necessary to consummate the deal.⁹ In order to place the station beyond the reach of NASCO and its attorneys in the lawsuit which ensued, Chambers, with the help of his attorney, sold the property to a trust created by them and operated by Chambers' relatives.¹⁰

Chambers, frequently through counsel, continued to violate an injunction and two restraining orders despite warnings and a \$25,000 contempt fine by the district court.¹¹ In addition, Chambers filed baseless motions and pleadings in an effort to delay NASCO's suit against him.¹² Finally, in response to the district court's judgment in favor of NASCO, Chambers removed station equipment from service and persuaded officials of the television station to oppose NASCO's pending FCC application.¹³

B. *The District Court's Opinion*

On remand from Chambers' frivolous appeal, NASCO moved for sanctions against Chambers.¹⁴ After a hearing on the matter, the district court set sanctions against Chambers, as the "strategist" behind the bad

7. See *infra* note 30.

8. *Chambers*, 111 S. Ct. at 2128.

9. *Id.*

10. *Id.* By recording the deeds from the sale of the television station to the trust before the district court could issue a temporary restraining order to prevent encumbrance of the station, Chambers sought to evade the court's jurisdiction under the Louisiana public records doctrine. The purchase agreement between Chambers and NASCO had not been recorded. *Id.*

11. *Id.* at 2129.

12. *Id.*

13. *Id.* at 2130.

14. *Id.*

faith conduct, at \$996,644.65, representing the entire amount paid by NASCO to its attorneys,¹⁵ and disbarred one attorney.¹⁶ In assessing the sanctions, the district court found rule 11 of the Federal Rules of Civil Procedure insufficient, because it addressed only false and frivolous papers filed with the court.¹⁷ The court did not rely on the federal sanctioning statute as a basis for the sanctions, because it only applied to attorneys and was “not broad enough to reach ‘acts which degrade the judicial system,’ ” including fraud.¹⁸ Rather, the district court based the sanctions award on its inherent power, which it found to be “particularly appropriate” where the sanctioned litigants “practiced a fraud upon the court.”¹⁹

C. *The Court of Appeals’ Opinion*

The Fifth Circuit Court of Appeals affirmed the lower court’s ruling, finding that a federal court sitting in diversity may assess attorneys’ fees as a sanction for bad faith conduct.²⁰ In addition, the court found that federal sanctioning rules and statutes would permit the inherent power to sanction “when the party’s conduct is not within the reach of the rule or the statute.”²¹ Finally, the court of appeals approved the district court’s use of discretion in awarding NASCO its attorneys’ fees and costs under its “limited” implied power.²² Chambers petitioned the Supreme Court for certiorari. The issue before the Court became whether the district court, sitting in diversity, properly invoked its inherent power by assessing attorneys’ fees and costs paid by NASCO as a sanction for Chambers’ bad faith conduct.²³

15. *Id.*

16. *Id.* at 2130 n.5.

17. *Id.* at 2131. Additionally, the falsity of some pleadings “did not become apparent until after the trial on the merits, so that it would have been impossible to assess sanctions at the time the papers were filed.” *Id.*

18. *Id.* (quoting *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 139 (W.D. La. 1989)). 28 U.S.C. § 1927 (1988) provides: “Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.” *Id.*

19. *Chambers*, 111 S. Ct. at 2131.

20. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), *aff’d sub nom.* *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

21. *Id.* at 702-03.

22. *Id.* at 702.

23. *Chambers*, 111 S. Ct. at 2128.

III. THE LAW OF SANCTIONS PRIOR TO *CHAMBERS*

A. *Inherent Power to Sanction*

The federal courts' inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs"²⁴ These implied powers of the courts stem "from the nature of their institution" and are "necessary to the exercise of all others."²⁵ The courts have the inherent authority to punish for contempt,²⁶ as well as the power to vacate judgments obtained by a fraud on the court.²⁷ In addition, courts may act *sua sponte* to dismiss actions for failure to prosecute.²⁸ Due to the powerful nature of the courts' inherent power, the Supreme Court has advised that sanctions be made thereunder with "restraint and discretion" on the part of judges.²⁹

B. *Federal Sanctioning Rules and Statute*

Various rules within the Federal Rules of Civil Procedure,³⁰ as well as 28 U.S.C. § 1927,³¹ provide express authority for federal courts to sanction. Fees that may be assessed as sanctions under this authority are "limited to those incurred as a result of the rule violation," which may, in the case of rule 11 violations, justify the imposition of awards as large as those allowed in *Chambers* if initial pleadings are false or frivolous.³²

IV. THE *CHAMBERS* DECISION

A. *The Majority's Opinion*

Justice White, writing for the majority,³³ found that the inherent

24. *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962).

25. *United States v. Hudson*, 11 U.S. 32, 34 (1812).

26. *Ex parte Robinson*, 86 U.S. 505, 510 (1873).

27. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944).

28. *Link*, 370 U.S. at 630-31.

29. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

30. Sanctions are authorized by The Federal Rules of Civil Procedure at rule 11 (requiring certification of papers filed with the court), rule 16(f) (requiring participation in pretrial proceedings), rule 26(g) (requiring certification of discovery documents), and rule 37 (requiring compliance with discovery orders). In addition, sanctions may be assessed at the appellate level under 28 U.S.C. § 1912 (1988) and The Federal Rules of Appellate Procedure 38 and 46. Sanctions are also available under specific circumstances of misconduct. For example, the improper removal of state court actions to federal court may be answered with an order to pay expenses, including attorneys' fees under 28 U.S.C. § 1447(c) (1988). See also J.D. Page & Doug Sigel, *The Inherent and Express Powers of Courts to Sanction*, 31 S. TEX. L. REV. 43, 51-61 (1990).

31. See *supra* note 18.

32. *Chambers*, 111 S. Ct. at 2131 n.8.

33. Justices Marshall, Blackmun, Stevens, and O'Connor joined in the majority opinion.

power of federal courts to impose sanctions is not displaced by federal sanctioning rules and statutes.³⁴ Justice White distinguished the inherent power as being both broader and narrower than the express sanctioning authorities.³⁵ The inherent power is broader in that it can address abuses of litigation not covered under the Rules of Civil Procedure or the statute.³⁶ At the same time, the power is narrower in the sense that it requires a finding of bad faith where, for example, rule 11 only imposes an objective standard of reasonable inquiry for the assessment of sanctions.³⁷ The Court noted that the inherent powers are also acknowledged in the Advisory Committee Notes for rule 11, reflecting Congress' intention that the inherent powers not be displaced by the Federal Rules.³⁸ The Court also declared that federal courts may invoke their inherent powers even though the bad faith conduct could also be sanctioned under the Rules.³⁹

In addressing the main issue, Justice White also noted that a federal court sitting in diversity may impose sanctions by means of the inherent power, even though state law denies the right to attorneys' fees in certain cases.⁴⁰ Accordingly, the precepts of *Erie Railroad v. Tompkins*⁴¹ regarding the application of state law, as opposed to federal law, are only employed where there is a conflict between the state and federal law.⁴² Despite a Louisiana statute which prohibits punitive damages in breach of contract claims,⁴³ sanctions are not prohibited since the state law only disallows punitive awards which are tied to the outcome of litigation.⁴⁴ Sanctions issued in *Chambers*, on the other hand, were not imposed as a part of substantive policy dependent upon the outcome of the litigation. Rather, the inherent power sanctions assessed against *Chambers* were dependent only upon the conduct of the one party.⁴⁵

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

35. *Id.* at 2134-36.

36. *Id.* at 2135.

37. *Id.* at 2135-36.

38. *Id.*

39. *Id.* at 2134 (citing 28 U.S.C. app. at 575-76 (1988)).

40. *Id.* at 2136.

41. 304 U.S. 64 (1938).

42. The *Erie* rule requires application of state law in federal actions in order to discourage forum-shopping and to avoid "inequitable administration of the laws." *Chambers*, 111 S. Ct. at 2137 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

43. *Chambers*, 111 S. Ct. at 2137-38 (citing LA. CIV. CODE ANN. art. 1995 (West 1987)).

44. *Id.* at 2138. *Chambers* asserted that sanctions qualify as punitive damages and the Supreme Court did not dispute this characterization. *Id.* at 2137-38.

45. Justice White agreed with the court of appeals that "[w]e do not see how the district court's inherent power to tax fees for that conduct can be made subservient to any state policy without transgressing the boundaries set out in *Erie* . . ." *Id.* at 2138 (quoting *NASCO, Inc. v. Calcasieu*

Finally, the Court found that the district court acted within its discretion in assessing attorneys' fees as sanctions for Chambers' misconduct.⁴⁶ Relying upon criteria for reviewing awards under rule 11, which were the criteria advanced by Chambers, Justice White approved the lower court's determination of the value which should have been associated with Chambers' misconduct.⁴⁷

B. *The Dissent's Argument*

Justice Kennedy's dissenting opinion in *Chambers*⁴⁸ attacked the majority's broad characterization of the court's inherent powers. Inherent powers, he argued, should instead be exercised only in narrow circumstances.⁴⁹ According to Justice Kennedy, the district court exceeded its inherent power when it sanctioned Chambers for his "pre-litigation" misconduct.⁵⁰ A court's inherent power "extends only to remedy abuses of the judicial process."⁵¹ The primary conduct of the litigants, on the other hand, should be addressed by the states.⁵²

The dissent also argued that the Federal Rules and sanctioning statute limit the exercise of the federal court's inherent sanctioning powers.⁵³ Related to this argument, the dissent asserted that the district court could have relied upon the Federal Rules and statute, principally rule 11, in adequately sanctioning Chambers' and his attorney's bad faith conduct.⁵⁴

Television & Radio, Inc., 894 F.2d 696, 705 (5th Cir. 1990), *aff'd sub nom.* Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991)).

46. *Chambers*, 111 S. Ct. at 2138.

47. *Id.* at 2138-40.

48. Justice Kennedy was joined in his dissent by Chief Justice Rehnquist and Justice Souter.

49. *Chambers*, 111 S. Ct. at 2143 (Kennedy, J., dissenting).

50. The district court's description of the pre-litigation bad faith conduct for which Chambers was sanctioned included Chambers' refusal to perform his "perfectly legal and enforceable contract" with NASCO, which "forced on NASCO" an "unnecessary lawsuit." *Id.* at 2147 (quoting NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 136 (W.D. La. 1989)).

51. *Chambers*, 111 S. Ct. at 2147-48 (Kennedy, J., dissenting).

52. *Id.* at 2148 (Kennedy, J., dissenting) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)). "The inherent power exercised here violates the fundamental tenet of federalism announced in *Erie* by regulating primary behavior that the Constitution leaves to the exclusive province of States." *Id.*

53. In support of this assertion, Justice Kennedy listed cases in which applicable Federal Rules were given weight over the courts' inherent powers, including *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (rejecting the reliance of the court of appeals on inherent power); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (holding that inherent powers could not justify a federal court's circumvention of the "harmless error" inquiry established by FED. R. CRIM. P. 52(a)); *Ex parte Robinson*, 86 U.S. 505 (1873) (holding that Congress had limited the courts' inherent power to punish for contempt by enacting a contempt statute). *Chambers*, 111 S. Ct. at 2143 (Kennedy, J., dissenting).

54. *Id.* at 2146-47 (Kennedy, J., dissenting).

In a separate dissent, Justice Scalia approved of the majority's characterization of the inherent power as essential to the judicial process, but disagreed that such a power "reaches conduct 'beyond the court's confines' that does not 'interfer[e] with the conduct of trial.'"⁵⁵ The district court, then, had no power to sanction Chambers for "flagrant, bad-faith breach of contract," which Justice Scalia argued was the basis for the sanctions.⁵⁶

V. ANALYSIS

A. *Standards for Imposing Sanctions Under Inherent Powers*

The most controversial aspect of the Court's opinion in *Chambers* is its authorization of broad inherent powers to sanction.⁵⁷ Justice White expressly stated that federal courts may go beyond the Federal Rules and statute in sanctioning bad faith conduct if neither is "up to the task."⁵⁸ In doing so, the Court implied that such an inherent power is virtually boundless, curbed only by the vague "informed discretion" of the judges.⁵⁹ The Court acknowledged that the only limitations applied to NASCO's actual sanctions award were those established for the review of rule 11 sanctions.⁶⁰ Despite its discussion of these rule 11 limitations, attempted review of inherent power sanctions under such standards will necessarily fail because the Court has recognized the inherent power as superior to the Federal Rules. Accordingly, sanctions assessed under the inherent power are not subject to the limitations under those Rules.

55. *Id.* at 2140-41 (Scalia, J., dissenting) (quoting *Chambers*, 111 S. Ct. at 2132).

56. *Id.* at 2141.

57. Even though an abuse of the court's discretion in assessing inherent power sanctions may be addressed on appeal, the broad grant should still be limited in the interests of efficiency. See GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 28(C) (1989) (while no cases discuss appealability of inherent power sanctions, guidelines for appealing rule 11 and § 1927 sanctions would appear to apply).

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

59. *Id.* The Federal Rules and the federal sanctioning statute not only "serve to raise the consciousness of judges and attorneys about the need for proper litigation conduct," they "also provide specific mechanisms and precedent to guide judicial imposition of sanctions." Page & Sigel, *supra* note 30, at 51.

60. Appellant Chambers sought review of the district court's sanctions against him under the criteria outlined in rule 11 cases such as *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir. 1990); *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991) and *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir. 1988) (en banc). *Chambers*, 111 S. Ct. at 2138-40. Applying these criteria, the Court in *Chambers* found the sanctions against Chambers to be timely, tailored to a particular wrong, sufficiently mitigated by NASCO, and "personalized." *Id.* In addition, the Court found that Chambers could be sanctioned for "abuses of process occurring beyond the courtroom, such as disobeying the court's orders," since he had received an appropriate hearing. *Id.* at 2139.

A meaningful discussion of any specific standards for either the assessment of sanctions imposed under inherent powers or the review of awards made thereunder is absent from the Court's evaluation. The Court recognized that bad faith is required before attorneys' fees may be assessed as inherent power sanctions and that due process principles must also be honored.⁶¹ The Court further advised caution in assessing sanctions.⁶² However, the Court simply cited to prior case law in which the inherent power included sanctioning authority as its justification for imposing "severe" sanctions.⁶³ Since the sanction of an "outright dismissal of a lawsuit" was previously upheld, the "less severe sanction" of an assessment of attorney's fees was undoubtedly within a court's inherent power as well."⁶⁴

Despite broadening the inherent power and increasing the discretion of judges, the Court provided no additional guidance for ensuring due process.⁶⁵ It is, therefore, necessary to examine the due process aspect of inherent power sanctions because the requirements are less than definitive.⁶⁶ In *Roadway Express, Inc. v. Piper*,⁶⁷ the Court mandated that sanctions should not be ordered without giving the offending party fair notice and the opportunity for a hearing on the record.⁶⁸ Similarly, in *Eash v. Riggins Trucking Inc.*,⁶⁹ due process for imposing monetary sanctions under the inherent power of the court was held to include prior

61. *Id.* at 2136.

62. *Id.*

63. *Id.* at 2132-33.

64. *Id.* at 2133 (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980)).

65. The Court advised that "[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." *Chambers*, 111 S. Ct. at 2136 (citing *Roadway Express*, 447 U.S. at 767).

66. One authority responds to criticism regarding the court's disregard for due process principles in using its inherent power to sanction by recognizing the "judicial sensitivity to due process principles." Page & Sigel, *supra* note 30, at 49 n.36. However, without specific due process requirements, there exists the potential for judicial abuse of the broad inherent power.

67. 447 U.S. 752 (1980).

68. *Id.* at 767 (discussing due process requirements for the imposition of sanctions generally under federal statute, Rules, and the courts' inherent power). The Court also noted that "[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers." *Id.* at 767 n.14. *Roadway Express*, however, was decided before *Chambers*, in which nearly \$1,000,000 was assessed in attorneys' fees and expenses.

69. 757 F.2d 557 (3d Cir. 1985) (en banc) (remanding on due process grounds an assessment of \$390 in juror's fees as an inherent power sanction for settling a lawsuit on the eve of trial in order to avoid a conflict).

notice and a hearing.⁷⁰ Yet, in *Link v. Wabash Railroad*,⁷¹ the Supreme Court recognized that due process is not automatically offended by the lack of notice and hearing on an order of the court.⁷² If circumstances show that the sanctioned party knew the consequences of his conduct, then the absence of traditional due process is acceptable.⁷³

The prerequisite of bad faith for the assessment of inherent power sanctions has also been compromised. Generally, the finding of bad faith of the sanctioned party is required for imposing inherent power sanctions.⁷⁴ But such a finding is not required under rule 11, which instead authorizes sanctions if an objective standard of "reasonable inquiry" is not met.⁷⁵ The Court noted that rule 11 was amended "precisely because the subjective bad faith standard was difficult to establish and courts were therefore reluctant to invoke it as a means of imposing sanctions."⁷⁶ Circumvention of explicit sanctioning authority, such as rule 11, should only occur in the presence of bad faith conduct. Courts should strictly apply the bad faith standard in sanctioning misconduct since behavior which is not bad faith is expressly addressed by the rules. However, case law concerning inherent power sanctions certainly contains instances in

70. *Id.* at 570. In contrast with *Link*, the court found that "as a general practice a monetary detriment should not be imposed by a court without prior notice and some occasion to respond." *Id.* The procedural safeguards of due process gave the sanctioned attorney sufficient opportunity to explain his misconduct, and a hearing facilitated appellate review of the sanction. *Id.* at 571. Finally, "fundamental fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to discipline or sanction by a court." *Id.*

The court's admonition need not be specific if due process requirements are followed. Consider, for example, the notice by United States District Judge for the Western District of Oklahoma Wayne E. Alley, in which Oklahoma lawyers are generally warned to be extremely cautious in filing motions to reconsider rulings of the court. 62 OKLA. B.J. 108 (1991). Though the model order provided by the judge threatens sanctions under 28 U.S.C. § 1927 for "vexatiously multiplying the litigation," under the authority granted in *Chambers* a disgruntled judge could sanction at his discretion. 62 OKLA. B.J. at 109. This generalized announcement could arguably satisfy due process despite the possibility that it was not seen by all attorneys with cases before the judge.

71. 370 U.S. 626 (1962).

72. *Id.* at 632.

73. *Id.* In *Link*, the plaintiff's case was dismissed under the inherent power of the court after the plaintiff's attorney, without reasonable excuse, failed to appear at a scheduled pre-trial conference. *Id.* at 628-29. The Court further justified the potential abuse of due process by noting that "the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of prior notice of less consequence." *Id.* at 632.

Ironically, the district courts should instead recognize their strong interest in strictly observing due process principles, since "due process considerations seem to weigh heavily in the decision to uphold sanctions by the appellate or supreme courts." DON HOWARTH & SUZELLE M. SMITH, CASE ASSESSMENT AND EVALUATION § 4:19, at 85 (1989).

74. See JOSEPH, *supra* note 57, § 26(A).

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

76. *Chambers*, 111 S. Ct. at 2134 n.11 (citing Advisory Committee Notes, 28 U.S.C. app. at 575-76 (1988)).

which a strict requirement of subjective bad faith was avoided.⁷⁷

Since the American rule prohibiting fee shifting is so firmly established in American law, bad faith is generally required before exceptions to the rule are made.⁷⁸ The various sanctions which may be created at the discretion of judges under the inherent power, however, are not as likely to require bad faith.⁷⁹ In his dissent, Justice Scalia strongly asserted that bad faith is not, and should not be, required for the imposition of inherent power sanctions.⁸⁰ Other cases indicate that a mere inference of bad faith will be sufficient.⁸¹ The Court's grant of latitude in the *Chambers* case will further degrade the bad faith requirement in the assessment of sanctions under the inherent power.

Finally, the Court in *Chambers* failed to establish explicit standards for sanctions with respect to a requirement of caution. Recognizing the "potency" of the inherent power, Justice White advised that such powers be "exercised with restraint and discretion."⁸² While the Court outlined various types of sanctions which may be ordered at the judge's discretion, Justice White failed to relate how restraint is to be specifically employed.⁸³ Indeed, the nature of inherent powers appears to be unrestrained in light of the federal courts' authorization to use the powers whenever they feel compelled to exercise their authority to sanction beyond that which is delineated in the Rules or statute. Federal courts may act solely at their own discretion to determine the need for and amount of sanctions under the theory of inherent power.

77. In *Link*, the Court imposed inherent power sanctions where it found the petitioner "had been deliberately proceeding in dilatory fashion." *Link v. Wabash R.R.*, 370 U.S. 626, 633 (1962). The Court implied that the petitioner acted in bad faith, though an express finding of bad faith was not made. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). See JOSEPH, *supra* note 57, § 26(B) (citing *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc)) (conduct which merely infers bad faith may be a basis for inherent power sanctions); JEROLD S. SOLOVY ET AL., SANCTIONS IN FEDERAL LITIGATION § 4.03(A) (1991) (citing *Toombs v. Leone*, 777 F.2d 465, 471 (9th Cir. 1985)) ("[E]ven if there is no express finding of bad faith, the record may support the sanction if it sets forth sufficient evidence of bad faith.").

78. See *Chambers*, 111 S. Ct. at 2140 (Scalia, J., dissenting).

79. The court may cite negligence rather than bad faith as its basis for sanctioning under the inherent power. Justice Scalia lists, as an example, the sanction of dismissal where counsel fails to appear for trial. *Id.*

80. Justice Scalia cites, as an example, *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174 (1884), in which dismissal was found to be an appropriate sanction for unexcused delay in prosecution. *Chambers*, 111 S. Ct. at 2140 (Scalia, J., dissenting).

81. See *Link v. Wabash R.R.*, 370 U.S. 626, 633 (1962) (affirming sanctions because the Court was able to infer bad faith from the actions of counsel in knowingly failing to appear at a pre-trial conference).

82. *Chambers*, 111 S. Ct. at 2132 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)).

83. *Id.* at 2132-33. See Cornelia H. Tuite, *Sanctions Standards Still Murky*, A.B.A. J., Jan. 1991, at 84.

As justification for using the inherent power in lieu of the Federal Rules,⁸⁴ the Court stated that satellite litigation over the adherence of rules sanctions to certain standards would be avoided.⁸⁵ By no means should this be an excuse, however, for the federal court to employ its inherent power instead of the applicable rules as authority to sanction. As noted above, inherent power sanctions are still subject to due process principles. Since the imposition of such sanctions may “often [be] a serious deprivation of property and liberty,”⁸⁶ due process claims may also spawn litigation.⁸⁷ Challenges asserting the due process aspect of inherent power sanctions are even more likely in light of the vagueness of such principles in comparison to the rule 11 standards. Satellite litigation is, therefore, expected to accompany inherent power sanctions.

B. *Severity of Inherent Power Sanctions*

The federal courts' relatively unrestricted ability to sanction under the inherent power raises the question of whether certain sanctions imposed are too severe. The purpose of inherent power sanctions is to penalize bad faith litigation abuses.⁸⁸ Among the penalties available to the court, at its discretion,⁸⁹ are fines,⁹⁰ award of attorneys' fees and costs,⁹¹ disqualification, suspension or disbarment of counsel,⁹² dismissal of an

84. The Court asserted that satellite litigation will result from sanctioning under the authority of both the Federal Rules and statute and the inherent power where misconduct in a lawsuit may be only partially addressed by the Rules. *Chambers*, 111 S. Ct. at 2136. The language of the Court indicates that the Federal Rules may be overlooked in favor of inherent powers even where every instance of misconduct may be sanctioned under the rules. *Id.*

85. Rule 11 sanction disputes may lead to cross-motions for sanctions and disruption of the lawsuit. The question of sanctions may spawn satellite litigation that even “overshadows the litigation on the merits.” DAVID F. HERR ET AL., *MOTION PRACTICE* § 19.4.1 (2d ed. 1991).

86. Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 Sw. L.J. 1011, 1020 (1989).

87. Page & Sigel, *supra* note 30, at 49 n.36.

88. JOSEPH, *supra* note 57, § 27(A) (citing *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201-02 (7th Cir. 1983)).

89. *Id.* See also SOLOVY ET AL., *supra* note 77, § 4.04 (“In exercising inherent power, a court must follow its own rules . . .”).

90. *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1209-10 (11th Cir. 1985) (imposing a fine of \$50,000 on counsel for intentionally implementing an illegal solicitation scheme for exclusion of class members from his client's lawsuit).

91. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975).

92. *Kleiner*, 751 F.2d at 1209-10 (disqualifying counsel for illegally soliciting exclusions from potential plaintiffs in a class action suit); *Titus v. Mercedes Benz of N. Am.*, 695 F.2d 746, 749 n.6 (3d Cir. 1982); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (en banc).

action,⁹³ preclusion of claims and defenses,⁹⁴ and enjoining litigants from future access to the courts.⁹⁵ The federal courts' inherent power to punish for contempt is similar to, but still may be distinguished from, its inherent power to sanction.⁹⁶

Courts are required only to find an "appropriate" sanction to redress misconduct under the inherent power.⁹⁷ Although the "appropriateness" of rule 11 sanctions is determined by a set of definite criteria, the method of evaluating the severity of inherent power sanctions is less exact.⁹⁸ The Court found that Chambers' sanction of nearly \$1,000,000 in attorneys' fees was within the discretion of the district court, and therefore, appropriate.⁹⁹ Acknowledging the Supreme Court's authority to "review a court's imposition of sanctions under its inherent power for abuse of discretion,"¹⁰⁰ Justice White evaluated the amount sanctioned under five criteria derived from rule 11 cases and argued by the defendant.¹⁰¹

Notwithstanding the apparent incongruity of using rule 11 criteria for the review of inherent power sanctions,¹⁰² the criteria advanced by the defendant and used by the Court in reviewing the sanctions indicates that an established standard is necessary to evaluate the severity of the sanctions.¹⁰³ If the Court is to recognize the rule 11 limitations on awards in the context of inherent power sanctions, then Justice White

93. *Link v. Wabash R.R.*, 370 U.S. 626, 629-30 (1962) (ordering dismissal for failure to prosecute).

94. *Petroleum Ins. Agency, Inc. v. Hartford Accident & Indem. Co.*, 106 F.R.D. 59 (D. Mass. 1985).

95. *Lysiak v. Commissioner of Internal Rev.*, 816 F.2d 311, 313 (7th Cir. 1987).

96. "A trial judge possesses the inherent power to discipline counsel for misconduct, short of behavior giving rise to disbarment or criminal censure, without resort to the powers of civil or criminal contempt." *Kleiner*, 751 F.2d at 1209.

Despite the distinction, the court's power to issue contempt sanctions is very similar to the court's inherent sanctioning powers for bad faith conduct in the sense that "[c]ourts must have the power to enforce order and to compel compliance with their authority." Louis Raveson, *A New Perspective on the Judicial Contempt Power: Recommendations for Reform*, 18 HASTINGS CONST. L.Q. 1, 3 (1990). See *Scott v. Hunt Oil Co.*, 398 F.2d 810, 811 (5th Cir. 1968) (imprisoning appellant's attorney as a civil contempt sanction for violating a court order enjoining him from filing an action in state court).

97. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2132-33 (1991).

98. The sanctions imposed by the courts under rule 11 must also be "appropriate." However, established criteria exist for determining whether the sanction is actually appropriate. See *supra* note 60.

99. *Chambers*, 111 S. Ct. at 2138.

100. *Id.*

101. *Id.* Despite the Court's acceptance of Chambers' own choice of criteria as the standard for review of the sanction imposed against him, the sanction was still found to be proper. *Id.*

102. See *supra* note 60 and accompanying text.

103. *Chambers*, 111 S. Ct. at 2138-40.

would have done well to affirmatively adopt them, despite the apparent contradiction such an adoption reflects.

C. *Problems of Inherent Power Sanctions*

One problem which arises from the Supreme Court's grant of authority to sanction under the inherent powers involves the reach of such power beyond the Federal Rules and the sanctioning statute. Justice White, writing for the majority in *Chambers*, allowed that, at times, sanctioning rules may be inadequate.¹⁰⁴ In *Eash v. Riggins Trucking Inc.*,¹⁰⁵ the court stated that traditional penalties, even those based on the inherent powers, may not be adequate to "regulate the wide range of attorney misconduct."¹⁰⁶ However, unlike the Federal Rules and statute enacted for the purpose of sanctioning litigants, the inherent power of the courts is "shielded from direct democratic controls."¹⁰⁷ The inherent power should be exercised in narrowly defined circumstances, not only to prevent judicial abuse, but also to prevent subversion of the Federal Rules.¹⁰⁸ If the inherent power is declared superior to the power of the courts provided for in the Federal Rules, the Federal Rules are rendered ineffectual.¹⁰⁹ Use of the inherent power is acceptable where no rules are applicable to the conduct, but the Federal Rules will not survive if courts may choose to ignore the restraints of specific rules, relying instead on the ambiguous inherent powers.

Case law also suggests that applicable Federal Rules and statute should be preferred over the inherent power of federal courts. In *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,¹¹⁰ the Court found that reliance upon the inherent power, rather than the applicable rule 37, only obscured the analysis of the problem before the Court of determining proper sanctions.¹¹¹ In *Rogers*, the sanction of dismissal for the plaintiff's failure to comply with the requirements of a pre-trial production order was found to be most appropriately addressed by rule 37 of the Federal Rules of Civil Procedure.¹¹² The

104. *Id.* at 2136.

105. 757 F.2d 557 (3d Cir. 1985) (en banc).

106. Debra T. Landis, Annotation, *Inherent Power of Federal District Court to Impose Monetary Sanctions on Counsel in Absence of Contempt of Court*, 77 A.L.R. FED. 789, 793 (1986).

107. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

108. JOSEPH, *supra* note 57, § 25(A)(2).

109. *See Chambers*, 111 S. Ct. at 2144 (Kennedy, J., dissenting).

110. 357 U.S. 197 (1958).

111. *Id.* at 207.

112. *Id.* Rule 37 "addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any

Court seemed to prefer the sanctioning basis which specifically addresses the misconduct at issue. In *Chambers*, the Court inadequately dealt with the *Rogers* conclusion stating that “[b]ecause Rule 37 dealt specifically with discovery sanctions . . . there was ‘no need’ ” to resort to other rules or the court’s inherent power.¹¹³ Especially in cases where all misconduct falls within the scope of Federal Rules, *Chambers’* broad grant of inherent sanctioning power contradicts prior Supreme Court cases which call for application of the relevant rules instead of that power.¹¹⁴

Another problematic effect of *Chambers* is that clients may be punished for the sins of their attorneys under the inherent power scheme.¹¹⁵ The focus of rule 11 and the federal sanctioning statute is on the attorney and his conduct as the director of the litigation.¹¹⁶ The inherent power is properly invoked for the imposition of sanctions on a party when there is clearly bad faith on the part of the client which may have been beyond the reach of the Rules. While the lower court identified *Chambers* as the “strategist”¹¹⁷ behind the bad faith conduct, the court failed to establish

order which is ‘just.’ ” *Id.* The Court also determined that rule 41 was not an appropriate basis for dismissal of the lawsuit since it “cannot easily be interpreted to afford a court more expansive powers than does Rule 37.” *Id.*

113. *Chambers*, 111 S. Ct. at 2135 n.14.

114. While not all of the conduct in *Chambers* could have been addressed by the Federal Rules, it still could be argued that there was “no need” to resort to the inherent power for conduct which could have been sanctioned under the rules. *Id.* at 2136.

115. JOSEPH, *supra* note 57, § 25(C) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59 (1975) (“The federal courts’ ability to impose inherent power sanctions on parties has long been recognized.”); *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). *Pro se* litigants may also be sanctioned under the federal courts’ inherent power. *DiSilvestro v. United States*, 767 F.2d 30, 32 (2d Cir.), *cert. denied*, 474 U.S. 862 (1985); *Van Sickle v. Holloway*, 791 F.2d 1431, 1437 (10th Cir. 1986).

In addition, corporate clients represent an area where the application of rule 11 sanctions is unclear “[b]ecause house counsel [of a corporation] rarely if ever sign any paper filed in litigation, courts cannot hold house counsel liable for a Rule 11 violation. House counsel, however, may be the person who advocates the conduct that the court ultimately finds to have violated the Rule.” Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 801 (1991). Corporate parties who have acted in bad faith may presumably be sanctioned under the inherent powers instead.

116. Although rule 11 does provide that a party may be sanctioned, the action for which sanctions may be imposed (the signing of false or frivolous court papers) is controlled by the attorney.

In deciding on whom the [rule 11] sanction should be imposed, courts consider the degree to which the attorney caused and the client authorized the violation:

Where the violation is primarily a professional dereliction, it is appropriate to impose the sanctions on the attorney and prohibit reimbursement by the client. Where, on the other hand, the violation may reflect deliberate litigation strategy, at least some part of the sanctions can fairly be imposed on the client.

HERR ET AL., *supra* note 85, § 19.4.4 (quoting William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 203 (1985)). 28 U.S.C § 1927 only provides for attorney sanctions.

117. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 132 (W.D. La. 1989), *aff’d*, 894 F.2d 696 (5th Cir. 1990), *aff’d sub nom. Chambers v. NASCO, Inc.*, 111 S. Ct. 2123

or discuss different criteria for imposition of inherent power sanctions when clients were simply acting on the advice of counsel. Though some cases have asserted the proposition that a finding of bad faith should be a prerequisite to party sanctions,¹¹⁸ other courts are willing to waive the bad faith requirement and use their inherent power to sanction.¹¹⁹

D. *Proposed Solution to the Chambers Dilemma*

The stricter standard of subjective bad faith should be required on the part of clients before they may be sanctioned under the federal courts' inherent power. Previous attempts to hold attorneys and parties to a subjective bad faith standard for the imposition of rule 11 sanctions have failed, thus inspiring an amendment to the rule which includes, instead, a standard of objective reasonable inquiry.¹²⁰ Judges found problems with the subjective standard, unsure of how or when to use the sanctioning power.¹²¹ However, attorneys may equitably be held to this lesser, objective standard for the imposition of sanctions since it is the attorney who controls what papers are filed with the court, and the attorney is charged with knowing the rules. Greater protection against potentially harsh inherent power sanctions should be afforded the client, who is further removed from the litigation procedures, such as filing documents with the court, addressed in the Federal Rules.¹²²

(1991). At a hearing in which a temporary restraining order and an injunction were granted against him, Chambers and his counsel were warned by the district court judge that the litigation was taking an unethical course. *Chambers*, 111 S. Ct. at 2129.

118. JOSEPH, *supra* note 57, § 26(A) (citing *In re Ruben*, 825 F.2d 977, 986 (6th Cir. 1987) ("[A] party cannot be taxed with the misconduct of his or her counsel absent evidence reflecting that the party participated in the misconduct."), *cert. denied*, 108 S. Ct. 1108 (1988) (sanctions for misconduct relating to the handling of the litigation were properly assessed against attorneys alone)). See also *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292 (S.D.N.Y. 1987). In *Unique Concepts*, the plaintiff's attorney, "personally and without reimbursement from his client," was ordered to reimburse defendant for the cost of a deposition transcript after acting in bad faith to harass and delay the deposition. *Id.* at 294. The attorney was also "fined \$250 to be paid into Court . . . for contentious, abusive, obstructive, scurrilous, and insulting conduct in a Court ordered deposition." *Id.*

"By the same token, counsel is not properly sanctioned for misconduct that is obviously that of the client alone." JOSEPH, *supra* note 57, § 26(A) (citing *Bower v. Weisman*, 674 F. Supp. 109, 112 (S.D.N.Y. 1987)) (holding sanctions for the plaintiff's perjury were personal to the plaintiff alone where the plaintiff's attorney had no knowledge of his client's bad faith).

119. See *supra* notes 78-82 and accompanying text. See also *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962) (because petitioner voluntarily chose his attorney as his representative in the action, he could not avoid the consequences of the acts or omissions of his "freely selected agent").

120. Peter Ramels, Note, *Factual Frivolity: Sanctioning Clients Under Rule 11*—Business Guides, Inc. v. Chromatic Communications Enterprises, 65 WASH. L. REV. 939, 939-40 (1990).

121. HERR ET AL., *supra* note 85, § 19.4.2. Before its revision in 1983, attorneys were not likely to be punished under rule 11. Between the time rule 11 was created in 1938 until 1976, only nineteen cases involving the rule were reported. *Id.*

122. *But see* *Business Guides, Inc. v. Chromatic Communications Enter.*, 111 S. Ct. 922 (1991).

To address the problems presented in *Chambers*, courts must develop clear and unbending due process limitations.¹²³ Due process restrictions placed upon punitive damage awards¹²⁴ may serve as a model in this regard.¹²⁵ Congress could draft statutes to administer types of sanctions and a clear strategy for their imposition.¹²⁶ In addition, the requisite bad faith should not be merely inferred or the requirement excused altogether in certain circumstances. The party seeking sanctions should carry the burden of showing bad faith by clear and convincing evidence when the Federal Rules or statute could be applied to the conduct as well.

Additionally, local rules, which provide guidelines for the imposition of inherent power sanctions, could be established. Local rules governing standards for the imposition of inherent power sanctions may be preferred "given that the district courts vary tremendously in size, volume of cases, calendar congestion, and types of cases, and that litigation

In *Business Guides*, the Court noted that often "it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading." *Id.* at 932.

123. Due process standards for inherent power sanctions are "flexible" and the protections vary according to the circumstances of each case. JOSEPH, *supra* note 57, § 28(A). While notice and the opportunity to be heard have been noted as prerequisites to sanctions, such protections are not always observed by the courts. See *supra* notes 69-73 and accompanying text.

To conform with due process principles, one commentator has suggested the following modifications to the courts' use of the inherent sanctioning power:

- (1) The aggrieved party should, "in writing and with precision," inform the other party of its misconduct; the party should then have ten days in which to cure its violation before the aggrieved party moves for a remedy;
- (2) the district court should hold a hearing on any request for sanctions with notice given as to what conduct will warrant sanctions and what range of penalties may be encountered; and
- (3) the court of appeals' review of inherent power sanctions should include an "abuse of discretion" standard with respect to the type and amount of the sanction assessed by a district court.

Cogan, *supra* note 86, at 1021 (citing *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987)) (regarding rule 11 sanctions).

124. See *supra* note 44. See also JOSEPH, *supra* note 57, § 27(B)(2) (explaining the purpose of an assessment of attorneys' fees as inherent power sanctions is punitive).

125. "As long as the discretion [in determining punitive damages] is exercised within reasonable constraints, due process is satisfied." *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991). See also Joseph C.M. Woltz, Note, *Possible Constitutional Limits on Punitive Damages: Bankers Life & Casualty Co. v. Crenshaw*, 24 TULSA L.J. 429 (1989).

In *Pacific*, the Court outlined standards for such restraint on discretion, including the determination of (a) a "reasonable relationship" between the award and defendant's conduct, (b) the "degree of reprehensibility" of defendant's conduct, (c) the profitability of the misconduct, (d) the defendant's financial condition, (e) the costs of the litigation, (f) the imposition of any criminal sanctions, and (g) the mitigation of any civil awards against the defendant for the same misconduct. *Pacific*, 111 S. Ct. at 1045. Of course, not all of these factors will always apply to sanctions awards under the court's inherent powers. They do, however, suffice as a model for standards which have "real effect" on awards made under the discretion of the court. *Id.*

126. Cogan, *supra* note 86, at 1020-21.

tactics of attorneys may differ across the country, it is not readily apparent that a national rule is either required or desirable."¹²⁷

Alternatively, criteria, as set out in case law for determining the "appropriateness" of rule 11 sanctions, should be expressly adopted in order to provide standards for the sanctions awarded under such a broad grant of judicial discretion.¹²⁸ The "degree of nexus" between the offending party's conduct and the sanctions imposed under the court's inherent power should also be measured in determining limits on such sanctions.¹²⁹

VI. CONCLUSION

The inherent power to sanction, as recently expanded by the Supreme Court in *Chambers*, is too broad and should not be exercised if the existing Federal Rules are applicable to parties' or attorneys' misconduct. Standards applied to the imposition of rule 11 sanctions may serve as a guide for limitations on the courts' inherent power when such sanctioning power is appropriately exercised in the absence of an applicable rule or statute. Existing limitations on the courts' inherent power, specifically due process and bad faith requirements, should not be so easily avoidable. If inherent power sanctions are to be imposed for misconduct which may be addressed by the Federal Rules or by statute, the requirement of subjective bad faith must be strictly upheld.

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127. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985). In *Eash*, the court found that:

[T]he district courts have the power, absent a statute or rule promulgated by the Supreme Court to the contrary, to make local rules that impose reasonable sanctions where an attorney conducts himself in a manner unbecoming a member of the bar, fails to comply with any rule of court, including local rules, or takes actions in bad faith.

Id. at 569.

128. See *supra* note 60 and accompanying text.

129. Landis, *supra* note 106, at 801 (citing *Nesco Design Group, Inc. v. Grace*, 577 F. Supp. 414 (W.D. Pa. 1983)) (imposing jury costs as sanction on attorney was directly related to the attorney's settlement of a lawsuit without sufficient notice to the court).

