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STRANDED AT SEA: THE SEVENTH CIRCUIT AND THE RULE 11 “SAFE HARBOR” RULE

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INTRODUCTION

Federal Rule of Civil Procedure 11 (“Rule 11”) performs a critical, but often overlooked, function in civil disputes. It imposes a “signing requirement” on attorneys.¹ The rule requires attorneys to certify that their pleadings and motions have a proper purpose by providing their signature as a stamp of approval.² By endorsing filings with their signature, attorneys attest that the claims they are submitting on behalf of their clients are supported by law or a good faith extension of the law³ and bolstered by evidence.⁴ Though the signing requirement may appear to be little more than a procedural formality, “[t]here may be no better example than Federal Rule of Civil Procedure 11 . . . of how the law of civil procedure has influenced the legal profession.”⁵

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¹ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990).

² FED. R. CIV. P. 11(b)(1).

³ FED. R. CIV. P. 11(b)(3).

⁴ FED. R. CIV. P. 11(b)(2).

⁵ Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589 (1998).

“[F]ederal courts exercise considerable discretion and great power . . . essential in preserving the rule of law and the rights and liberties of the American people, in cases large and small, landmark and mundane.”⁶ When a party invokes these powers in a civil case, it ignites a “powerful, intimidating, and often expensive” legal process that is often vulnerable to abuse by litigants.⁷ This is in part because meritless pleadings are distracting, costly, and an impediment to swift justice.⁸ Despite the common misconception, Rule 11 is more than a toothless, guiding principle. Rather, it regulates attorney conduct by discouraging them from pursuing “baseless filings” that can bungle proceedings in federal court.⁹

Rule 11’s regulatory might is rooted in the discretion it gives district court judges to levy sanctions.¹⁰ Rule 11(c) provides that “the court may impose an appropriate sanction on any attorney, law firm, or party that violate[s] the rule or is responsible for the violation.”¹¹ The rule encourages thorough pre-filing investigation by attorneys when analyzing their clients’ claims.¹² To avoid sanctions, lawyers and their clients must limit their pleadings and motions to those reasonably supported by the law.¹³ The threat of sanctions can be “petrifying” for attorneys.¹⁴ The very existence of Rule 11 is a constant reminder of the problems that fester within the federal civil

⁶ Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 883 (7th Cir. 2017).

⁷ *Id.*

⁸ *Id.* at 883-84.

⁹ Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

¹⁰ *Id.* at 399.

¹¹ FED. R. CIV. P. 11(c).

¹² Melissa L. Stuart, *A Young Lawyer’s Guide to Rule 11 Sanctions*, AMERICAN BAR ASSOCIATION (June 20, 2012), <https://apps.americanbar.org/litigation/committees/trialpractice/articles/spring2012-young-lawyers-guide-rule11-sanctions.html>

¹³ *Id.*

¹⁴ *Id.*

litigation system.¹⁵ It serves as “a model and potent tool” for deterring and sanctioning misconduct during the early stages of litigation.¹⁶

There is currently a circuit split among the United States courts of appeals about the procedure attorneys must follow to trigger sanctions against opposing counsel.¹⁷ A plain reading of the rule suggests that attorneys must serve a motion upon opposing counsel before filing for sanctions with the court pursuant to Rule 11.¹⁸ This “warning shot” provides targeted parties and their legal counsel an opportunity to seek “safe harbor” by correcting or withdrawing sanctionable pleadings.¹⁹ The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits are unified in demanding strict compliance with this procedure.²⁰ The Seventh Circuit, however, has developed precedent that mere “substantial compliance” is sufficient.²¹ In *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, the Seventh Circuit was presented with an opportunity to clarify its position. Part I of this note discusses the origins of Rule 11 and explores how the rule has transformed since its inception. Part II takes a deeper look at how substantial compliance became controlling precedent in the Seventh Circuit and why other circuits have chosen not to adopt the same approach. Part III discusses the Seventh Circuit’s recent decision in *Northern Illinois Telecom v. PNC Bank, N.A.* Part IV analyzes the decision and explores the arguments for and against the strict and substantial compliance interpretations of Rule 11. And, finally, Part V provides a brief

¹⁵ GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES, AND PREVENTIVE MEASURES 2* (Richard G. Johnson ed., 3rd ed. 2004).

¹⁶ *Id.* at 2.

¹⁷ *Matrix IV, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago*, 649 F.3d 539, 542 (7th Cir. 2011).

¹⁸ *Penn, LLC v. Prosper Business Development Corp.* 773 F.3d 764, 767 (6th Cir. 2014); *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006).

¹⁹ *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 882 (7th Cir. 2017).

²⁰ *Penn*, 773 F.3d at 768.

²¹ *Matrix IV*, 649 F.3d at 553 (7th Cir. 2011); *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 808 (7th Cir. 2003).

summation of the note and assesses the likely future of the “substantial compliance” rule in the Seventh Circuit.

I. HISTORICAL BACKGROUND

Rule 11, at its simplest, is an effort to ensure that attorneys act responsibly while advancing their clients’ interests.²² The threat of sanctions, however, has not always been a factor that attorneys have seriously considered when drafting pleadings.²³ Over time, a series of amendments to the rule have manipulated the firmness with which courts have applied it. In its original form, Rule 11 was little more than a wispy, rarely applied promise.²⁴ But, it quickly evolved into a disruptive armament wielded by litigators after it was amended in 1983.²⁵ This radical transformation incited the adoption of a safe harbor requirement²⁶ which is still taking shape today.

A. Pre-1983 Amendments

The Federal Rules of Civil Procedure were enacted in 1938.²⁷ Rule 11, in both its original and current form, requires attorneys to sign the pleadings, motions, and other filings they submit to the court on behalf of their clients.²⁸ The signature is an act of “certification” that is meant to provide the court confidence that attorneys are pursuing legitimate, actionable claims.²⁹ From the outset, Rule 11

²² Vairo, *supra* note 15, at 5-6.

²³ Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 885 (7th Cir. 2017).

²⁴ Vairo, *supra* note 15, at 9-10.

²⁵ *Id.* at 19-20.

²⁶ FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.

²⁷ Vairo, *supra* note 15, at 5.

²⁸ *Id.* at 5-6.

²⁹ *Id.*

provided federal district courts considerable discretion to impose sanctions on attorneys that violated the rule’s mandate.³⁰

The debut of Rule 11 was not the first codified attempt to deter attorneys from pursuing frivolous claims.³¹ As early as the mid-nineteenth century, Judge Joseph Story championed a theory that the adoption of an attorney signing requirement would ensure that lawsuits were well-grounded in facts and the law.³² Rule 24 of the Federal Equity Rules of 1842 embraced Story’s recommendation by requiring pleadings to contain the signature of the presenting attorney.³³ Similarly, Rule 11 was not the first attempt to sanction attorney conduct.³⁴ 28 U.S.C. § 1927 allowed judges the discretion to penalize attorneys who were found to have “unreasonably” inflated the cost of litigation.³⁵ Yet in comparison with its predecessors, Rule 11 promised a more direct path for judges to sanction attorneys who advanced claims that were frivolous or brought for another improper purpose, like delay or the inflation of expenses for the opposing party.³⁶ The early supporters of Rule 11 had two goals: first, to create an environment that cultivated honest attorneys; and, second, to “streamline the litigation process.”³⁷

Rule 11 was ineffective at achieving the idealistic expectations that cultivated it. The primary issue underlying Rule 11’s initial ineffectiveness was that it held attorneys to a good-faith standard.³⁸ Sanctions were only justified if, in the eyes of the judge, the targeted attorney could not muster a “good faith argument” in support of his or

³⁰ Vairo, *supra* note 15, at 5-6.

³¹ *Id.*

³² JARED S. SOLOVY & CHARLES M. SHAFFER, RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION 15-16 (1987).

³³ *Id.*

³⁴ Vairo, *supra* note 15, at 5-6.

³⁵ *Id.*

³⁶ FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.

³⁷ *Id.*

³⁸ Vairo, *supra* note 15, at 7.

her potentially infringing filing.³⁹ This standard was too subjective and proved to be too flimsy to function as an useful deterrent.⁴⁰ Instead, Rule 11 was a source of “considerable confusion” that failed to significantly curtail abuses.⁴¹ There were “only a handful” of decisions that involved Rule 11 sanctions between its enactment in 1938 and 1983.⁴²

B. 1983 Amendments

Rule 11 was amended for the first time in 1983.⁴³ With the rule’s shortcomings in mind, the Advisory Committee set out to make the rule a more potent force in preventing litigation abuses by reducing “reluctance” to impose sanctions.⁴⁴ The drafters of the revisions took an aggressive stance against attorney misconduct. The Advisory Committee stressed that the courts needed to play a more active role in the “detection” of violations and explicitly encouraged “punishment” of infringing attorneys.⁴⁵

Perhaps the most impactful change to Rule 11 was the adoption of a new standard of conduct.⁴⁶ The rule, in its original form, was criticized as too “vague and subjective” because its “good-faith” standard tilted the benefit of doubt in favor of infringing parties and attorneys.⁴⁷ To cure this perceived flaw, the drafters of the amendment heightened the standard from mere good-faith to the more objective reasonableness under the circumstances standard.⁴⁸ The Advisory Committee intended this change to provide judges with a more

³⁹ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399 (1990).

⁴⁰ *Vairo*, *supra* note 15, at 7.

⁴¹ FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.

⁴² *Vairo*, *supra* note 15, at 47.

⁴³ FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Vairo*, *supra* note 15, at 7.

⁴⁸ FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.

objective lens through which to analyze attorney conduct and to broaden the “range of circumstances” that would trigger sanctions.⁴⁹

Additionally, Rule 11 underwent a series of textual changes that sent the message to judges that they needed to impose sanctions more frequently.⁵⁰ First, the drafters included the word “sanctions” in the text of the rule for the first time.⁵¹ The new rule “expressly allowed for the imposition of expenses, including . . . reasonable attorneys’ fees.”⁵² This strategic addition solidified a new commitment to penalizing attorneys for violating Rule 11.⁵³ Second, the drafters removed a provision that allowed judges to simply strike improper motions and pleadings.⁵⁴ This provision was “confusing” and rarely used.⁵⁵ Most importantly, the rule was redrafted to include the phrase “shall impose.”⁵⁶ The new version of Rule 11 tasked judges with an affirmative duty to impose sanctions for violations where they once had discretion.⁵⁷

When the 1983 Amendments took effect, some feared that Rule 11 would continue to be ignored, while others argued that it was still too subjective.⁵⁸ Others feared that the drastic changes would lead the rule to be aggressively over-applied in unintended ways.⁵⁹ In 1990, the United States Supreme Court tackled concerns about Rule 11 sanctions in *Cooter & Gell v. Hartmarx Corp.* In *Cooter & Gell*, the Court considered whether a district court could rightfully impose sanctions on a plaintiff who voluntarily withdrew a frivolous

⁴⁹ FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Vairo, *supra* note 15, at 11.

⁵³ FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.

⁵⁴ *Id.*

⁵⁵ Vairo, *supra* note 15, at 11.

⁵⁶ FED. R. CIV. P. 11 advisory committee’s note to 1983 Amendment.

⁵⁷ *Id.*

⁵⁸ Vairo, *supra* note 15, at 13.

⁵⁹ *Id.* at 12-15.

complaint.⁶⁰ The Court held that judges were required to impose sanctions even where the filing at issue was voluntarily withdrawn or corrected.⁶¹ The Supreme Court clung to a “plain meaning” interpretation of Rule 11; judges, the Court held, did not have the discretion to waive sanctions.⁶² Though the court embraced a black-letter interpretation of Rule 11, it did not hesitate to identify the rule’s shortcomings, noting that it “must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy”⁶³

C. 1993 Amendments

The fear that Rule 11 would be “overused” following the 1983 revisions quickly became a reality.⁶⁴ Over 650 Rule 11 hearings were held and recorded between the adoption of the 1983 amendments and December 1987, a substantial increase from the “handful” of decisions recorded in the previous era.⁶⁵ The revisions were criticized as an “over-correction.”⁶⁶ As Rule 11 began facing harsh criticism, momentum started to build for a new set of amendments.⁶⁷ An interim report that highlighted the flaws of the 1983 revisions was compiled.⁶⁸ According to the report, Rule 11 chilled attorney creativity, discouraged the pursuit of novel arguments, created substantial delays in proceedings, and was being applied inconsistently by judges.⁶⁹ Most notably, Rule 11 was criticized for exacerbating the “contentious and uncooperative behavior” during litigation that the rule was originally

⁶⁰ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 388 (1990).

⁶¹ *Id.* at 398.

⁶² *Id.* at 392.

⁶³ *Id.* at 393.

⁶⁴ Vairo, *supra* note 15, at 13.

⁶⁵ *Id.* at 47.

⁶⁶ *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 885 (7th Cir. 2017).

⁶⁷ Vairo, *supra* note 15, at 15.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* at 19-20.

enacted to prevent.⁷⁰ The interim report made it clear that there was a need for further revisions.⁷¹ It showed that only 20% of judges favored a retreat to the pre-1983 status quo.⁷² The Advisory Committee for the 1993 amendments needed to discover a middle ground. Rule 11 required balance.

The 1993 amendments “intended to remedy problems” that arose with the “interpretation and application of the 1983 revision”⁷³ Specifically, the committee wanted to “place greater constraints on the imposition of sanctions” in order to “reduce the number of motions for sanctions” that were delaying proceedings.⁷⁴ Accordingly, the committee set out to tighten the spigot on the gush of sanctions that were flooding the courts by retreating from the hard line approach it embraced only ten years prior.⁷⁵ Judges were once again granted “significant discretion” in determining whether sanctions were warranted and, if so, how harsh they should be on a case by case basis.⁷⁶ The mandate that judges “shall impose” sanctions was relaxed to an instruction that they “may impose” them.⁷⁷ Ultimately, the committee settled on a softer, more lenient position.⁷⁸ This, it was believed, signaled to judges and attorneys that they should be “less zealous in using Rule 11” during litigation, especially “where there were relatively minor infractions”⁷⁹

Further, the revised Rule 11 included a new provision that mandated advance notice of impending sanctions to attorneys that risked facing sanctions before they could be imposed.⁸⁰ This

⁷⁰ Vairo, *supra* note 15, at 19.

⁷¹ *Id.*

⁷² *Id.*

⁷³ FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ FED. R. CIV. P. 11(c).

⁷⁸ Vairo, *supra* note 15, at 32.

⁷⁹ *Id.*

⁸⁰ FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.

procedural hurdle was added to provide at-risk attorneys an “opportunity to respond” to opposing parties that threatened sanctions.⁸¹ All “requests for sanctions” required a separate motion to be served on attorneys to warn them that sanctions were being threatened.⁸² This practice, the committee hoped, would provide potentially infringing attorneys a chance to correct or withdraw their pleadings and avoid triggering costly satellite litigation.⁸³

More precisely, the revised Rule 11 required attorneys who intended to pursue sanctions to wait at least 21 days after service before officially filing the motion with the court.⁸⁴ This addition to the Rule was intended to provide a “warning shot” to attorneys who might be in violation of the rule a chance to seek safe harbor.⁸⁵ It, in turn, provided lawyers security from sanctions by giving them an opportunity to re-certify their filings.⁸⁶

The safe harbor provision was adopted to fulfill the “streamlining purpose originally envisioned by the 1983 architects of Rule 11.”⁸⁷ The new rule imposed a 21 day safe harbor period.⁸⁸ Though this would cause minor delays, it would save time and costs in the aggregate because it allowed attorneys to abandon frivolous claims and avoid triggering even more time consuming and costly satellite litigation.⁸⁹ The 1993 amendment refocused the purpose of Rule 11 as a mechanism for clarifying the issues and merits of the case rather than a mechanism to punish attorneys.⁹⁰ By allowing safe harbor, Rule 11 finally found the appropriate balance needed to effectively combat frivolous motions and pleadings.

⁸¹ FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Vairo, *supra* note 15, at 32.

⁸⁸ FED. R. CIV. P. 11(c).

⁸⁹ FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.

⁹⁰ *Id.*

II. HISTORY OF SUBSTANTIAL COMPLIANCE

The 1993 amendments drew back the “fangs” of Rule 11.⁹¹ After the changes took effect, district courts quickly aligned with the new rule’s “relax[ed]” standards of liability,⁹² and the circuit courts began to reinforce that sanctions were again discretionary, not mandatory.⁹³ The adjustments to the rule were successful at placing new constraints on judge’s ability to impose sanctions.⁹⁴ But, the new Rule 11 was not immune to criticism or confusion. Some judges reacted unfavorably to the new safeguards.⁹⁵ This distaste materialized in the Seventh Circuit’s unique interpretation of the safe harbor provision.

A. Emergence of Substantial Compliance

In 2003, the Seventh Circuit adopted a novel interpretation of Rule 11 when resolving an appeal of a district court decision that denied sanctions. In *Nisenbaum v. Milwaukee County*, the plaintiff brought a 42 U.S.C.S. § 1983 claim against his government employer for allegedly violating his First and Fourteenth Amendment rights.⁹⁶ Nisenbaum, a security supervisor for Milwaukee County, argued that he was improperly stripped of his job as retaliation because he ran for County Clerk.⁹⁷ The magistrate judge and the Seventh Circuit agreed that Nisenbaum’s claims were patently frivolous because the county passed a budget that phased out Nisenbaum’s position before he began

⁹¹ *Pierre v. Inroads, Inc.*, 858 F.Supp. 769, 774 (N.D. Ill. 1994).

⁹² *Vairo*, *supra* note 15, at 77.

⁹³ *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994).

⁹⁴ *Vairo*, *supra* note 15, at 77-80.

⁹⁵ *Knipe*, 867 F. Supp. at 763 n. 12.

⁹⁶ *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 806 (7th Cir. 2003).

⁹⁷ *Id.* at 806.

his candidacy.⁹⁸ The Seventh Circuit, however, disagreed with the magistrate judge on whether sanctions were warranted.⁹⁹

The magistrate judge determined that Nisenbaum's claim was "frivolous from the get-go" and was sanctionable under Rule 11(c),¹⁰⁰ but refused to enforce sanctions because the defendants failed to adhere to the procedure required by Rule 11(c)(2) which states that a motion *must* be served on a party facing sanctions.¹⁰¹ Milwaukee County did not serve Nisenbaum with a motion nor did it file a motion with the district court.¹⁰² Instead, the county simply sent Nisenbaum's attorney a letter in which it threatened sanctions.¹⁰³ Despite the warning, Nisenbaum's attorney proceeded with his plaintiff's claims.¹⁰⁴

When explaining the denial of sanctions, the magistrate judge noted that his decision to do so was "technical" because if the defendant provided notice by service of a motion, then sanctions would have been warranted.¹⁰⁵ The Seventh Circuit disagreed. "A serious request for sanctions is entitled to more than a brushoff," wrote Circuit Judge Easterbrook.¹⁰⁶ On review, the Seventh Circuit remanded the case to the court below with instruction that the defendants were "entitled to a decision on the merits of their request for sanctions."¹⁰⁷ The court reconciled the lack of procedural compliance with the safe harbor provision by finding that the defendants "complied substantially" with Rule 11(c)(2).¹⁰⁸ By providing informal notice to Nisenbaum and giving him 21 days to

⁹⁸ *Nisenbaum*, 333 F.3d at 807.

⁹⁹ *Id.* at 808.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 811.

¹⁰⁷ *Id.* at 808.

¹⁰⁸ *Id.*

correct or withdraw his claim, Milwaukee County was compliant with Rule 11.¹⁰⁹

The Seventh Circuit has consistently recognized substantial compliance with Rule 11(c) as sufficient grounds for sanctions.¹¹⁰ The court explained the merits of a substantial compliance approach in *Matrix IV, Inc. v. American National Bank & Trust Co. of Chicago*.¹¹¹ In *Matrix IV*, the plaintiff brought a common law fraud claim against the defendant in district court even though a similar fraud claim had already failed in bankruptcy court.¹¹² The district court found against Matrix IV, Inc. (“Matrix”) on the grounds of *res judicata* and collateral estoppel.¹¹³ On appeal, the Seventh Circuit confirmed that the suit was properly dismissed.¹¹⁴ The Seventh Circuit agreed with the district court that sanctions were not warranted in *Matrix IV*, but did so on different grounds.¹¹⁵

In district court, Matrix was spared the burden of sanctions because the defendant’s method of notice was “procedurally defective.”¹¹⁶ Notice was sent to Matrix in the form of a letter from opposing counsel explicitly threatening sanctions against Matrix if the claims against the defendant were not dismissed.¹¹⁷ The letter was sent almost two years prior to the eventual dismissal of the claim, and the defendants, in turn, moved for sanctions three weeks after the

¹⁰⁹ *Nisenbaum*, 333 F.3d at 808.

¹¹⁰ *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 886-87 (7th Cir. 2017).; *Matrix IV, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago*, 649 F.3d 539, 552 (7th Cir. 2011); *Nisenbaum*, 333 F.3d at 808.

¹¹¹ *Matrix IV*, 649 F.3d at 552; *see also* *Fabriko Acquisition Crop v. Prokos*, 536 F.3d 605, 610 (7th Cir. 2003) (discussing that an informal letter is sufficient to start the “21-day window to withdraw or correct the claim” so long as a formal motion is submitted to the court to trigger sanctions).

¹¹² *Matrix IV*, 649 F.3d at 541-42.

¹¹³ *Id.* at 542.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 552.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

dismissal.¹¹⁸ Though the defendants did not serve Matrix with an official motion at least 21 days prior to filing for sanctions, the Seventh Circuit ruled for the defendants, stating “motions for sanctions are permissible so long as the moving party substantially complies with Rule 11’s safe harbor requirement.”¹¹⁹ In this case, like in *Nisenbaum*, the Seventh Circuit held that the method of notice was sufficient to serve as proper notice and trigger sanctions.¹²⁰ Though the court ultimately agreed with the district court that sanctions were not warranted, the decision turned on substantive rather than procedural grounds.¹²¹

B. Opposition to Substantial Compliance

The Seventh Circuit is currently the only circuit that recognizes substantial compliance with Rule 11(c)(2).¹²² It is the only circuit to recognize that proper notice can come in the form of an informal letter.¹²³ Most other circuits require strict compliance based on the plain language of the rule, but some circuits have not yet addressed this question.¹²⁴

Substantial compliance has been met by other circuits with disapproval. In *Roth v. Green*, 466 F.3d 1179 (2006), the Tenth Circuit explicitly rejected and openly criticized the substantial compliance test.¹²⁵ There, the plaintiff alleged that a “stop and search” performed by police officers violated his Fourth Amendment rights.¹²⁶ The court

¹¹⁸ *Id.*

¹¹⁹ *Matrix IV, Inc. v. Am. Nat’l Bank & Trust Co. of Chicago*, 649 F.3d 539, 552 (7th Cir. 2011).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 881 (7th Cir. 2017).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Roth v. Green*, 466 F.3d 1179, 1182 (10th Cir. 2006).

held that the plaintiff failed to establish a lawsuit under 42 U.S.C.S. § 1983.¹²⁷ Defense counsel sent informal warning letters more than 21 days before filing for Rule 11 sanctions with the court,¹²⁸ yet defense counsel never officially served the plaintiff’s with a motion in compliance with Rule 11(c)(2).¹²⁹ In its decision, the *Roth* court considered whether substantial compliance with Rule 11 could be enough to impose sanctions, but ultimately sided against the Seventh Circuit by determining that strict compliance with Rule 11(c)(2) was necessary.¹³⁰ It found *Nisenbaum* to be “unpersuasive . . . because it contain[ed] no analysis of the language of Rule 11(c)(1)(A) or the Advisory Committee Notes, cite[d] to no authority for its holding, and indeed [was] the only published circuit decision reaching such a conclusion.”¹³¹

Similarly, *Penn, LLC v. Prosper Bus. Dev. Corp.*, a Sixth Circuit case, also explicitly rejected and openly criticized the substantial compliance test, instead favoring strict compliance and a plain reading interpretation of Rule 11.¹³² It roundly criticized the Seventh Circuit’s decision in *Nisenbaum* for its failure to “address any of the textual or policy concerns . . . and other circuits roundly criticize the decision’s cursory reasoning.”¹³³

III. NORTHERN ILLINOIS TELECOM, INC. V. PNC BANK, N.A.

Recently, the Seventh Circuit was presented an opportunity to review its stance on Rule 11(c)(2). *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.* presented the question whether informal letters that threaten sanctions can substantially comply with the safe harbor

¹²⁷ *Id.*

¹²⁸ *Roth*, 466 F.3d at 1185.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1193.

¹³¹ *Id.*

¹³² *Penn, LLC v. Prosper Business Development Corp.*, 773 F.3d 764, 768 (6th Cir. 2014).

¹³³ *Id.* at 768.

provision when the letters do not explicitly specify that plaintiff's counsel has 21 days to correct or withdraw the pleadings and when defense counsel neglects to serve the targeted party with a formal motion.¹³⁴ Ultimately, the court held that letters threatening sanctions do not substantially comply with Rule 11(c)(2) if they do not expressly offer 21 days safe harbor to attorneys.¹³⁵

A. Facts of the Case

In 2007, MidAmerica Bank merged with National City Bank.¹³⁶ As part of the transition, Northern Illinois Telecom, Inc. (NITEL) was subcontracted to outfit four branches owned by these banks in the Chicagoland area with communications cabling.¹³⁷ The contractor for the project, Nexxtworks, determined that there were “quality problems” with the installation at the four branches and withheld a portion of the payment promised to NITEL for failure to perform.¹³⁸ As a result, other subcontractors needed to be hired to correct and complete NITEL's work.¹³⁹ In 2009, Nexxtworks filed for bankruptcy and listed the contested amount as disputed debt.¹⁴⁰ NITEL sought to recover \$115,000 in bankruptcy court, but the claim was dismissed because NITEL missed the deadline.¹⁴¹ In the interim, each of the bank branches where the work was performed was acquired by PNC Bank, N.A. (PNC Bank).¹⁴²

¹³⁴ *NITEL*, 850 F.3d at 881-82.

¹³⁵ *Id.* at 888.

¹³⁶ *Northern Illinois Telecom, Inc. v. PNC Bank, NA (NITEL I)*, No. 12 C 2372, 2014 WL 4244069 at *2 (N.D.Ill. Aug. 27, 2014).

¹³⁷ *Id.* at *1.

¹³⁸ *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 882 (7th Cir. 2017).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

In 2012, NITEL filed a breach of contract claim against PNC Bank seeking to recover \$81,300 for the work performed plus fees and costs.¹⁴³ PNC Bank, as defendant, successfully removed the case from state court to the Northern District of Illinois, Eastern Division because there was complete diversity of citizenship between the parties and the amount in controversy was greater than \$75,000.¹⁴⁴ PNC Bank moved for summary judgment arguing that neither it, nor any of the bank branches it acquired, actually entered into a contract with NITEL.¹⁴⁵ The contracts at issue, PNC Bank contended, were between NITEL and Nexxtworks.¹⁴⁶ District Judge Amy J. St. Eve agreed¹⁴⁷ finding that NITEL “failed to submit any evidence that a contract existed” with PNC Bank or its predecessors.¹⁴⁸ Accordingly, summary judgment was granted for PNC Bank because NITEL failed to establish a “genuine issue of material fact.”¹⁴⁹

The district court’s grant of summary judgment did not conclude litigation, however. In a footnote, District Judge St. Eve noted that that defense counsel “might seek sanctions under Rule 11.”¹⁵⁰ During discovery, PNC Bank’s attorney, Jim Crowley, threatened sanctions against NITEL and plaintiff’s counsel, Robert Riffner, twice.¹⁵¹ On July 31, 2012, Crowley wrote his first letter to Riffner.¹⁵² The letter explained that it was apparent that NITEL never contracted with PNC Bank or any of its predecessors and unless the complaint was dismissed the defendants would pursue “sanctions under Federal Rule

¹⁴³ *Id.*

¹⁴⁴ *NITEL*, 850 F.3d at 882.

¹⁴⁵ *Northern Illinois Telecom, Inc. v. PNC Bank, NA (NITEL I)*, No. 12 C 2372, 2014 WL 4244069 at *5 (N.D.Ill. Aug. 27, 2014).

¹⁴⁶ *Id.* at *4.

¹⁴⁷ *Id.* at *5.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *5 n.3.

¹⁵¹ *Id.* at *1-2.

¹⁵² *Id.* at *1.

11 against NITEL and your firm”¹⁵³ The defendant filed a motion to compel discovery.¹⁵⁴ In March 2013, the magistrate judge who presided over the hearing determined that NITEL had the burden of proof to provide evidence that it entered into a contract with PNC Bank.¹⁵⁵ On April 2, 2013, Crowley wrote a second letter warning Riffner that defense counsel intended to move for summary judgment and Rule 11 sanctions.¹⁵⁶ The letter alleged that the claim was “frivolous” and, for that reason, Riffner never should have accepted the case.¹⁵⁷ Riffner did not respond to either letter.¹⁵⁸

District Judge Robert Blakey of the Northern District of Illinois held that sanctions were warranted on both substantive¹⁵⁹ and procedural¹⁶⁰ grounds.¹⁶¹ First, on the merits, the claim was clearly frivolous.¹⁶² NITEL maintained throughout the litigation that they contracted with PNC, but failed to provide even a shred of useful evidence supporting the claim.¹⁶³ Second, in terms of procedure, PNC gave sufficient notice to NITEL because it substantially complied with Rule 11(c)(2).¹⁶⁴ Summary judgment was granted on August 27, 2014, and on October 21, 2014 PNC Bank filed a motion for Rule 11 sanctions against NITEL and Riffner.¹⁶⁵ Crowley warned Riffner twice, first in 2012, and again on April 2, 2013, thereby providing Riffner far more time than the 21 days of safe harbor demanded under

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *2.

¹⁵⁵ Northern Illinois Telecom, Inc. v. PNC Bank, NA (NITEL II), No. 12 C 2372, 2015 WL 1943271 at *2 (N.D.Ill. Apr. 29, 2015).

¹⁵⁶ *Id.* at *2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* *1-2.

¹⁵⁹ *Id.* at *5.

¹⁶⁰ *Id.* at *6.

¹⁶¹ *Id.* at *9.

¹⁶² *Id.* at *6.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at *4.

¹⁶⁵ *Id.* at *3.

Rule 11(c)(2). Crowley, however, never served NITEL with a formal motion threatening sanctions.¹⁶⁶ Further, Crowley did not specify in either letter how much time NITEL had to withdraw or correct its pleadings before he would seek to pursue sanctions.¹⁶⁷ But according to Seventh Circuit precedent “substantial compliance may be enough.”¹⁶⁸

B. Hamilton’s Majority

On appeal, the Seventh Circuit reversed the district court’s decision imposing sanctions.¹⁶⁹ According to Circuit Judge Hamilton, who wrote for the majority, the sanctions were improper even though the Seventh Circuit is uniquely lenient when assessing compliance with Rule 11(c)(2).¹⁷⁰ The court held that the letters sent by PNC Bank’s counsel to Riffner fell “far short” of substantial compliance with the safe harbor requirement.¹⁷¹

Riffner appealed on both substantive and procedural grounds.¹⁷² He needed to establish an abuse of discretion by the district court judge on either basis to reverse the district court’s decision.¹⁷³ First, the court confidently affirmed that the sanctions were substantively justified.¹⁷⁴ NITEL’s position that PNC Bank was liable for breach of contract was “objectively baseless” because no contract ever existed between the parties.¹⁷⁵ The claim was frivolous and, thus, violated Rule 11(b)(2).

¹⁶⁶ Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 886 (7th Cir. 2017).

¹⁶⁷ *Id.* at 889.

¹⁶⁸ *NITEL II*, 2015 WL 1943271 at *4.

¹⁶⁹ *NITEL*, 850 F.3d at 888.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *883.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

The court then probed the procedural merits of Riffner’s appeal. In the opinion, Hamilton first addressed whether PNC Bank strictly complied with Rule 11.¹⁷⁶ The two letters sent from PNC Bank’s attorney to Riffner “simply did not comply” with Rule 11(c)(2).¹⁷⁷ The rule requires the party seeking sanctions to serve the targeted party with a motion threatening sanctions.¹⁷⁸ The threatening party then must wait at least 21 days after providing notice of impending sanctions before filing the motion with the court to allow the targeted party an opportunity to correct or withdraw the contested filing.¹⁷⁹ PNC Bank never served NITEL or Riffner with a motion.¹⁸⁰ In most circuits, the analysis would have ended here.

But, in accordance with circuit precedent, the court then analyzed whether the two letters that PNC Bank’s attorney sent to Riffner substantially complied with Rule 11’s safe harbor requirement.¹⁸¹ Though the district court ruled that PNC Bank’s two “settlement offers” sent to Riffner were “sufficient warning shots” to establish substantial compliance with Rule 11, the Seventh Circuit disagreed.¹⁸² According to Hamilton, “[t]he Rule 11 threats did not transform PNC Bank’s settlement offers into communications that substantially complied” with Rule 11’s safe harbor requirement.¹⁸³ Though he did not provide detail, Hamilton indicated that to be substantially compliant with Rule 11, a letter that threatens sanctions must establish that the “opposing party is serious” and also specify “when the 21-day safe-harbor clock starts to run.”¹⁸⁴

Hamilton did not stop at reversing the district court’s decision to sanction Riffner. Though the court decided this case within the

¹⁷⁶ *NITEL*, 850 F.3d at 886.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 885.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 886.

¹⁸¹ *Id.* at 886-87.

¹⁸² *Id.*

¹⁸³ *Id.* at 888.

¹⁸⁴ *Id.*, at 886.

framework of existing Seventh Circuit precedent, Hamilton was candid about his reservations against the substantial compliance interpretation of Rule 11(c)(2) moving forward. The final footnote of the decision warned that those who “rely on a theory of substantial compliance should understand that, at least in the present landscape, they are inviting possible *en banc* and/or Supreme Court review of the question.”¹⁸⁵

C. Posner’s Dissent

Former Circuit Judge Posner responded with a brief, scathing dissent that criticized the majority opinion and disparaged Riffner. Posner scorned at his colleague’s hesitancy to “punish misbehaving lawyers”¹⁸⁶ Riffner was a “boor”, Posner accused. His pursuit of such a hopelessly frivolous claim, and his failure to respond to multiple settlement offers presented by PNC Bank justified the imposition of sanctions.¹⁸⁷

Posner felt that the case presented a “good example of substantial compliance” and, therefore, he would have affirmed the district court judge’s decision to impose sanctions.¹⁸⁸ Posner argued that the letters sent by PNC Bank demanding withdrawal of the lawsuit were sufficient to provide Riffner notice of impending sanctions.¹⁸⁹ Though PNC failed to serve Riffner with a motion as required by Rule 11(c)(2), the letters “were the equivalent of Rule 11 motions.”¹⁹⁰

¹⁸⁵ *NITEL*, 850 F.3d at 889 n.5.

¹⁸⁶ *NITEL*, 850 F.3d at 889 (Posner, J., dissenting).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

IV. ANALYSIS AND COMMENTARY

In *NITEL*, the Seventh Circuit had the chance clear up the confusion surrounding its unique, controversial interpretation of the safe harbor provision. But, ultimately, it balked at the opportunity.

A. *NITEL's Shortcomings*

The court could have overturned past precedent. The Seventh Circuit has subscribed to a substantial compliance interpretation of Rule 11 since *Nisenbaum*.¹⁹¹ A decision to overturn the court's current commitment to substantial compliance would have aligned the Seventh Circuit with every other circuit that has addressed this issue.¹⁹² To do so, the court could have determined that the letters sent from Crowley to Riffner were in fact substantially compliant with Rule 11(c)(2), but that substantial compliance is, and always has been, an improper reading of the rule.

The letters at issue in *NITEL* seemed to be substantially compliant with Rule 11(c)(2). The first letter from Crowley to Riffner “offered to settle the matter in exchange for a dismissal order and a check to cover PNC’s attorney fees and costs. . . .”¹⁹³ A failure to comply, Crowley threatened, would prompt PNC to seek “sanctions under Federal Rule 11”¹⁹⁴ This letter was sent to Riffner on July 31, 2012.¹⁹⁵ Crowley sent another letter that was functionally the same as the first one on April 2, 2013.¹⁹⁶ The letters explicitly threatened that Rule 11 sanctions would be pursued if the *NITEL* did not withdraw or correct

¹⁹¹ *NITEL*, 850 F.3d at 881.

¹⁹² *Penn, LLC v. Prosper Business Development Corp.* 773 F.3d 764, 768 (6th Cir. 2014).

¹⁹³ *Northern Illinois Telecom, Inc. v. PNC Bank, NA (NITEL II)*, No. 12 C 2372, 2015 WL 1943271 at *1 (N.D.Ill. Apr. 29, 2015).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *2.

its pleading.¹⁹⁷ NITEL had more than 21 days to withdraw or correct its pleading. PNC Bank moved for summary judgment on September 8, 2013 and filed a motion for Rule 11 sanctions on October 21, 2014.¹⁹⁸ More than two years elapsed between the first explicit, but informal, threat of sanctions and PNC Bank’s motion for summary judgment. Nonetheless, the court held that the procedure fell “far short” of substantial compliance.¹⁹⁹

Alternatively, the court could have doubled down on its commitment to substantial compliance. Based on the explicit threats for Rule 11 sanctions communicated in Crowley’s letters and the extensive time allowed by Crowley before moving for summary judgment and sanctions, the court could have affirmed the district court’s decision by holding that the letters were substantially compliant with Rule 11(c)(2). By specifically identifying why Crowley’s letters were substantially compliant with the Rule, the court could have provided the clarity that the substantial compliance interpretation has always lacked. Additionally, the court could have laid out its policy arguments supporting the merits of the substantial compliance interpretation. *NITEL* provided the Seventh Circuit an opportunity to supply the justification for substantial compliance it has always neglected to provide.

Instead, the court settled on a limited, narrow holding. The court reversed the district court’s ruling, holding that Crowley’s informal letters to Riffner were not substantially compliant with Rule 11(c)(2).²⁰⁰ By reversing, the court affirmed circuit precedent. Substantial compliance is still the controlling theory in the Seventh Circuit.²⁰¹ Of course, providing narrow decisions is within the court’s right. But in this case, the Seventh Circuit missed an opportunity to explain the merits of substantial compliance.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at *3.

¹⁹⁹ Northern Illinois Telecom, Inc. v. PNC Bank, N.A., 850 F.3d 880, 883 (7th Cir. 2017).

²⁰⁰ *Id.* at 888.

²⁰¹ *Id.*

By neglecting to clarify *why* Crowley’s letters fell short of substantial compliance, it missed an important opportunity to provide guidance to litigating attorneys and district courts judges tasked with enforcing the standard. The court’s sheepishness in *NITEL* generated confusion for district court judges. Recently in *Knapp v. Evgeros, Inc.*, Judge Feinerman of the Northern District of Illinois, Eastern Division highlighted the mixed message that the Seventh Circuit sent to the lower courts with *NITEL*. Citing *Matrix IV*, Judge Feinerman noted that “a letter informing the opposing party of the intent to seek sanctions and the basis for the imposition of sanctions . . . is sufficient for Rule 11 purposes.”²⁰² But, the Seventh Circuit appeared to be “within a cat’s whisker of overruling [substantial compliance]” in *NITEL*.²⁰³ Since substantial compliance remains precedent, the judge concluded that he “must follow it until the Seventh Circuit says otherwise.”²⁰⁴

Knapp proves that district courts within the Seventh Circuit are being held hostage by the Seventh Circuit’s reluctance to clarify its substantial compliance doctrine. There are no clear benchmarks that separate letters that are substantially compliant with Rule 11 from those that fall short. District courts have been left to piece together sparse decisions like *Nisenbaum* and *NITEL* and are struggling to find consistency. The district courts, as a result, seem to be creating their own tests. *Knapp* proposed that Rule 11 sanctions can be sought “only on the grounds set forth in the letter.”²⁰⁵ The court “may not consider any grounds set forth in the motion that were not articulated in the letter. . . .”²⁰⁶ In *Momo Enters., LLC v. Banco Popular of N. Am.*, the Northern District of Illinois decided that substantial compliance is met where parties are provided “an opportunity to correct their purported

²⁰² *Knapp v. Evgeros, Inc.* 15 C 754, 2017 WL 3668165 at *5 (N.D.Ill. Aug. 24, 2017) (citing *Matrix IV*, 649 F.3d at 552).

²⁰³ *Id.* at *2.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at *5.

²⁰⁶ *Id.* at *6.

errors.”²⁰⁷ But the district court, much like the Seventh Circuit, struggled to provide any criteria for what an “opportunity to correct” involves.²⁰⁸

Judge Hamilton’s warning that reliance on a substantial compliance is inviting “possible *en banc* and/or Supreme Court” review indicates that the issue is ripe for a deeper look.²⁰⁹ Between the slanted circuit split and the lack of guidance the Seventh Circuit has provided to the district courts on this issue, substantial compliance will likely come under review again.

B. The Future of Rule 11(c)(2) in the Seventh Circuit

If the Seventh Circuit is presented with a case that allows it to address the merits of substantial compliance in the future, it will need to consider a variety of factors in deciding the fate of the substantial compliance rule.

1. The Case for Strict Compliance

One factor tilting against substantial compliance is its failure to adhere to the plain language requirements of Rule 11. It is undeniable, as many circuits have pointed out, that Rule 11(c)(2) requires motion a motion to be served in order to trigger the 21 day safe harbor requirement.²¹⁰

²⁰⁷ *Momo Enters., LLC v. Banco Popular of N. Am.*, No. 15-cv-11074, 2017 U.S. Dist. LEXIS 161827 at *8-9 (N.D.Ill. Sept. 30, 2017) (holding that a party’s motion for sanctions did not substantially comply with Rule 11 when it was served 10 months before moving for sanctions after summary judgment).

²⁰⁸ *Id.*

²⁰⁹ *NITEL*, 850 F.3d at 889 n.5.

²¹⁰ *See Penn, LLC v. Prosper Business Development Corp.* 773 F.3d 764, 768 (6th Cir. 2014) (discussing the breadth of the circuit split against substantial compliance and identifying cases in the 2nd, 3rd, 4th, 5th, 8th, 9th, and 10th circuits that have held informal letters without a motion are insufficient to trigger the 21 day safe harbor period because they do not strictly comply with Rule 11).

Further, a commitment to substantial compliance, especially a poorly defined version of substantial compliance, can increase the use of abusive litigation tactics by attorneys. The dramatic increase in sanctions in the 1980's highlighted the downside of a legal system that allowed frequent, burdensome sanctioning.²¹¹ The 1983 version of the Rule 11 allowed sanctions to become “a favorite weapon in litigators’ briefcases, often used and even more often brandished to threaten.”²¹² Attorneys are more likely to threaten sanctions as a litigation tactic if the threat can be executed at no cost through an informal letter.

Other reasons to overturn substantial compliance precedent align with the arguments that motivated the 1993 Amendments to Rule 11. Arguably, the substantial compliance rule is more likely to chill attorney creativity and zealousness in pursuing novel arguments.²¹³ If the ease of triggering sanctions is increased, attorneys may be more hesitant to commit to some claims and be more cautious in pursuing to some arguments. This effect would be compounded if substantial compliance rests on uneasy footing with unclear criteria. Additionally, a commitment to substantial compliance could generate more satellite litigation than adherence to strict compliance of Rule 11. In the long term, informal notice of sanctions will likely generate more Rule 11 hearings which can be costly and time consuming.

A key argument against strict compliance is that it is unnecessarily formalistic and costly.²¹⁴ Filing a motion to trigger the safe harbor requirement does increase the financial burden to the party at the wrong end of an improper filing. Arguably, there is a financial disincentive for aggrieved parties to move for sanctions. The court reserves the right, however, to demand a “for cause” showing of a proper purpose if it so wishes.²¹⁵ On the court's own initiative, it may “order an attorney, law firm, or party to show cause why conduct . . .

²¹¹ FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.

²¹² *NITEL*, 850 F.3d at 885.

²¹³ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990).

²¹⁴ *NITEL*, 850 F.3d at 887; *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 808 (7th Cir. 2003).

²¹⁵ FED. R. CIV. P. 11(c)(3).

has not violated Rule 11(b).²¹⁶ The court can enact sanctions *sua sponte* if it so desires.²¹⁷ Therefore, an aggrieved party may not need to pay the costs for a motion where a filing is particularly egregious.²¹⁸ Additionally, an aggrieved party that is confident that an opposing party’s filing is improper will be reimbursed if sanctions are determined to be warranted by the district court judge.²¹⁹ The court has the discretion to “award to the prevailing party the reasonable expenses, including attorney’s fees, incurred” for a Rule 11 hearing.²²⁰

2. The Case for Substantial Compliance

There seems to be some merit behind substantial compliance once the plain meaning of Rule 11(c)(2) is set aside. According to the Rule 11(c)(1), “[i]f, after *notice and a reasonable opportunity to respond*, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction. . . .”²²¹ If looking simply at the general mandate of Rule 11, substantial compliance may be sufficient.

One of the most persuasive arguments against the strict compliance interpretation of Rule 11 is the inherent conflict it creates with Federal Rule of Civil Procedure 1. Rule 1 defines the scope and purpose of the Federal Rules of Civil Procedure.²²² The rules, it sets forth, “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”²²³ Rule 11 contradicts

²¹⁶ *Id.*

²¹⁷ Douglas R. Richmond, *Alternative Sanctions in Litigation*, 47 N.M. L. Rev. 2019, 215-16 (2017) (discussing the court’s power to impose sanctions on its own initiative, which requires a higher standard for sanctions, but reduces the risk that attorneys will bring claims with an improper purpose knowing opposing party might be unwilling to undertake extra costs).

²¹⁸ *Id.*

²¹⁹ FED. R. CIV. P. 11(b)(3).

²²⁰ FED. R. CIV. P. 11(b)(3).

²²¹ FED. R. CIV. P. 11(c)(1).

²²² FED. R. CIV. P. 1.

²²³ *Id.*

Rule 1. The rules should be administered to ensure “speedy” proceedings.²²⁴ By requiring 21 days safe harbor before allowing a motion for sanctions to be filed, it artificially slows down the proceedings for at least three weeks. Another area of contradiction is the instruction that the rules should be construed to ensure that proceedings are “inexpensive.”²²⁵ Strict compliance with Rule 11 increases the financial demand on the threatening party. By requiring an official motion, Rule 11 increases attorney fees and filing costs for the party who is being wronged. Substantial compliance theory is consistent with Rule 1. In comparison, strict compliance is arguably unnecessarily formalistic and contrary to the scope and purpose of the Federal Rules of Civil Procedure.

Though the Rule 11(c)(2) is widely accepted and often celebrated, it is not without flaws. One of the main arguments against the safe harbor provision is that it increases short-term costs and burdens on the aggrieved party. The safe harbor provision provides attorneys a second chance at recertification that was previously unprecedented. Additionally, the security provided by the safe harbor requirement may reduce the quality of attorney pleadings and motions. Attorneys may be more cavalier when presenting filings to the court. They may be more willing to take a risk, knowing that they can retreat if the filing is challenged by the opposing party. By reducing the threat of sanctions, attorneys may be less likely to conduct reasonable inquiry into their clients’ claims, which is a core facet of Rule 11.

V. CONCLUSION

The outstanding question that remains for the Seventh Circuit to address is whether its substantial compliance interpretation can be crafted in a way that avoids the ills sought to be addressed by the 1983 Amendments. It is unclear whether there is a middle ground between the Seventh Circuit’s poorly supported substantial compliance interpretation and Rule 11(c)(2). Notably, substantial

²²⁴ *Id.*

²²⁵ *Id.*

compliance is *not* mere or minimal compliance. The outcomes in *Matrix* and *NITEL* show that not every party that moves for sanctions will be successful. Substantial compliance is still a relatively high bar.

But, all in all, it is important to remember that the key goal for Rule 11 is deterrence, not punishment.²²⁶ The evolution of Rule 11 conforms that sanctions are not meant to be punitive. The arguments in support of the Seventh Circuit’s substantial compliance interpretation of Rule 11(c)(2) are not persuasive enough to ignore the plain language of the rule that says a motion *must* be served on the opposing party. The emergence of a drastic circuit split and the Seventh Circuit’s hesitance to clearly define what exactly substantial compliance with Rule 11(c)(2) should look like do not bode well for substantial compliance’s future. The legal system does not often allow second chances, but Rule 11 is an important exception. Rule 11 sanctions exist to enhance the quality of pleadings, motions, and other papers. A softer, more flexible rule that allows for a warning shot and safe harbor is more consistent with the intent and purpose of the rule than the alternative.

²²⁶ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990).; FED. R. CIV. P. 11 advisory committee’s note to 1993 Amendment.