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Procedure—Sanctions—Federal Procedural Rules Do Not Displace Inherent Powers of Court to Award Attorney's Fees for Bad Faith Conduct. Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991).

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PROCEDURE—SANCTIONS—FEDERAL PROCEDURAL RULES DO NOT DISPLACE INHERENT POWERS OF COURT TO AWARD ATTORNEY'S FEES FOR BAD FAITH CONDUCT. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

G. Russell Chambers was the sole stockholder and director of Calcasieu Television and Radio, Inc., a television station which operated the NBC affiliate station KPLC-TV in Lake Charles, Louisiana.[1] On August 9, 1983, Chambers entered into an agreement to sell the station to NASCO, Inc. (NASCO) for eighteen million dollars. In late August, however, Chambers decided not to go through with the sale and asked NASCO to abandon the deal.[2] When NASCO refused, Chambers breached the contract by failing to file Federal Communication Commission papers as required by the purchase agreement.[3] Consequently, NASCO informed Chambers that it would file suit for specific performance and seek a temporary restraining order prohibiting the transfer or encumbrance of any of the properties subject to the agreement.[4] In response, Chambers and his attorney devised a plan intended to take advantage of NASCO's failure to record the agreement pursuant to the Louisiana Public Records Doctrine.[5] Under the plan, Chambers attempted to place the real property subject to the contract beyond the jurisdiction of the district court by selling the properties to a related entity and recording the deeds before the issuance of the temporary restraining order.[6]

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1. Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2128 (1991).
2. *Id.*
3. NASCO, Inc., v. Calcasieu Television and Radio, 124 F.R.D. 120, 125 (W.D. La. 1989).
4. *Chambers*, 111 S. Ct. at 2128.
5. *Id.*
6. The scheme called for Chambers to execute warranty deeds puporting to convey CTR real property to newly created trusts controlled by him. On the morning of October 17, 1983, these deeds were executed and recorded. Later that same morning, NASCO's counsel filed its complaint, and a hearing was held on the temporary restraing order (TRO). Chambers' attorney participated in the hearing by telephone, but failed to mention the transfer of the properties to the trusts despite the district court judge's inquiry concerning the possibility of a sale to a third party. The judge issued a TRO on the afternoon of October 16, 1983. On the same day, but after the TRO was issued, Chambers met with his sister, the trustee of the trusts to which the properties were transferred, and had her sign the trust documents and a note payable to CTR. The next day, October 18, 1983, Chambers' attorney informed the district court by letter of the previous recordation of the deed before the issuance of the TRO. In the days following the entry of the TRO, Chambers' attorneys prepared an agreement under which CTR leased back the properties con-

Throughout the proceedings Chambers' conduct was abusive, and the court repeatedly warned him to cease improper behavior. For example, Chambers refused to allow NASCO officials to inspect CTR's corporate records as provided by the agreement.[7] Chambers then filed a series of motions, pleadings, and delaying actions.[8] He also interjected collateral issues and used the discovery process to explore them.[9] Despite the lengthy pretrial proceedings,[10] on the eve of the trial Chambers conceded that the agreement was valid.[11] At trial, the court found that Chambers introduced no evidence against the validity of the agreement and that the purported sale of the properties to the related entity was a sham transaction without legal effect.[12] The court, therefore, entered judgement on the merits in NASCO's favor and ordered Cham-

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veyed to the trusts. On October 24, 1983, the district court held a hearing and granted NASCO a preliminary injunction that ordered Chambers to refrain from selling or in any way encumbering any of the assets being purchased by NASCO. Also, at the October 24th hearing, the court warned Chambers that his acts on October 16th and 17th were reprehensible and unethical and that no similar acts should be repeated in the future. The next day, October 25, 1983, Chambers' sister signed the trust documents as trustee and returned the leaseback agreement to Chambers. *NASCO, Inc.*, 124 F.R.D. 120, 125-27.

7. Chambers was held in comptempt and fined $25,000 as a result. The court held the fine was justified because Chambers acted in a deceptive manner and had a condescending attitude toward the judicial resolution of the matter. NASCO, Inc. v. Calcasieu Television & Radio, 583 F. Supp. 115, 122 (W.D. La. 1984).

8. These motions included two motions for summary judgment that the district court found were submitted in bad faith. Chambers also filed other charges and counterclaims against NASCO which the court concluded were deliberate untruths and fabrications. The district court found that Chambers' attorney knew they were false at the time they were filed. *NASCO, Inc.*, 124 F.R.D. at 127-28.

9. Chambers took depositions of bank officials and NASCO's board members. The court canceled several of the uncompleted depositions because of irrelevance and considered the cancellation to be another warning to Chambers. Chambers also designated over 100 witnesses before trial, but called only two of them to testify. Seventeen months after the initial complaint was filed, Chambers filed a motion to recuse the judge. After the motion was denied, Chambers further delayed the trial by filing an unsuccessful writ of mandamus seeking to compel disqualification with the Fifth Circuit Court of Appeals. *Id.* at 128.

10. The pretrial proceedings lasted seventeen months. The initial complaint was filed in October, 1983, and the trial was held in April, 1985. *Id.* at 126, 128.

11. Chambers argued that even though the contract was valid, it should not be enforced because of the earlier sale of properties to another party. *Id.*

12. Before judgment was entered, Chambers filed a petition with the Federal Communications Commission (FCC) asking for permission to construct a new transmission tower and move the station's transmission facilities to that site. The petition was withdrawn when NASCO sought contempt sanctions. Once judgment was entered, Chambers convinced CTR officials to file formal opposition to NASCO's pending application for FCC approval of the transfer of the station's license. NASCO again sought contempt sanctions and the opposition was withdrawn. Chambers then attempted to exclude from the sale certain new operating equipment that had been acquired during the pretrial proceedings. *NASCO.*, 124 F.R.D. at 129.

bers and CTR to perform the purchase agreement.[13]

The United States Court of Appeals for the Fifth Circuit affirmed, ruling from the bench at the close of oral argument. The appellate court imposed sanctions under Federal Rule of Appellate Procedure 38[14] and remanded the case to the district court to determine whether sanctions under Federal Rule of Civil Procedure (FRCP) 11[15] and 28 U.S.C. § 1927[16] (Section 1927) should be imposed against Chambers and his attorneys. On remand, the court found that Chambers attempted to deprive the court of jurisdiction by performing fraudulent acts and filing false and frivolous pleadings. He also attempted to reduce NASCO to exhausted compliance by tactics of delay, oppression, and harassment.[17] The court, accordingly, imposed sanctions against Chambers in the form of attorney's fees and expenses totaling $996,645.[18] The sanctions represented the entire amount of the litigation costs NASCO paid to its attorneys.[19]

The district court relied on its inherent power as authority to impose sanctions.[20] The sanctioning mechanisms of both FRCP 11 and Section 1927 were rejected because the mechanisms were deemed to be insufficient to support an award of full litigation costs.[21] The Court of

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13. NASCO, Inc. v. Calcasieu Television and Radio, 623 F. Supp. 1372, 1386 (W.D. La. 1985).

14. The rule provides that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

15. The rule provides in part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

16. This section states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof 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.

28 U.S.C. § 1927 (1988).

17. *NASCO, Inc.*, 124 F.R.D. at 138.

18. The court also imposed sanctions against Chambers' attorneys. Attorney Gray, who was primarily involved in a scheme to transfer the assets in a fraudulent sale, was disbarred and prohibited from seeking readmission for three years. Attorney McCabe, who was involved in tactics to delay closing of the sale, was suspended from practicing for five years. *Id.* at 145-46.

19. *Id.* at 133.

20. *Id.* at 139-43.

21. Rule 11 was deemed inapplicable because it did not reach the majority of Chambers' conduct. *Id.* at 138-39. Also, it would have been impossible to assess sanctions at the time the

Appeals for the Fifth Circuit affirmed.[22] The Supreme Court granted certiorari.[23] The Court held that the district court acted within its discretion and affirmed the Fifth Circuit. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991).

The inherent powers doctrine gave federal courts authority to take action necessary to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases"[24] and to "impose silence, respect, and decorum, in [its] presence, and submission to [its] lawful mandates . . . ."[25] At common law, the inherent power was the primary authority to control the behavior of litigants.[26] The federal court thus developed the authority under inherent powers to impose a wide range of sanctions. Most notably, inherent power was extended to provide authority to impose monetary sanctions against a party who acted in bad faith and to dismiss a complaint.[27]

The Supreme Court first ruled on the judiciary's inherent ability to impose sanctions for bad faith conduct in 1962 in *Vaughan v. Atkin-*

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papers were filed because their falsity did not become apparent until after the trial on the merits. *Id.* The court, likewise, did not rely on Section 1927, which imposes sanctions for bad faith conduct, because the statute only applies to attorneys and not parties to a suit. *Id.* at 139.

22. NASCO, Inc. v. Calcasieu Television and Radio, 894 F.2d 696, 708 (5th Cir. 1990).

23. Chambers v. NASCO, Inc., 111 S. Ct. 38 (1990).

24. Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962).

25. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821). *See also Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510-11 (1873).

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

27. In Eash v. Riggens Trucking, 757 F.2d 557, 562-64 (3d Cir. 1985), the Third Circuit attempted to categorize different uses of the term "inherent power." The court noted that the phrase has been used in three different contexts. The first use of the phrase involves an extremely narrow range of authority concerning only activity fundamental to the essence of the court. *See generally* A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem In Constitutional Revision*, 107 U. PA. L. REV. 1 (1958). The second use of the phrase encompasses those powers which arise from the nature of the court and are necessary to exercise all others. Unites States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). The third use of the term encompasses power obtained from English common-law equity courts. ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978).

The court in *Eash* stated that judges, when invoking inherent power, rarely explain which of these three bases provides authority. Yet, courts have developed a wide range of authority under the inherent power doctrine. *Eash*, 757 F.2d at 564. Along with the power to issue monetary sanctions for bad faith conduct, these powers include the power to hold a party in contempt, Anderson v. Dunn, 19 U.S. (6 Wheat) 204, 227 (1821); to discipline attorneys, Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871) and Roadway Express v. Piper, 447 U.S. 752, 766 (1980); to conduct an independent investigation to determine whether fraud has been perpetrated upon the court, Universal Oil Prods. v. Root Ref. Co., 328 U.S. 575, 580 (1946); to dismiss a case sua sponte, Link v. Wabash R.R., 370 U.S. 626, 630 (1962); to remove disruptive litigants, Illinois v. Allen, 397 U.S. 337 (1970); and to enjoin the filing of repeated, frivolous in forma pauperis petitions, *In re* McDonald, 489 U.S. 180 (1989).

son.[28] The Court held that the inherent powers permitted an assessment of attorney's fees as a sanction when the losing party acted in a callous manner.[29] Later Supreme Court decisions have cited *Vaughan* as supporting an award of sanctions to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for other oppressive reasons.[30] While *Vaughan* only referred to losing parties,[31] sanctions have been extended to prevailing parties who abuse the litigation process.[32] In *Roadway Express v. Piper* the Supreme Court fur-

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28. 369 U.S. 527 (1962). *See generally* MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY'S FEES ¶ 1.02 [IV] (1986) [HEREINAFTER DERFNER & WOLF].

The court's ability to impose sanctions for bad faith conduct is often referred to as the "bad faith exception" to the American rule of allocating litigation costs. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE, 372-73 (1989) [hereinafter JOSEPH]. The American rule provides that, as a general rule, attorney's fees are not recoverable as cost or damages in the absence of the statute authorizing the award of fees or an agreement between the parties providing for them. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Proponents of the American rule argue that the rule is justified because the shifting of attorney's fees is a form of a penalty and a litigant should not be penalized for merely bringing or defending a lawsuit. The poor may be reluctant to bring a lawsuit to vindicate their rights if payment of the opposing side's attorney's fees is a penalty for losing. Also, the additional burden on the legal system resulting from due process requirements justify the American rule. DERFNER & WOLF, *supra*, ¶ 1.03[1].

Prior to Chambers, courts were inconsistent in defining awards of attorney's fees. Sometimes it was labelled an award of "costs;" at other times it was referred to as an award of "damages." The difference between costs and damages could be substantial. If fees were considered damages, some courts held that the merits of the lawsuit were not appealable until the amount of fees had been set. Also, they were likely to be considered substantive and governed by state law in a diversity case. In addition, if fees were held to be damages they were required to be specifically pleaded and proved. DERFNER & WOLF, *supra*, ¶ 1.01[2].

29. The court in *Vaughan* did not explain the rationale of the newly announced exception. *Vaughan*, 369 U.S. at 530-31 (1962).

30. *See, e.g.*, F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 n.17 (1974). The court's inherent power to sanction litigants and attorneys who act in bad faith embraces two types of conduct. The basis for sanctions may either be bad faith which induces the litigation or bad faith which occurs during litigation. The first type of conduct, prelitigation bad faith, occurs where a defendant has unjustifiably refused to recognize the clear legal rights of the plaintiff, thereby forcing the plaintiff to bring a lawsuit. *See, e.g.*, Richardson v. Communications Workers, 530 F.2d 126, 132-33 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976) (breach of fiduciary duty and wrongful discharge from employment). Prelitigation bad faith may also occur where a plaintiff has brought a vexatious or harassing action into court against a defendant. Nemeroff v. Abelson, 469 F. Supp. 630, 640 (S.D.N.Y. 1979). The second type of conduct, litigation in bad faith, occurs where a party or attorney unnecessarily prolongs or complicates litigation for purposes of delay or malice. *See, e.g.*, First Nat'l Bank v. Dunham, 471 F.2d 712, 713 (8th Cir. 1973) (evasive and delaying tactics, fraudulent conveyances, and soliciting misleading testimony); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088-89 (2d Cir. 1977) (harrassment, procedural delay, and threatening a witness).

31. *Vaughn,*, 469 U.S. at 530.

32. *See, e.g., In re* TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985); Wright v. Jackson, 522

ther extended the scope of inherent power to include counsel as well as litigants.[33]

Courts have realized, however, that the authority to control litigants' behavior pursuant to inherent power is limited.[34] One limitation concerns situations where such authority conflicts with a federal rule.[35] The Supreme Court first considered such a limitation in 1958 in *Societe Internationale Pour Participations Industrieles*.[36] The Court held that it was inappropriate for a district court to rely on inherent power rather than FRCP 37 to dismiss a complaint when the plaintiff failed to comply with a discovery order.[37] Rule 37 described specific consequences for failure to make discovery. The available sanctions under the Rule included striking all or part of a pleading or dismissing an action.[38] The Court stated that "whether a court has power to dismiss a complaint because of noncompliance with a discovery order depends exclusively upon Rule 37 . . . ."[39] Reliance on inherent power, the Court added, could only obscure the analysis of the issue.[40]

The holding in *Societe Internationale* is a reflection of an early goal behind the promulgation of the Federal Rules of Civil Procedure.

F.2d 955, 958 (4th Cir. 1975).

33. *Roadway Express*, 447 U.S. at 766.

34. Courts have considered areas where the inherent power to sanction may be preempted. Examples include diversity cases, *see infra* note 89 and accompanying text, the application of fee-shifting statues, securities fraud cases, civil rights cases, and bankruptcy proceedings. DERFNER & WOLF, *supra* note 28, at ¶ 4.03.

35. While Congress did not enact the Federal Rules of Civil Procedure, the rules are considered to be statutory in nature because Congress participates in the rule-making process. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, H.R. DOC. NO. 54, 98th Cong., 1st Sess. 3-25 (1983).

Along with the sanctioning mechanisms of the federal rules, Section 1927 represents a codification of the inherent power to impose sanctions for abusive litigation. Section 1927 provides that an attorney who unreasonably and vexatiously multiplies proceedings may be required to personally pay the excess costs associated with his conduct. 28 U.S.C. § 1927 (1988).

36. 357 U.S. 197 (1958).

37. *Id.* at 207.

38. The rule stated in part:

> Sanctions by Court in Which Action is Pending. If a party . . . refuses to obey . . . an order made under Rule 34 to produce any document or other thing for inspection . . . , the court may make such orders in regard to the refusal as are just, and among others the following:
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> . . . .
>
> (iii) An order striking out pleadings or other parts thereof . . . or dismissing the action or proceeding or any part thereof . . . .

FED. R. CIV. P. 37(b)(2).

39. 357 U.S. at 207.

40. *Id.*

Congress enacted the rules to bring about uniformity in the federal courts.[41] This uniformity, it is argued, promotes fairness and efficiency in the federal court system.[42] Surprises are reduced, and attorneys and litigants know how to proceed when they act under a set of uniform rules.[43]

Shortly after the decision in *Societe Internationale*, the Supreme Court considered whether Federal Rule 41(b) limited a district court's inherent power to dismiss a complaint for lack of prosecution. In *Link v. Wabash R.R.*[44] the district court judge, without resorting to Rule 41(b), dismissed a complaint when the plaintiff's attorney did not provide a reasonable excuse for failing to attend a pretrial conference.[45] Rule 41(b) provided that a complaint could be dismissed upon a motion by the defendant if the plaintiff failed to prosecute the action.[46] Here, the plaintiff made no motion to dismiss.[47] In affirming the dismissal, the Supreme Court first stated that the inherent power to dismiss was well established.[48] The Court next reasoned that such a power could only be abrogated by a clear expression of such purpose.[49] Rule 41(b) contained no such language.[50]

After the decisions in *Societe Internatinale* and *Link*, Congress amended the federal rules' sanctioning mechanisms. The amendments were made to increase the federal judges' propensity to impose sanctions by building on and expanding the courts' inherent power.[51] Rule

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41. Hanna v. Plumer, 380 U.S. 460, 472 (1965).

42. *See generally* Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 860 (1989).

43. *Id.*

44. 370 U.S. 626 (1962).

45. *Id* at 628-29.

46. Rule 41(b) provided in part:

> Involuntary Dismissal: Effect Thereof. 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 . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdicition or improper venue, operates as an adjudication upon the merits.

FED. R. CIV P. 41(b).

47. 370 U.S. at 630.

48. *Id.* at 629.

49. *Id.* 631-32.

50. *Id.* at 630.

51. Despite the judicial authority to impose sanctions against those who acted in bad faith, courts before 1983 were generally reluctant to resort to this inherent power. Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990). The Advisory Committee Notes to the 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure state that the Rule was amended

37, for example, was amended to allow the imposition of sanctions for a negligent failure to comply with a discovery order.[52] Prior to the amendment, courts frequently interpreted Rule 37 as requiring a willful failure on the part of the noncomplying party before sanctions could be imposed.[53] Likewise, the judiciary amended FRCP 11 to require the signer[54] of a paper filed with the federal court to make a reasonable prefiling inquiry into both the facts and law.[55] The Rule 11 Advisory Committee Notes state that this standard is intended to be more stringent than the inherent powers good faith threshold.[56] The amendments to Rule 11 make sanctions mandatory in an attempt to overcome the

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in order to encourage judges to sanction abusive conduct when appropriate. WEST'S FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 44 (1991). Old Rule 11, before its amendment in 1983, coincided with the inherent power to sanction for bad faith conduct. The Rule provided that a pleading could be stricken as a sham if the filer acted in bad faith. From the Rule's promulgation in 1938 to 1976, there were only 23 reported cases where a party attempted to have the opposing party's pleading striken. D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34 (1976). The advisory notes to the 1983 amendments to Rule 11 also state that the amendments were an attempt to deal with growing abuse in litigation by building on and expanding the court's inherent power. Likewise, the notes to Rule 26, which imposes sanctions for discovery abuses, make explicit that the authority for the amendments is derived from the courts' inherent power. WEST'S FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 103 (1991).

52. The Rule's title was amended to change "refusal" to comply to "failure" to comply. FED R. CIV. P. 37. *See* WEST'S FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 128 (1991).

53. In *Societe Internationale* the Supreme Court distinguished between an inability to comply with a discovery order, which was not subject to sanctions under the Rule as it then existed, and a failure to comply because of willfulness, bad faith, or fault, which was subject to sanctions. 357 U.S. at 212.

54. In *Business Guides, Inc. v. Chromatic Communications Enters.*, the Supreme Court held that the term "signer" in Rule 11 applied to a party represented by an attorney, as well as an attorney, if the represented party signed a paper filed with the court. 111 S. Ct. 922, 928-30 (1991).

55. The term "reasonable" in Rule 11 has been interpreted to impose an objective standard upon signers. *See, e.g.*, Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986) (finding of subjective bad faith for bringing a cause of action for violations of the Voting Rights Act, 42 U.S.C. § 1971 (1982), was not necessary to impose sanctions under Rule 11).

In *Business Guides* the Supreme Court held that represented parties subject to Rule 11, are subject to an objective standard in the same manner as attorneys. 111 S. Ct. at 933. The Court rejected Business Guides' argument that the application of Rule 11 to impose an objective standard of reasonable inquiry resulted in wholesale fee-shifting which exceeded the judiciary's authority under the American rule. *Id.* at 934. The Court noted that the basis for shifting attorney's fees under Rule 11 is derived from the Rules Enabling Act, which provides that the judiciary may promulgate rules reasonably necessary to maintain the integrity of the system of federal practice and procedure if the effect on substantive rights is only incidental. *Id.* The Court in *Business Guides* stated that the effect on substantive rights from imposing attorney's fees as a sanction under Rule 11 was incidental because the purpose of the Rule is to deter baseless filings rather than to compensate injured parties. *Id.*

56. WEST'S FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 44 (1991).

usual practice under inherent power to intervene only at the request of a party.[57] The amendments to Rule 11 also provide that, if an attorney violates the duty imposed by the Rule, courts have the discretion to impose sanctions on the attorney, the party the signing attorney represents, or both.[58] The Advisory Committee Notes state that under the new Rule 11 it may be appropriate to impose sanctions against a client even though it is the attorney whose signature violates the Rule.[59] These provisions thus attempt to supplement the court's inherent power by eliminating any doubt as to the propriety of sanctions.[60]

Along with the desire to reduce the judiciary's reluctance to impose sanctions, the amendments to the federal rules represent an effort by Congress to strike a balance between two competing policies.[61] On the one hand, Congress seeks to further the policy of giving courts the power to sufficiently deter abusive parties or attorneys from using the courts for improper purposes.[62] The effect of awarding monetary sanctions also may compensate an injured party for out of pocket costs and attorney's fees, but this function is usually considered to be secondary to the rule's deterrence function.[63] On the other hand, it is recognized that imposing punitive sanctions may have a significant impact on a competing policy interest: the chilling effect on a decision whether to bring a meritorious suit.[64] This concern is especially strong where new or unpopular causes of aciton are brought or where the court imposes large monetary sanctions.[65]

Ten years after the 1970 amendments to Rule 37, the Supreme Court in *Roadway Express Inc v. Piper*[66] indicated that Rule 37 and inherent power were both available as authority to impose sanctions for

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57. *Id.*

58. *E.g.*, Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184 (10th Cir. 1985). The court held that sanctions could be imposed against a client, as well as an attorney, where the evidence showed that the client was the catalyst behind the frivolous motion. *Id.* at 1187.

59. WEST'S FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 44 (1991).

60. *Id.*

61. *See generally* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L. J.. 1313 (1986) [hereinafter Nelken].

62. Nelken, *supra* note 61, at 1316-18.

63. Business Guides, Inc. v. Chromatic Communication Enters., 111 S. Ct. 922, 934 (1991).

64. Nelken, *supra* note 61, at 1338-51.

65. Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L. J. 383, 393 (1990). This concern is particularly strong in civil rights suits. *Id.*

66. 447 U.S. 752 (1980).

a failure to comply with discovery orders. The district court dismissed the suit and ordered the plaintiff to pay the defendant's costs and attorney's fees for the entire suit.[67] The district court relied on Section 1927[68] as authority to impose sanctions.[69] The Supreme Court held that Section 1927 as it then existed did not support an award of attorney's fees.[70] The Court then remanded the case for a determination whether a sanction was available under either Rule 37 or inherent power.[71] Although the Court indicated that both Rule 37 and inherent power were available as authorities for imposing sanctions, it failed to discuss whether Rule 37, as amended in 1970, limited the court's inherent power. Likewise, only passing reference was made to *Societe Internationale.*[72]

Predictably, the decision in *Roadway Express* was later interpreted as holding that Rule 37 was no longer the sole authority to impose sanctions for failure to comply with discovery orders. In *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*[73] the First Circuit held that a district court properly relied on inherent power to enter a default judgement for an abuse in the discovery process.[74] The court cited *Roadway Express* as authority to support the proposition that the federal rules did not completely describe the power of the judiciary to deal with abusive litigants.[75] The court then reasoned that it was unnecessary to rely on the sanctioning mechanisms of the federal rules because the defendant's conduct constituted fraud on the court.[76] This level of abuse was sanctionable under inherent power because it exceeded the behavior contemplated by Rule 37 and violated the court's ability to function.[77]

After the 1983 amendments to Rule 11, a similiar issue arose regarding whether the new Rule limited the court's inherent power to

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67. *Id.* at 756.

68. *See supra* note 16.

69. *Roadway Express*, 447 U.S. at 756.

70. *Id.* at 761. The Court observed that Section 1927 provided that "costs" could be awarded, but failed to define the term. *Id.* at 757. Subsequently, Section 1927 was amended to include awards of attorney's fees as sanctions. *See generally* JOSEPH, *supra* note 28, at 313.

71. *Roadway Express*, 447 U.S. at 767.

72. *Id.* at 767 n.14.

73. 771 F.2d 5 (1st Cir. 1985).

74. *Id.* at 12.

75. *Id.* at 11.

76. *Id.* at 11-12.

77. *Id.* at 10-12.

impose sanctions. In *Zaldivar v. City of Los Angeles*[78] the Ninth Circuit reversed the imposition of Rule 11 sanctions issued against the plaintiffs for filing an action after the dismissal of a similar case in which the plaintiffs were not parties. In holding that Rule 11 did not reach the conduct at issue, the court stated that Rule 11 was not intended to repeal or modify existing authority of the federal courts to deal with abusive attorneys under inherent power.[79]

Despite the apparent trend to abandon the reasoning in *Societe Internationale*, the Supreme Court in 1988 refused to allow the use of inherent power to dismiss a criminal case when a Federal Rule of Criminal Procedure covered the conduct in question. In *Bank of Nova Scotia v. United States*[80] the Supreme Court held that a district court could not rely on its supervisory power to circumvent the clear mandate of a federal rule. The Rule at issue, Federal Rule of Criminal Procedure 52(a),[81] provided that a harmless error which does not affect substantial rights must be disregarded by the court. The district court judge relied on the court's supervisory power, and not Federal Rule of Criminal Procedure 52, to dismiss an indictment on the basis of prosecutorial misconduct and irregularities in grand jury proceedings.[82] The Supreme Court found that the misconduct was not prejudicial because it had no effect on the grand jury's decision to indict.[83] To be deemed prejudicial the misconduct must have either substantially influenced the grand jury's decision or given rise to a grave doubt that the decision to indict was free from substantial influence.[84] The Court held, therefore, that the district court judge's dismissal violated the harmless error provision of Rule 52(a). Accordingly, it was inappropriate for the district court to resort to its supervisory powers to dismiss a complaint when a procedural rule specifically mandated a contrary result.[85]

Along with holding that procedural rules preempted a court's ability to resort to inherent power to sanction bad faith conduct, federal courts also concluded that inherent power was preempted in diversity

78. 780 F.2d 823 (9th Cir. 1986).

79. *Id.* at 829-30.

80. 108 S. Ct. 2369 (1988).

81. FED. R. CRIM. P. 52. The Rule provided that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

82. *Bank of Nova Scotia*, 108 S. Ct. at 2373.

83. *Id* at 2378.

84. *Id.*

85. *Id.*

cases.[86] In *Alyeska Pipeline Co. v. Wilderness Society*[87] the Supreme Court reaffirmed that a federal court had the inherent power to sanction a party who acted in bad faith. However, in footnote 31 the Court stated:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal stuatute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."[88]

Some federal courts interpreted this footnote to hold that sanctions in the form of attorney's fees could not be awarded on the basis of the court's inherent power unless the applicable state law allowed such a sanction.[89] Other federal courts, however, did not read the footnote in such a manner and upheld the court's ability to sanction litigants for bad faith conduct when the court sat in diversity.[90]

Significantly, in *Chambers v. NASCO, Inc.* the Supreme Court ruled that the inherent power to assess sanctions for bad faith conduct was not preempted.[91] The Court first determined that the provisions of the federal rules and Section 1927 that impose sanctions for bad faith conduct did not displace the inherent power to impose sanctions. The Court emphasized that inherent power to sanction for bad faith conduct is still necessary because the power is both broader and narrower than the sanctioning mechanisms in the federal rules.[92] The inherent power to sanction is broader than the federal rules because the inherent power applies to a wide range of conduct while the federal rules seek to pinpoint specific abuses. The inherent power to sanction is narrower than the federal rules because the inherent power requires a finding of bad faith while the federal rules sanction negligent or unreasonable

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86. *See generally* JOSEPH, *supra* note 28, at 376.

87. 421 U.S. 240 (1975).

88. *Id.* at 259 (quoting 6 JAMES W. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 54.77[2] (2d ed. 1974)).

89. *See, e.g.*, McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 232 (1st Cir. 1980); Perkins State Bank v. Connolly, 632 F.2d 1306, 1310 (5th Cir. 1980); Lewis v. S.L. & E., Inc., 629 F.2d 764, 773 n.21 (2d Cir. 1980); Montgomery Ward & Co. v. Pacific Indem. Co., 557 F.2d 51, 58 n.9 (3d Cir. 1977).

90. *See, e.g.*, Piney Woods Country Life Sch. v. Shell Oil Co., 539 F. Supp. 957, 987-88 (S.D. Miss. 1982).

91. *Chambers*, 111 S. Ct. at 2131-32.

92. *Id.* at 2134.

conduct.[93] The Court also relied on the Advisory Committee Notes to the 1983 amendments to the federal rules.[94] The Notes state that the sanctioning provisions of the federal rules are intended to build upon and expand the inherent power of the court to sanction.[95] The Court in *Chambers* cited with approval the Ninth Circuit's holding in *Zaldivar* that Rule 11 did not displace inherent power.[96]

The Court also distinguished its prior holdings in *Societe Internationale* and *Bank of Nova Scotia*.[97] The Court stated that *Societe Internationale*, which held that it was improper to resort to inherent power to punish a discovery abuse specifically covered in Rule 37, was not on point because in *Societe Internationale* the procedural rule covered the entire conduct in question.[98] The Court indicated that the situation in *Chambers* was different from *Societe Internationale* because Rule 11 did not cover all of Chambers' bad faith conduct. The Court recognized that when bad faith conduct can be adequately sanctioned under the federal rules, the courts should rely on the rules' sanctioning mechanisms rather than inherent power. If, however, in the informed discretion of the judge neither the federal rules nor Section 1927 is "up to the task," the judge may safely rely on inherent power.[99]

The Court stated that *Bank of Nova Scotia*, which held that inherent power may not be used to escape the clear mandate of a procedural rule, was not to the contrary because the reliance on inherent power did not violate the purposes of the other statutory sanctioning mechanisms.[100] The Court indicated that the situation in *Chambers* was different from that in *Bank of Nova Scotia* because in *Chambers* an appropriate sanction was issued in compliance with FRCP 11.[101] In *Bank of Nova Scotia*, the court did not comply with the mandatory terms of Federal Rule of Criminal Procedure 52.[102]

The Court next determined that a federal court sitting in diversity has the ability to impose sanctions under inherent power regardless of state law. Footnote 31 in *Alyeska* only limited the inherent power to

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93. *Id.*
94. *Id.* at 2134-35.
95. *See supra* note 51.
96. *Chambers*, 111 S. Ct. at 2135.
97. *Id.* at 2135 n.14 & 2136.
98. *Id.* at 2135 n.14.
99. *Id.* at 2136.
100. *Id.*
101. *Id.*
102. *See supra* note 80 and accompanying text.

award fees as sanctions when a state rule addressed the award of attorney's fees in terms of a substantive state policy.[103] Where no such rule exists, the Court noted, attorney's fees may be imposed as a sanction for bad faith conduct because the practice is procedural under *Erie Railroad Co. v. Tompkins*.[104] The Court drew an analogy to its reasoning in *Business Guides, Inc. v. Chromatic Communications Enterprises*.[105] There the Court held that FRCP 11 sanctions do not result in a type of fee-shifting that creates a substantive right because imposition of the sanctions is not tied to the outcome of the litigation.[106] The relevant inquiry under Rule 11 is whether a specific filing is, if not successful, at least well founded. Sanctions under the court's inherent power, likewise, do not depend on which party wins the lawsuit, but on how the parties conduct themselves.[107]

Finally, the Court discussed the general scope of the ability to award sanctions under both inherent power and FRCP 11. The Court noted that sanctions may be awarded years after a judgement on the merits if it finds sanctionable conduct, and the full amount of attorney's fees may be awarded as a sanction if the abuses in the judicial system are severe, as they were in *Chambers*. The Court also stated that under inherent powers it may sanction abuses that occur beyond the courtroom, such as disobeying court orders.[108]

Justice Kennedy, in his dissent, contended that the majority erred in two respects. First, he contended that the majority infringed on Congress' power to regulate fees and costs associated with litigation by failing to resort to the sanctioning mechanisms in the controlling rules and statutes.[109] Justice Kennedy also noted that, under the American rule, the allocation of costs accruing from litigation is a matter to be determined by the legislature, not the courts.[110] By direct action and delegation, the dissent continued, Congress exercised this perrogative by providing district courts with a comprehensive list of federal rules and

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

104. 304 U.S. 64 (1938). The holding in *Erie* provides, generally, that where a federal court sitting in diversity is faced with a conflict btween federal and state substantive law, the federal court should apply state law. But, if the rule at issue is procedural, then the court should follow the federal rule.

105. 111 S. Ct. 922 (1991).

106. *Id.* at 934-35.

107. *Chambers*, 111 S. Ct. at 2137.

108. *Id.* at 2139.

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

110. *Id.* at 2141-42 (Kennedy, J., dissenting).

statutes to deal with abuses. These provisions were enacted only after much consideration of the surrounding policy issues. The dissent contended, therefore, that the majority's holding that a court may resort to inherent powers when federal rules or statutes cover the same conduct, is an intrusion on the scope of the procedural rules.[111] Second, Justice Kennedy argued that the majority improperly upheld a sanction that was in part attributable to an intentional breach of contract rather than an abuse of the judicial process.[112] The dissent based this argument on a portion of the disctrict court's opinion which held that the balance of attorney's fees and expenses would not have been incurred by NASCO if Chambers had not defaulted and forced NASCO to bring suit.[113]

The decision in *Chambers* addresses a problem of increasing importance: how to curb the explosion of litigation abuse. Federal courts are increasingly burdened by groundless suits and "Rambo" litigators.[114] Sanctions against such abusive behavior are needed to protect the public's legal rights, to promote access to federal courts, and to maintain the integrity of the legal profession. Any Supreme Court decision that significantly deals with the litigation abuse problem is noteworthy.

The response to the problem posed by the Court, at least until cries for reform are answered, is to create a two-level sanctioning scheme. The two levels are distinguished by the culpability of the attorney or party against whom sanctions are sought. If the party acts in subjective bad faith, then under *Chambers*, a federal court may resort to inherent power to impose a wide variety of sanctions.[115] If the court finds, however, that the litigant only acted negligently or unreasonably, then the court may only look to the statutory sanctioning mechanisms of the FRCP. Thus, in almost any case in which sanctions are issued, a judge should, to be precise, distinguish whether the party acted in bad faith or was merely negligent.

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

112. *Id.* at 2147-48 (Kennedy, J., dissenting).

113. The district court stated:

> The balance of . . . fees and expenses included in the sanctions would not have been incurred by NASCO if Chambers had not defaulted and forced NASCO to bring this suit. There is absolutely no reason why Chambers should not reimburse in full all attorney's fees and expenses that NASCO, by Chambers' action, was forced to pay.

Id. at 2148 (citing NASCO, Inc., v. Calcasieu Television & Radio, 124 F.R.D. 120, 143 (W.D. La. 1989).

114. *See* Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A.J., March 1, 1988, at 79.

115. *See supra* note 27.

This two-level sanctioning scheme will have two potential results. First, the scheme will increase the federal judge's ability to police abusive parties. The legal definition of what types of conduct constitute bad faith is broad and unclear.[116] Courts are often in conflict over the threshold that must be surpassed to label a litigant's conduct as bad faith.[117] The standard is amorphous and often identifiable only after the conduct in question has concluded. Because the legal definition of what types of conduct constitute bad faith is unclear, the federal judge has wide discretion to label a litigant's conduct as either negligent or the product of bad faith. This broad power to define bad faith will increase the judges' ability to impose many types of sanctions that otherwise may not be available under the FRCP.

The second result of *Chambers*' two-level sanctioning scheme concerns much of the satellite litigation regarding the sanctioning provisions of the FRCP. As of December 1987, there were almost 700 Rule 11 cases interpreting the scope of the Rule's application.[118] These cases have explored in detail the application of the Rule to many specific circumstances.[119] A question that arises after *Chambers* is whether so much satellite litigation will be needed in the future if the issue of whether the court has proper authority to issue a sanction can be resolved by a finding of bad faith. *Business Guides* provides an example.[120] The issue in the case concerned whether Rule 11 imposed an objective standard of reasonable inquiry on a represented party who signed a paper filed with the court. The Court held that a represented party may be sanctioned if the party signed a paper even if the party only acts unreasonably or negligently. The Court viewed the signing requirement as critical to liability.

A casual reading of *Business Guides* may lead one to conclude that a party who does not sign a paper is protected from liability based on a congressional policy decision to encourage access to federal courts by restricting the reach of Rule 11. This conclusion, at first glance, seems to be supportable because *Business Guides* devoted extensive discussion to the signing requirement. Yet, *Chambers* makes it clear that a court may safely rely on inherent power to sanction a party who acts in bad faith, regardless of whether the party signed a paper filed with

116. *See generally*, DERFNER & WOLF, *supra note 28, at ¶ 4.02[1].*
117. *Id.*
118. Georgene M. Vario, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988).
119. *See* JOSEPH, *supra* note 28, at 33.
120. *See supra* note 54.

the federal court. Because courts often have difficulty defining bad faith, the holding in *Business Guides* seems to sink to an inconsequential level.

Chambers is also significant because the Court only briefly refers to the policy issues concerning the allocation of fees and expenses arising from litigation. The sanctioning mechanisms of the FRCP and Section 1927 reflect substantial policy choices that relate back to the American rule of awarding attorney's fees.[121] Commentators have written extensively on the rationales of the American rule.[122] Likewise, since the 1983 amendments to FRCP 11, commentators have discussed whether the Rule's application results in the desired deterrent effect without chilling new litigation.[123] Yet, *Chambers* viewed the creation of congressionally enacted sanctioning mechanisms as merely an extension of judicial power to control litigants' and attorneys' behavior in the courts, rather than a reflection of policy choices made by Congress.

Finally, the case may have a significant effect on Arkansas law because of the Arkansas courts' reluctance to impose sanctions for bad faith conduct under inherent power.[124] Since *Chambers* clarified that a district court's ability to award sanctions is procedural under *Erie*, a federal court applying Arkansas law may now freely apply inherent power to sanction a party who acts in bad faith. Whether Arkansas courts will more readily impose sanctions as a result of this decision remains to be seen.

Goodloe Partee

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121. *See supra* note 28.

122. *See* Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. J. 651.

123. Nelken, *supra* note 61, at 1338-51.

124. Arkansas courts have not ruled specifically on whether the inherent power is an appropriate basis for imposing sanctions for bad faith. Chrisco v. Sun Indus., Inc., 304 Ark. 227, 228, 800 S.W.2d 717, 718 (1990).