Nova Law Review

Volume 16, *Issue* 3 1992 *Article* 15

Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception for Fee Shifting-Chambers v. NASCO, Inc.

Alexander B. Rotbart*

*

Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception for Fee Shifting-Chambers v. NASCO, Inc.

Alexander B. Rotbart

Abstract

Confronted with the growing problem of crowded dockets, federal courts have enacted and imposed a variety of rules and sanctions designed to discourage abuse of the judicial process

KEYWORDS: bad faith, American, power

Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception for Fee Shifting—*Chambers v. NASCO, Inc.*

TABLE OF CONTENTS

I. INTRODUCTION

Confronted with the growing problem of crowded dockets, federal courts have enacted and imposed a variety of rules and sanctions designed to discourage abuse of the judicial process.[1] In the interests of justice, federal courts, pursuant to their inherent power,[2] may award attorney's fees to a party when his opponent has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons."[3] Consequently, the question of who should bear the brunt of those fees is likely to be an issue in every lawsuit, large or small. Litigants would like to shift the costs of their counsel to the opponent if possible, but under the American Rule, ("Rule") this generally cannot be accomplished.[4] The Rule

1. *See generally* David W. Pollack, Comment, *Sanctions Imposed by Courts on Attorney's who Abuse the Judicial Process*, 44 U. CHI L. REV. 619 (1977).

2. Hall v. Cole, 412 U.S. 1, 4-5 (1973). The inherent power of the federal courts "is part of the original authority of the chancellor to do equity in a particular situation." Spargue v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939).

3. *Hall*, 412 U.S. at 4-5.

4. *See* Joan Chipser, Note, *Attorney's fees and the Federal Bad Faith Excep-*

provides that a prevailing party must bear his own attorney's fees and cannot have them taxed against the loser.[5] The Rule precludes a court, without statutory authorization, from engaging in fee shifting as part of the merits of the award.[6] However, a litigant who abuses the judicial process,[7] or acts in "obdurate obstinacy"[8] may be faced with paying for his adversary's attorney's fees.[9] The federal courts have long possessed this inherent power to award attorney's fees as a sanction for bad faith conduct.[10]

Nevertheless, most litigants point to the Federal Rules of Civil Procedure or a statute when the issue of sanctions is raised.[11] However, the authority to impose monetary sanctions pursuant to the inherent power is older, deeper and broader than any other formal doctrine.[12] It has long been accepted that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institutions," powers "which cannot be dispensed with in a court because they are necessary to the exercise of all others."[13] These powers are regulated

---

tion, 29 HASTINGS L.J. 319, 320 (1977). The American Rule states that attorney's fees are not ordinarily recoverable as costs or damages in the absence of a statute authorizing the award of fees or an agreement between the parties providing for fees. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Compare with the "English Rule," where as early as 1275 the law courts of England were authorized to award counsel fees to a successful plaintiff. Statute of Glouster, 1278, 6 Edw. 1, c. 1 (this statute mentioned only the cost of a writ purchased, but was liberally construed to include attorney's fees).

5. *Alyeska*, 421 U.S. at 247.

6. *Id.* at 260; *see also* Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2140 (1991) (Scalia, J., dissenting).

7. Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978).

8. *Id.*

9. F.D. Rich Co. Inc. v. United States *ex rel.* Indus. Co., Inc., 417 U.S. 116, 129 (1974).

10. *Hall*, 412 U.S. at 5; *see also* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 562 n.6 (1986); *Hutto*, 437 U.S. at 689 n.14; *Alyeska*, 421 U.S. at 258-59; *F.D. Rich Co.*, 417 U.S. at 119; Newman v. Piggie Park Enter. Inc., 390 U.S. 400, 402 n.4 (1968) (*per curiam*); Vaughan v. Atkinson, 369 U.S. 527 (1962).

11. FED. R. CIV. P. 11; Long, *When Winning Isn't Enough: Boards of Contract Appeals and Monetary Sanctions for Frivolous and Bad Faith Conduct in Administrative Litigation*, 27-50-10 ARMY. LAW. 37, 38 (1990).

12. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); *Alyeska*, 421 U.S. at 258-59 (holding *inter alia*, that federal courts may impose attorney's fees pursuant to their inherent power when an attorney acts in bad faith, even though the American Rule says otherwise).

13. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812); *see also Road-*

not by any rules or statutes, but by the inherent authority "vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases."[14] Thus, the inherent power is necessary to permit the courts to function and preserve its authority.[15]

In *Chambers v. NASCO, Inc*,[16] the United States Supreme Court, during its 1990 term, specifically addressed one issue: Whether a federal court sitting in diversity, can utilize its inherent power to assess attorney's fees as a sanction for a party's bad-faith conduct.[17] The Supreme Court held that federal courts sitting in diversity can impose sanctions pursuant to their inherent power despite the existence of federal rules and statutes which prescribe equal sanctions.[18] Such a ruling however, can easily lead to inconsistent results among the federal courts and undermine congress' goal of uniformity throughout the federal system.

Part two of this Comment reviews the procedural history and facts of *Chambers v. NASCO, Inc.*,[19] part three examines the scope and development of the courts' inherent power beginning from its inception, to the "American rule" prohibiting substantive fee shifting and the bad faith exception; part four reviews and analyzes the Supreme Court's holding and reasoning; and part five discusses the possible implications and inconsistent results that *Chambers* might cause.

II. Facts and the Procedural History of *Chambers v. NASCO, Inc.*

On August 9, 1983, Chambers and his corporation, Calcasieu Television and Radio ("CTR"), entered into a purchase agreement to sell KPLC-TV to NASCO, Inc. ("NASCO").[20] The agreement was never

---

way, 447 U.S. at 764 (inherent powers of federal courts are those which are necessary to the exercise of all others (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

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

15. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 785, 819-820 (Scalia, J., concurring).

16. 111 S. Ct. 2123 (1991).

17. *Id.* at 2128. At the Fifth Circuit, this case was known as NASCO, Inc. v. Calcasieu Television and Radio, Inc., 894 F.2d 696 (5th Cir. 1990), *aff'g* NASCO, Inc. v Calcasieu Television and Radio, 124 F.R.D. 120 (W.D. La. 1989); NASCO, Inc. v. Calcasieu Television and Radio, Inc., 623 F. Supp. 1372 (W.D. La. 1985).

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

19. *Id.* at 2123.

20. *NASCO*, 623 F. Supp. at 1373. Chambers was the sole shareholder and di-

recorded in the Calcasieu and Jefferson Davis Parishes where the properties were located.[21] However, by late August Chambers had changed his mind and in September, he informed NASCO that he would not file the necessary documents.[22] On Friday, October 14, NASCO's counsel informed counsel for Chambers that it would file suit the following Monday seeking specific performance of the agreement, as well as a temporary restraining order ("TRO") to prevent the alienation or encumbrance of the properties.[23]

On Sunday, October 16, the day before NASCO would file suit, Chambers and his attorney knowingly and deliberately took advantage of the notice given by NASCO, and set in motion an illegal and fraudulent scheme.[24] The pair conspired to deprive NASCO of a judicial determination of its rights by attempting to place the properties at issue beyond the district court's jurisdiction by using the Louisiana Public Records Doctrine.[25] To this end, Chambers and his counsel formed

---

rector of (CTR) which operated a television station in Lake Charles, Louisiana. *Id.*

21. *Id.* at 1373-74. The failure to record the purchase agreement in the respective counties would later be used by Chambers as a means to deprive the district court of its jurisdiction. *See NASCO, Inc.*, 124 F.R.D. at 125.

22. *NASCO*, 623 F. Supp. at 1373-74. The purchase agreement required NASCO and CTR to use their best efforts in obtaining the requisite approval of the Federal Communications Commission ("FCC") for the transfer of the station's license. *Id.* Furthermore, the Agreement obligated both parties to file the necessary documents with the FCC no later than September 23, 1983. *Id.*

23. *Id.* at 1376. The suit was filed the following Monday in the United States District Court for the Western District of Louisiana. *Id.* at 1375. Notice was given to the defendants Chambers and CTR pursuant to the requirements of Federal Rule of Civil Procedure 65(b) and Rule 11 (now Rule 10) of the local rules of the court which are designed to give a defendant in a temporary restraining order application notice of the hearing and an opportunity to be heard. *Id.* at 1376.

24. *NASCO, Inc.*, 124 F.R.D. at 125.

25. *Id.* The Louisiana Public Records Doctrine states that contracts affecting immovable property must be recorded in order to affect third parties. Dallas v. Farrington, 490 So. 2d 265, 269 (La. 1986). The Public Records doctrine is essentially a negative doctrine declaring what is not recorded is not effective, except between the parties, and a third party in purchasing immovable property is entitled to rely on the absence from the public records of any unrecorded interest in the property. *Id.*; *see also* Phillips v. Parker, 483 So. 2d 972 (La. 1986).

Because the purchase agreement had never been recorded, Chambers and his counsel determined that if the properties were sold to a third party, and these deeds were recorded before the issuance of the temporary restraining order, the district court would lack jurisdiction over the properties. *NASCO*, 623 F. Supp. at 1381. Thus, NASCO would be deprived of a judicial determination of its rights to specific performance, and Chambers could maintain possession of his station. *NASCO, Inc.*, 124 F.R.D.

a trust, appointing Chambers' sister as the trustee and naming Chambers' three adult children as the beneficiaries.[26] Despite knowledge that the land on which the television station and the associated properties were located was to be sold to NASCO under the purchase agreement, Chambers directed CTR to execute duplicate warranty deeds to the trustee for consideration of $1.4 million.[27] The deeds were recorded early Monday morning, before NASCO's counsel appeared in the district court to file the complaint and seek the TRO.[28] Despite the district court's questioning at the TRO hearing concerning the possibility that CTR was negotiating to sell the properties to a third party, Chambers' counsel made no mention of the recordation of the deeds earlier that day.[29] The next morning, after the TRO had been issued, Chambers' attorney notified the District Court of the recordation of the deeds the day before, and admitted to intentionally withholding this information from the court.

The following week the district court granted a preliminary injunction against Chambers and CTR, and entered a second TRO directed against the trustee to prevent her from selling, transferring or in any way encumbering the CTR properties.[30] Within the next week, Chambers' attorneys prepared a leaseback agreement from the trustee to CTR, so that CTR could remain in possession of the properties and continue to operate the station.[31] At the second TRO hearing, the district court was unaware of the leaseback agreement, but warned Chambers and his attorney that their conduct had been unethical and

---

at 125.

26. *NASCO*, 623 F. Supp. at 1376.

27. *Id.* Chambers phoned his sister, Baker, and informed her of the creation of the trust and that it was his desire that she act as trustee; however, he did not inform her of the duplicate deeds, which had been executed, or that the trust was undercapitalized. *Id.* In fact, the assets never exceeded $1,000 which was insufficient to meet the $17,735 monthly payment by the trust. *Id.* at 1378 Nonetheless, Chambers and his counsel were not concerned since Chambers had absolute control of the trustee. *Id.*

28. *Id.* at 1376. The deeds had not been signed by the trustee, none of the consideration had been paid and CTR continued in undisturbed possession, despite the recordation of the deeds. *Id.*

29. *NASCO, Inc.*, 124 F.R.D. at 126. Also, the district court judge was unaware that Chambers' attorney had tape recorded certain conferences which had been conducted over the phone. *Id.* at 126 n.8.

30. *Id.*

31. *Id.* The trustee had no knowledge of the lease or its terms, did not take part in the negotiations, and simply signed and returned the lease to Chambers. *Id.*

that no such act should be repeated in the future.[32]

Chambers subsequently entered a series of groundless motions, charges and pleadings aimed at delaying the judicial process and depriving NASCO of its rights under the purchase agreement.[33] After the district court found that the motions were all filed "in absolute bad faith;" that the charges were "deliberate untruths and fabrications," plainly "improbable and unrealistic;" and that the pleadings were "simply part of a sordid scheme of deliberate misuse of the judicial process," further warnings were issued.[34] Finally, on the eve of trial, Chambers stipulated that the purchase agreement was valid and enforceable, and that he had breached the agreement by failing to file the necessary documents with the Federal Communications Commission

---

32. *NASCO, Inc.*, 124 F.R.D. at 127. Despite this reprimand, Chambers' abuse of the judicial process continued. *Id.* In November 1983, Chambers refused to allow NASCO to inspect CTR's corporate records in direct contravention of the standing preliminary injunction. *Id.* The resulting contempt proceedings, NASCO, Inc. v. Calcasieu Television and Radio, Inc., 583 F. Supp. 115 (W.D. La. 1985), vindicated NASCO's rights, but at the cost of much expense, delay, and waste of resources. This was compounded by Chambers' attorney's prosecution of two separate and independent appeals which were dismissed by the appellate court. NASCO, Inc. v. Calcasieu Television and Radio, Inc., 757 F.2d 157, 157-58 (5th Cir. 1985).

33. *NASCO, Inc.* 124 F.R.D. at 127. Two motions for summary judgment were filed by counsel on behalf of Chambers; a third motion for summary judgment followed by a motion to strike were filed on behalf of the trustee; and, a motion for a protective order and clarification were filed on behalf of Chambers. *Id.* at 127-28. Next, Chambers through his attorney filed baseless charges and counterclaims against NASCO alleging fraud, harassment, interference with TV station operation, spreading of misinformation and public disapproval of the sale. *Id.* Also, alleged were unnamed breaches of the purchase agreement by NASCO and NASCO's disregard for a non-existent oral agreement with Chambers. Pointless new issues were injected: NASCO's conduct of its FCC ascertainment survey; its ability to pay the purchase price; and its plans for the future management and commitment to the community interest. *Id.* Needless depositions of the bank officials, who were to finance the purchase, were noticed by Chambers' counsel and depositions of the NASCO board of directors were taken. The district court noted that throughout the course of the proceedings, Chambers, (CTR) and his counsel sought, and sometimes received, continuances of trial dates, extensions of deadlines and deferment of scheduled discovery. *Id.* at 127-28. Pretrial and status conferences were held where several motions in preparation for a trial on the merits were ruled upon. *NASCO, Inc.*, 124 F.R.D. at 127-28. However, a motion to recuse the trial judge for bias and prejudice by Chambers was denied. A writ of mandamus to compel disqualification of the judge was also filed with the U.S. Court of Appeals for the Fifth Circuit on behalf of Chambers; however, this was also denied. *Id.* Nonetheless, trial on the merits was again delayed.

34. *Id.* at 128.

("FCC").[35] At trial, the only defense presented was the Public Records Doctrine.[36]

Between the trial on the merits and the entry of the district court's judgment against Chambers, he continued to use every ruse possible to evade performance of the purchase agreement.[37] Chambers, without notifying NASCO, sought permission from the FCC to construct a new transmission tower for the station and to relocate the transmission facilities to that site.[38] Only after NASCO threatened further contempt sanctions and informal intervention did Chambers withdraw his application from the FCC. The district court then entered judgment on the merits in NASCO's favor,[39] finding that the trustee did not qualify as a third party purchaser under the Public Records Doctrine.[40]

However, Chambers' adamant tactics did not end here.[41] During the pendency of his appeal, Chambers caused CTR officials to lodge formal opposition with the FCC against its approval of the transfer of the station license.[42] NASCO sought contempt sanctions for a third

---

35. *Id.* The district court noted that at this point there was no clearer indication that all of the previously asserted affirmative defenses, counterclaims, pleadings, motions and opposition prosecuted so vehemently by the defendants were untruths and distortions, absolutely devoid of any substantive merit. *Id.*

36. *Id.* The district court stated that in any event, this defense was manufactured as part of the "initial fraud". *Id.*

37. *Id.* at 128-29.

38. *NASCO, Inc.*, 124 F.R.D. at 129. Chambers' goal in relocating the facilities was to render the Purchase Agreement meaningless, since by moving the facilities, the tower sites would no longer be covered by the Purchase Agreement. *Id.*

39. *NASCO, Inc.*, 623 F. Supp. at 1385. The district court found that the transfer of the properties to the trust was a simulated sale, and that the deeds purporting to convey the properties were "null, void, and of no effect." *Id.*

40. *Id.* The court found that at the recordation of the deeds, the trustee had no knowledge of the value, extent, location of the properties, the purchase price, and whether the sale had ever taken place. *Id.* Under Louisiana law, a party interposed by the seller for the sole purpose of raising the Public Records Doctrine as a shield cannot be considered a valid third party purchaser. *See* Burns v. Jolley, 95 So. 648 (La. 1923); First Nat'l Bank of Ruston v. Mercer, 448 So. 2d 1369 (La. Ct. App. 1989).

41. *NASCO, Inc.*, 124 F.R.D. at 129. Following judgment on the merits, Chambers moved the district court to stay its judgment pending his contemplated appeal. Having found the purchase agreement legal, valid and enforceable, and the rejection of the Public Records doctrine defense, the district court refused "absolutely" to grant the stay. *Id.* Chambers nonetheless, petitioned the fifth circuit as well as the Supreme Court, to stay the district court's merits; however, this petition was likewise denied. *In re* Calcasieu Television & Radio, Inc. and G. Russell Chambers v. NASCO, Inc., No. A-611 (U.S. Feb. 18, 1986) (order denying stay of judgment).

42. *NASCO, Inc.*, 124 F.R.D. at 129.

time, until the court intervened and caused the opposition to be withdrawn.[43] Despite the court's judgment on the merits and numerous interventions, Chambers continued his refusal to close the sale of the television station, forcing NASCO to seek judicial assistance once again to correct the abuses.[44]

Following oral argument on Chambers' appeal from the district court's judgment, the Court of Appeals for the Fifth Circuit ruled and found the appeal frivolous.[45] The court imposed appellate sanctions in the form of attorney's fees and double costs, pursuant to Federal Rule of Appellate Procedure 38, and remanded the case to the district court with instructions to determine whether further sanctions should be imposed for the manner in which the litigation had been conducted.[46]

On remand, NASCO moved for appropriate sanctions, invoking the district court's inherent power, Federal Rule of Civil Procedure 11, and 28 U.S.C. section 1927.[47] In considering the sanctions, the district court first considered Rule 11.[48] The district court noted the alleged

---

43. *Id.*

44. *Id.* During the pendency of the appeal to the fifth circuit, a dispute arose between Chambers and NASCO over the station's equipment to be transferred under the Purchase Agreement. NASCO Inc. v. Calcasieu Television and Radio, 894 F.2d 696, 700 (5th Cir. 1990). During the hearing regarding this dispute, Chambers and CTR removed all of the disputed equipment, thereby violating the orders of the district court. *NASCO, Inc.*, 124 F.R.D. at 129. At the hearing, a CTR official testified that the disputed assets were not owned by CTR, but leased from another Chambers corporation. The trial court concluded that the leases were "nothing more than instruments of deception." *Id.*

45. *See NASCO, Inc.*, 124 F.R.D. at 122 n.4.

46. *NASCO, Inc.*, 894 F.2d at 700. Rule 38 states 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.

47. *NASCO, Inc.*, 124 F.R.D. at 123.

48. FED. R. CIV. P. 11. As amended in 1983, this rule provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . 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. . . .

sanctionable conduct was that Chambers' had: "(1) attempted to deprive this Court of jurisdiction by acts of fraud, nearly of all which were performed outside the confines of this Court, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce [NASCO] to exhausted compliance."[49] The court noted that the acts alleged under "(1)" and "(3)" could not be considered under Rule 11 as they did not involve the certification of documents.[50] Similarly, the conduct under "(2)," the falsification of the assertions knowingly and deliberately made by Chambers, did not become apparent until after the trial of the merits.[51] Thus, because there was no evidence in the record establishing the falsity of these allegations, sanctions could not have been assessed at the time the papers were filed.[52] The court, accordingly found sanctioning under Rule 11 to be insufficient.[53] Likewise, 28 U.S.C. section 1927 was deemed inadequate to sanction Chambers' acts since the statute only applied to attorneys.[54] However, the court turned to its inherent power and imposed upon Chambers sanctions amounting to approximately one million dollars in attorney's fees and costs incurred by NASCO.[55] In assessing the sanctions, the district court noted that

---

Id.

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

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* The court noted that the acts alleged under "(1)" and "(3)" could not be considered under Rule 11 as they did not involve the certification of documents. *Id.* Similarly, the conduct under "(2)," the falsification of the assertions knowingly and deliberately made by Chambers did not become apparent until after the trial of the merits. Thus, because there was no evidence in the record establishing the falsity of these allegations, sanctions could not have been assessed at the time the papers were filed. *Id.*

54. *NASCO, Inc.*, 124 F.R.D. at 139. "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (1988).

The district court found the sanctionable conduct, alleged by NASCO, outside the reach of section 1927 for several reasons: (1) only sanctionable acts against attorney's could be considered; (2) the statute is not broad enough to cover acts which degrade the judicial system (referring to the attempt to deprive the court of jurisdiction, fraud, misleading and lying to the court, and surreptitiously taping conversations with the court); and (3) the statue only provides for *excess* costs and expenses and attorney's fees. *See NASCO, Inc.*, 124 F.R.D. at 139.

55. *NASCO, Inc.*, 124 F.R.D. at 139. The court noted that if it finds that fraud

Chambers knew throughout the proceedings that NASCO had a valid contract, that he hired counsel to find a defense and arbitrarily refused to perform, forcing NASCO to bring its suit for specific performance.[56] On appeal, the Court of Appeals for the Fifth Circuit affirmed the district court's sanctions, rejecting Chambers' argument that a federal court sitting in diversity cannot look to the court's inherent power, but must look to state law.[57]

Subsequently, because of the importance of the issues presented, the United States Supreme Court granted certiorari.[58] The Court held that a federal court's inherent power to impose sanctions for bad faith conduct is not displaced by the 28 U.S.C. § 1927 and the various sanctioning provisions in the Federal Rules of Civil Procedure, and that even though some of the sanctionable conduct was covered by the statutes and the federal rules, the court could nonetheless rely on its inherent power.[59] Furthermore, federal courts sitting in diversity can assess attorney's fees as a sanction pursuant to their inherent power even though state law does not recognize a bad faith exception to the general rule against fee shifting.[60] The Court reasoned that since the imposition of attorney's fees pursuant to the inherent power solely vindicated the abuses of process, fee shifting was a procedural and not substantive matter.[61] Thus, the Court found that choice of law concerns were not implicated.[62]

Through its broad analysis of the inherent power, the Court partially sanctioned Chambers for his bad faith in the substance of the dispute, something which the Supreme Court has never clearly sanctioned. In doing so, the Court also displaced many other well estab-

---

has been practiced upon it, or that "the very temple of justice has been defiled," the entire cost of the proceedings could justly be assessed against the guilty party. *Id.*; *see* Spargue v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939); *see also* Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944).

56. *NASCO, Inc.*, 124 F.R.D. at 143.

57. Nasco, Inc. v. Calcasieu Television and Radio, Inc., 894 F.2d 696 (5th Cir. 1990). The court likewise found that neither 28 U.S.C. section 1927, nor Federal Rule of Civil Procedure 11 limits a court's inherent power to sanction bad faith conduct "when the parties conduct is not within the reach of the rule or the statute." *Id.* at 702-03.

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

59. Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991).

60. *Id.*

61. *Id.* at 2138.

62. *Id.* at 2137-38.

lished congressionally created statutes and rules in favor of a concept which is amorphous and lacks workable standards.

III. Background Law: The American Rule and the Bad Faith Exception

It has long been established that courts have an inherent power—a power vested in the courts upon their creation,[63] and not derived from any statute.[64] Inherent powers have repeatedly been used to manage a court's docket, and to regulate the conduct of the members of its bar.[65] Courts have also relied on this power to impose many types of sanctions upon those who abuse the judicial process,[66] including the assessment of attorney's fees.[67] Even though the American Rule prohibits fee shifting in most cases,[68] when a party has acted in bad faith, federal courts may award such fees pursuant to their inherent equitable powers.[69] The inherent powers concept has often been characterized as "nebulous," and with "shadowy" bounds.[70] Notwithstanding this observation, some federal courts have implemented the inherent powers in three general modes.[71]

---

63. *See* Michaelson v. United States, 266 U.S. 42, 65-66 (1924); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821).

64. Link v. Wabash Railroad Co., 370 U.S. 626, 630 (1962); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

65. Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561 (3d Cir. 1985).

66. *Id.*; *e.g.*, *Link*, 370 U.S. at 629-30 (federal courts have the power to dismiss a case for failure to prosecute). Also, some commentators have noted that courts occasionally have disbarred, suspended or reprimanded an attorney for abuse of the judicial process. *See e.g.*, Michael Scott Cooper, Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. Rev. 855, 856 (1979). Courts have even used their inherent powers to declare attorneys absent from docket call "ready for trial," even though this could lead to the entry of a default judgment. *See e.g.*, Williams v. New Orleans Public Serv., Inc., 728 F.2d 730, 732 (5th Cir. 1984).

67. Hall v. Cole, 412 U.S. 1, 4-5 (1973).

68. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975). The American Rule provides that a prevailing party must bear his own attorney's fees and cannot have them taxed against the loser. *Id.* at 247.

69. *Id.* at 258-59; *see also Hall*, 412 U.S. at 5; Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 n.4 (1968) (*per curiam*).

70. *See* R. Rodes, K. Ripple & C. Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure, 179 n.466 (1981).

71. *Eash*, 757 F.2d at 562.

The first use of inherent powers springs from the congressional creation of the lower federal courts, which vested theses lower courts with the judicial powers pursuant to Article III of the United States Constitution.[72] These inherent powers are grounded in the separation of powers concept, because to deny this power "and yet to conceive of courts is a self-contradiction."[73] The second use of inherent powers regards those powers which are necessary only in the practical sense of being useful.[74] This use of inherent power contemplates a court's use of its power to provide it with appropriate instruments required for the performance of its duties.[75] The third use of inherent powers stems from those powers that are sometimes said to arise from powers which are " 'necessary to the exercise of all others.' "[76] These powers have historically been viewed as "essential to the administration of justice,"[77] and "absolutely essential" to the judiciary system.[78] Because this form of inherent power emanates from absolute necessity, the Court has noted that though this authority "may be regulated within limits not precisely defined," it can "neither be abrogated nor rendered practically inoperative."[79]

It is this third form of inherent power which grants a federal court the power to control admission to its bar and discipline attorneys who appear before it.[80] Similarly, this is the basis of a court's power to pun-

---

72. *Id.* This use of inherent power encompasses a very narrow range of authority involving activities, which are fundamental to a court as a constitutional tribunal; to divest a court of its command within this sphere is equivalent to rendering the terms "court" and "judicial power" meaningless. *Id.*; *see* U.S. CONST. art. III; Levin & Amsterdam, *Legislative Control Over Judicial Rule Making: A Problem of Constitutional Revision*, 107 U. PA. L. REV. 1, 30-32 (1958).

73. *Eash*, 757 F.2d at 565. *See* Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1023 (1924).

74. *Eash*, 757 F.2d at 563.

75. *Ex parte* Peterson, 253 U.S. 300 (1920). An example of this use of the court's inherent powers is (where matters are very unfamiliar to the court such as complex business or scientific matters) when the court supplies itself with an auditor to aid in its decision making, or appoints "persons unconnected with the court to aid judges in the performance of specific judicial duties." *Id.* at 312.

76. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (quoting Unites States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)). In *Roadway*, the Supreme Court termed the contempt sanction "the most prominent" of the inherent powers. *Id.* at 764.

77. *Michaelson*, 266 U.S. at 65.

78. Levine v. United States, 362 U.S. 610, 616 (1959).

79. *Michaelson*, 266 U.S. at 66.

80. *See Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824).

ish for contempt;[81] the power which allows a federal court to vacate its own judgment upon proof that fraud has been committed upon it,[82] and sanction a litigant for bad faith conduct.[83] However, because of their amorphous nature, inherent powers must be exercised with restraint and discretion.[84] The ability to fashion an appropriate sanction for conduct which abuses the judicial process is a primary aspect of this discretion.[85]

In 1796, the Supreme Court first held that attorney's fees are not recoverable as damages by a prevailing party.[86] This doctrine has come to be known as the "American Rule" because it is considered a unique part of the American legal system.[87] This doctrine has consistently been observed,[88] in spite of the repeated criticism,[89] and is followed in all federal and some state courts.[90]

Although the American Rule is the principal rule of law in the

---

81. *Robinson*, 86 U.S. (19 Wall.) at 510.

82. Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2132 (1991); *see* Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1943). The historic equity power to set aside fraudulent judgments is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner. . . involves far more than injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public." *Id.* at 245-46.

83. *Roadway*, 447 U.S. at 765-67; *see also Link*, 370 U.S. at 629-30.

84. *Id.* at 764.

85. *Chambers*, 111 S. Ct. at 2133.

86. Acrambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

87. *See* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U.PA. L. REV. 636, 637 (1974).

88. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); *Chambers*, 111 S. Ct. at 2133.

89. *See, e.g.*, Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966). The adoption of the English rule (the English rule generally allows a meritorious litigant to recover attorney's fees from his adversary) in the United States has been advocated because the chance of recovering attorney's fees from a losing opponent can create a strong incentive to take on a meritorious case without considering the client's ability to pay . *Id.* at 798. These advocates also stress that a successful party is never fully compensated because such a party must pay attorney's fees, which may be equal to, or greater, than the total recovery in the suit. *See* Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75, 84 (1963).

90. *See Alyeska*, 421 U.S. 240; Fleischmann Distilling Corp. v Maier Brewing Corp, 386 U.S. 714 (1967); Campbell v. Maze, 339 So. 2d 202 (Fla. 1976); Strickland v. Williams, 218 S.E.2d 8 (Ga. 1975); Austin Paving Co. v. Cimarron Constr., Inc., 511 S.W.2d 417 (Tex. Civ. App. 1974); Pelican Printing Co. v. Pecot, 216 So. 2d 153 (La. Ct. App. 1968).

federal courts, numerous exceptions have been created. Congress has provided a vast collection of statutes that provide for fee shifting which are tailored to advance important legislative policies and encourage private litigation.[91] Furthermore, Congress has also provided for the recovery of attorney's fees in the Federal Rules of Civil Procedure.[92] Even though in *Sociate Internacional v. Rogers*,[93] the Supreme Court stated that where misconduct is sanctionable under the federal rules there is no need for the court to invoke its inherent powers,[94] certain abusive behavior is simply not covered by the rules.[95]

The federal courts have used their inherent equitable powers to fashion three accepted exceptions to the American Rule.[96] Of the three

---

91. *See, e.g.*, Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988 (1976); The Civil Rights Act of 1964 tit. VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1976); The Clayton Act, 15 U.S.C. § 552(a)(4)(E) (1976); The Equal Access to Justice Act, 28 U.S.C. § 2412 (1976), 5 U.S.C. § 504 (Supp. IV 1980).

92. *E.g.*, FED. R. CIV. P. 37 (failure to make discovery); FED. R. CIV. P. 26(c) (protective orders). Federal Rules of Civil Procedure 11, 26(g), and 37 represent some of the enforcement power to punish discovery and judicial abuses. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 382 (1989). *See generally*, FED. R. CIV. P. 11, 26(b), (g) advisory committee's notes (1983).

93. 357 U.S. 197 (1958).

94. *Id.* at 207. The Court noted that:

> [W]hether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.'. . . Reliance upon . . . inherent power can only obscure analysis of the problem before us.

Id.

95. *See* JOSEPH, *supra* note 92, at 383.

96. *Alyeska*, 421 U.S. 240 at 257-259. In addition to the bad faith exception, the court's have recognized two other exceptions:

> (a) Under the "common fund" exception attorney's fees are awarded when the claimant has created, increased, or protected a fund or right through their litigation which will directly benefit others; the shifting of fees in this scenario is not punitive as in the bad-faith situation, but designed to prevent unjust enrichment. Spargue v. Ticonic Nat'l Bank, 307 U.S. 161, 164-66 (1939).
>
> (b) Under the "prior litigation" exception a court may assess attorney's fees as a sanction for the willful disobedience of a court order. *Fleischmann*, 386 U.S. at 718. This exception is applied when a person is required, due to the wrongful act of another (i.e., as where a defendant's breach of contract causes plaintiff to breach its contract with a third party) to protect his interests by bringing or defending a lawsuit against a third party. *See generally*, Joan Chipser, Note, *Attorney's Fees and the*

judicially created exceptions to the American rule, the bad faith exception is considered the most versatile[97] due to its punitive underlying rationale.[98] The essential element in triggering an award of sanctions under the bad faith exception is the existence of bad faith on the offender's behalf.[99] In fact, when an exception to the American Rule is granted, a finding of some blameworthy conduct is necessary to the imposition of inherent power sanctions.[100] The inherent authority to levy fees against a party who has litigated in bad faith emanates from the traditional equitable powers of the courts'[101] and has been reaffirmed as an inherent supervisory power on numerous occasions.[102] However, as much as the bad faith exception to the American Rule seems to be purely compensatory,[103] it is not, since the imposition of a sanction does not depend on who prevails, but on how the parties conduct themselves during the litigation.[104]

One cannot deny that all of the exceptions to the American rule serve a compensatory function as they recompense a party for actual

---

Federal Bad Faith Exception, 29 HASTINGS L.J. 319, 322 (1977).

97. Jane P. Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 630 (1983).

98. *See Hall*, 412 U.S. at 5; *see also* Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 180 (1980).

99. Roadway Express, Inc. v. Piper, 447 U.S. at 765-66 (1980); *Alyeska*, 421 U.S. at 258-59; Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 455 (7th Cir. (1987); *Lipsig*, 663 F.2d at 180.

100. *Roadway*, 447 U.S. at 765. *See* MALLOR, *supra* note 97, at 620 (stating that when the blameworthy conduct consists of some abuse of the judicial process, the exceptions may compensate the individual injured by the abuse, but the interest which is exonerated is the preservation of judicial authority and resources).

101. *Hazel-Atlas*, 322 U.S. at 245. The courts of equity in the United States were created by the Judiciary Act of 1789, and given the power possessed by the English chancery courts at the time the United States Constitution was adopted. Act of September 27, 1789, ch. 20, 1 Stat. 73; Fountain v. Ravenel, 58 U.S. (17 Haw.) 369, 384 (1854) (since the equity courts in England possessed discretionary power to award attorney's fees for bad faith conduct, these same powers were seized by the United States federal equity courts upon their creation). *See generally* Guardian Trust Co.v. Kansas City S. Ry., 28 F.2d 233, 241-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). Included in this equitable authority was the power to deter frivolous litigation, to punish for abuse of the judicial system and to avoid injustice to litigants. *See* Note, *supra* note 96, at 323-24. As these goals epitomize the underlying rational of the federal bad faith exception, they are clearly within a court's equity powers. *Hall*, 412 U.S. at 5.

102. *E.g.*, *Roadway*, 447 U.S. at 765; *Alyeska*, 421 U.S. 240, 259.

103. Hutto v. Finney, 437 U.S. 678, 691 n.17 (1978).

104. Chambers v. NASCO, Inc., 111 S. Ct. 2132, 2137 (1991).

and out of pocket costs.[105] However, the imposition of sanctions under the bad faith exception actually serves a dual purpose.[106] A fee awarded under the court's inherent power upon a finding of bad faith not only makes the prevailing party whole for expenses caused by his opponent's obstinacy, but also vindicates judicial authority without having to resort to sanctions available for contempt.[107] Therefore, any compensatory effect the bad faith exception results in is subordinate or ancillary to other policies which compensate some litigants but not others for their expenses in bringing lawsuits.[108]

The bad faith exception consists primarily of bad faith which precedes or induces litigation,[109] and bad faith which occurs during litigation.[110] Both instances of bad faith can encompass three varieties of misconduct which amount to abuse of the judicial system: obdurate or obstinate conduct which causes legal action;[111] substantive bad faith in propounding a frivolous claim, counterclaim, or defense;[112] and vexatious conduct during the course of litigation.[113]

Bad faith which precedes or induces litigation arises when a de-

---

105. *See* MALLOR, *supra* note 97, at 619-620.

106. *Hutto*, 437 U.S. at 639 n.14.

107. *Id.*

108. *Id.*

109. *Hall*, 412 U.S. at 15. Heucker v. Milburn, 538 F.2d 1241, 1245 n.9 (6th Cir. 1976); *see also* Browning Debentures Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1979).

110. *Hall*, 412 U.S. at 15.

111. *Hutto*, 437 U.S. at 689 n.14; Vaughan v. Atkinson, 369 U.S. 527 (1962); Lewis v. Texaco, Inc., 418 F. Supp 27 (S.D.N.Y. 1976); Fairley v. Patterson, 493 F.2d 598, 606. (5th Cir. 1974).

112. *See, e.g.*, *Roadway*, 447 U.S. 752; *Alyeska*, 421 U.S. 240; F.D. Rich Co. Inc. v. United States *ex rel* Indus. Trial Lumber Co., 417 U.S. 116 (1974) (supporting the power to sanction for the assertion of a substantive bad faith claim). Ellingson v. Burlington N., Inc., 653 F.2d 1327, 1331-32 (9th Cir. 1981) (frivolous appeal). *But see* Nemroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980); Health-Chem Corp. v. Hyman, 523 F. Supp. 27, 31 (S.D.N.Y. 1981).

113. *Roadway*, 447 U.S. at 764-66 (this aspect of the bad faith exception protects the orderly administration of the legal process). Many courts which impose sanctions pursuant to their inherent power fail to specify the detail of the power, or use this generic term to describe several distinguishable branches of this power. *Eash*, 757 F.2d at 561-62. Consequently, vigorous litigation in an area of the law, which is unsettled, should not be equated with "obduracy, wantonness, or vexatiousness." Adams v. Carlson, 521 F.2d 168, 170 (7th Cir. 1975). However, such litigation practices in matters which are relatively settled may constitute abuses of the judicial system and add up to the entry of sanctions on a punitive basis. *Id.*

fendant, without any valid justification, refuses to recognize the clear legal right of the plaintiff, and forces the plaintiff to bring a lawsuit to enforce his rights.[114] In this situation fee shifting occurs due to the unfairness imposed on a party, who should have freely enjoyed his rights, but had to pay the cost of litigation to do so.[115] The gravamen of a party's obstinacy is the consumption of private and judicial resources, and as the Supreme Court stated in *Hutto v. Finney*, such an award "vindicates the . . . Court's authority over a recalcitrant litigant," while sending the message that protracted litigation will not be tolerated.[116]

Several cases demonstrate how a party's pre-litigation conduct can lead to the imposition of attorney's fees where an opponent refuses to recognize a valid right. In *Vaughan v. Atkinson*, the Supreme Court awarded attorney's fees in a suit brought by a seaman for his employer's failure to respond to a claim for maintenance and cure.[117] The Court awarded the seaman attorney's fees under the rubric of compensatory damages.[118] However, the Court stressed that the employer's callous attitude in not even making an investigation into the claim forced the seaman to hire counsel to enforce his rights.[119]

Similarly, in *Bell v. School Board*,[120] the defendant school board had not integrated despite the fact that nine years had passed since the Supreme Court's decision in *Brown v. Board of Education*.[121] The school board had resisted the transfer of black students by creating complicated transfer procedures applied only to blacks.[122] In granting injunctive relief, the Fourth Circuit Court of Appeals focused on the long pattern of evasion and obstruction practiced by the school board.[123] The court noted that the award of fees was based on the de-

---

114. Hall v. Cole, 412 U.S. 1, 15 (1973); *see, e.g.*, Vaughan v. Atkinson, 369 U.S. 527 (1962).

115. *See* Comment, *note* 87, at 660-61.

116. *Hutto*, 437 U.S. 678, 691 (the defendant's obstinacy was found in their failure to remedy constitutional violations which had been found earlier in the proceedings).

117. 369 U.S. 527, 528 (1967).

118. *Id.* at 530.

119. *Id.* at 530-31; *see also Lewis*, 418 F. Supp. at 28 (the court noted that Texaco's unjustified and unsupported refusal to pay knowing of its obligation "was sheer recalcitrance and an act of bad faith" on its part).

120. 321 F.2d 494 (4th Cir. 1963).

121. 347 U.S. 483 (1954).

122. *Bell*, 321 F.2d at 500.

123. *Id.*

fendant's long continued pattern of evasion, and the defendants refusal to take initiative and by interposing administrative obstacles to thwart the plaintiff's valid rights.[124]

In 1974, *NAACP v. Allen*[125] illustrated another application of the bad faith exception to non-litigation conduct. In *Allen*, a finding of bad faith was based on the fact that in the thirty-seven year existence of the Alabama Trooper organization, not one black had ever been a trooper, but had only been employed by the Department in a non-merit system.[126] The court awarded attorney's fees since it was more than apparent that the Department understood that its acts were unconstitutional, but it continued to maintain a defense in the lawsuit which amounted to unreasonable and obdurate conduct.[127]

Subsequently, in 1975 the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*.[128] In *Alyeska*, environmental groups sued the Secretary of the Interior in an attempt to prevent the issuance of permits to the Alyeska Pipeline Service Company for the construction of the trans-Alaska oil pipeline.[129] With the merits of the litigation settled,[130] the Court addressed whether Alyeska could be required to pay one-half of the environmental group's award due to the group having performed the functions of a private attorney general.[131] The Supreme Court held that a court, pursuant to its inherent power, may assess attorney's fees as a sanction when "the losing party has '*acted* in bad faith, vexatiously, wantonly or for oppressive reasons.' "[132] However, this language does not necessarily embrace the reasoning of *Bell* or *Allen*.[133] Awarding attorney's fees for bad faith

---

124. *Id.*

125. 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). Plaintiffs brought suit against the Alabama Department of Public of Safety and the Alabama Personnel Department under 42 U.S.C. section 1983, alleging the unconstitutional exclusion of blacks from employment in the Public Safety Department. *Id.* at 705. The court awarded the plaintiffs attorney's fees under the bad faith exception to the American rule. *Id.* at 707-10.

126. *Id.* at 708.

127. *Id.*

128. 421 U.S. 240 (1975).

129. *Id.* at 241.

130. *Id.* at 244-245. Congress had enacted legislation which amended the Mineral Leasing Act allowing the granting of the permits sought by Alyeska. *Id.* at 244.

131. *Id.* at 246.

132. *Id.* at 258-59 (quoting F.D. Rich Co. v. United States ex rel Indus. Lumber Co., 417 U.S. 116, 129 (1974)).

133. *See Bell*, 321 F.2d 494 (4th Cir. 1963); *Allen*, 340 F. Supp. 703; *see also*,

conduct causing the original dispute must be distinguished from an award of fees for bad faith which unjustifiably opposes a clear claim.[134] A fee award in the later instance protects the judicial system against unwarranted expenditures of its resources, whereas an award in the former situation punishes a party for his role in the substance of the dispute.[135] Although such an award falls within a court's equitable powers, this can present a confusing overlap when a party is also awarded punitive damages.[136]

The Supreme Court has not explicitly read the bad faith exception to include bad faith conduct causing the original dispute[137] until the *Chambers* decision.[138] However, Supreme Court cases and other lower federal court cases do suggest that some form of misconduct beyond a determination of fault in the facts that give rise to the cause of action is required for an award of fees under the bad faith exception.[139] Some commentators suggest that such an expansion of the court's inherent powers under the bad faith exception could lead to fee shifting in the ordinary tort or contract case in which the only bad faith is in the cause of action itself.[140]

MALLOR, *supra* note 97, at 634.

134. *See* MALLOR, *supra* note 97, at 634-35.

135. *Id.* at 635 (suggesting that such an award is tantamount to an award of punitive damages); *see* Straub v. Vaisman & Co., 540 F.2d 591, 599-600 (3d Cir. 1976).

136. *See* Hon. James L. Oakes, *Introduction: A Brief Glance at Attorney's After Alyeska*, 2 W. NEW ENG. L. REV. 169, 175-76 (1979).

137. *See* Fleischmann Distilling Corp. v. Maier, 385 U.S. 714, 719 (1967) (holding that the defendant's deliberate violation of a trademark did not fall within any of the judicially created exceptions of the American Rule); *see also* Runyon v. McCrary, 427 U.S. 160, 183-84 (1976) (rejecting that the mere determination of fact against a party did not prove the threshold of conduct for which a penalty would be justified).

138. *See* Chambers v. NASCO, Inc, 111 S. Ct. 2132, 2138 (1991) (stating that it did not impose sanctions for Chambers' breach of contract, but for the fraud he perpetrated on the court). However, the dissent believes the Court appears to have disclaimed that its holding does reach this aspect of pre-litigation conduct. *Id.* at 2147 (Kennedy, J., dissenting); *see also id.* at 2138 nn. 16-17.

139. *See, e.g.*, Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (defendant's non-litigation conduct was "intolerable"; however, there was no showing of bad faith in defending the suit); *Straub*, 540 F.2d at 599-60 (reversing an award of attorney's fees in a 10b-5 action when bad faith existed solely in the acts which gave rise to the cause of action).

140. *See* MALLOR, *supra* note 97, at 636 (suggesting deterrence to such conduct and adequate incentive to sue already exists through the imposition of compensatory and punitive damages).

Another theory under which courts have awarded attorney's fees is when a party's conduct during the course of litigation results in needless expenditures. This corollary of the bad faith exception focuses on a party's abuse of the Federal Rules of Civil Procedure.[141] Because the procedural rules and practices provide an unlimited opportunity for delay and harassment, several reasons have been suggested as to why judges seem more willing to make a finding of bad faith on an objective basis when procedural abuses are alleged.[142] First, judges are in a position to observe a party's procedural moves first hand.[143] Second, as judges are versed in procedural matters, they can easily compare a party's procedural maneuvers to the norm in order to determine if they are propounding needless litigation.[144] Also, since the principles which govern the procedural rules in the federal courts are usually much clearer than in certain areas of substantive law, procedural abuses are monitored easier.[145]

Finally, the "substantive" bad faith exception to the American rule is designed to compensate, punish, and deter the harm done to courts and private parties by the assertion of frivolous claims.[146] Theoretically, this corollary of the bad faith exception was intended to decrease the amount of groundless litigation since a party who asserts a groundless claim, counterclaim, or defense may be accountable for the share of litigation attributable to litigating the bad faith claim,[147] or for the entire cost if bad faith pervades the entire lawsuit.[148] However, some have criticized the American Rule saying it not only fails to deter such litigation, but encourages claims which are not even colorable.[149]

---

141. Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 182 (D.C. Cir. 1980); *see also* Browning Debentures Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088-89 (2d Cir. 1979).

142. *See* MALLOR, *supra* note 97, at 645.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Browning*, 560 F.2d at 1088; *see* Comment, *Nemroff v. Abelson, Bad Faith, and Awards of Attorney's Fees*, 128 U. PA. L. REV. 468, 481-83 (1979) (application of this branch is similar to the tort of malicious prosecution.); GLENN EUGENE DAVIS, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U.L.Q. 75, 111 (1982).

147. *Lipsig*, 663 F.2d at 181 n.21; *Browning*, 569 F.2d at 1088-89.

148. *See Ellingson*, 653 F.2d 1327 (awarding attorney's fees for defense of main action and frivolous appeal).

149. *See* EHRENZWEIG, *supra* note 87, at 797. Courts have noted that in order for the imposition of sanctions pursuant to the courts' inherent power, there must be

A review of case law illustrates that although courts apply objective standards for the bad faith exception to a party's pre-litigation conduct, much more is required to establish a party's bad faith assertion of a substantive claim or defense.[150]

In *Ellingson v. Burlington Northern, Inc.*,[151] the plaintiff was found to have abused the judicial process and to have harassed the defendants.[152] The Ninth Circuit Court of Appeals found that the plaintiff's bad faith was based in his filing of a new suit, which was grounded on "sham" pleadings containing false allegations, and which had been resolved against him over twenty years earlier.[153] However, subsequent case law suggests that if a claim was colorable when initiated, it might not be found to have been brought in bad faith.[154] In *Nemroff v. Abelson*,[155] the Second Circuit Court of Appeals overturned an award of attorney's fees imposed on the plaintiff for having filed a lawsuit consisting largely of inadmissable and irrelevant evidence.[156] The court stated that a claim is colorable, for purposes of bad faith, when it has some legal and factual support, considered in light of the reasonable belief of the individual making the claim.[157] Furthermore, the court noted that the test is "whether a reasonable attorney could have concluded that the facts supporting the claim *might be established*, not whether such facts actually *had been established*."[158]

In contrast, the court in *Miracle Mile Associates v. City of Roch-*

---

clear evidence that the challenged actions were entirely without color and made for reasons of harassment, delay or other improper purposes; *see, e.g., Adams*, 521 F.2d 168.

150. *Browning*, 569 F.2d at 1087-88 (a substantive claim brought in bad faith must be entirely with out color, based on an objective bases, and brought with improper purposes, which is a subjective analysis); *see also* Autorama Corp. v. Stewart, 802 F.2d 1284, 1287 (10th Cir. 1986).

151. 653 F.2d 1327 (9th Cir. 1981).

152. *Id.* at 1331-32.

153. *Id.* T court also imposed fees on the plaintiff for his prosecution of a groundless appeal stating that "a frivolous lawsuit does not become meritorious when appealed." *Id.* at 1332.

154. *See, e.g., Lipsig*, 663 F.2d at 181; *Nemroff*, 620 F.2d at 348; *Browning*, 560 F.2d at 1088.

155. 469 F. Supp 630, 640 (S.D.N.Y. 1979), *aff'd in part, rev'd in part*, 620 F.2d 339 (2d Cir. 1980).

156. *Nemroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

157. *Id.* at 348.

158. *Id.* (emphasis in original).

ester[159] awarded attorney's fees to the defendants' based on a finding that the plaintiffs' claim was frivolous and made in bad faith.[160] On appeal, the court reversed the award, rejecting a contention that the plaintiff's bad faith was shown because of the weaker merits of the current case than the merits of previous cases brought under the same theory where recovery was barred.[161]

It follows that the application of the substantive bad faith exception requires an objective determination as to whether a reasonable attorney had any legal or factual support for making the claim.[162] If the claim is found to have support, it could not have been made in bad faith. If the claim lacked support, a court must then determine if the litigant had an improper purpose.[163] In addition, the substantive bad faith exception requires more than a showing that a party did not prevail on the merits of a claim, defense or position.[164]

Because the objective determination is often difficult to establish, the standard usually is exercised in the most extreme circumstances.[165] Some indicia of substantive bad faith recognized by federal courts include claims or defenses advanced which "were meritless, that counsel knew or should have known this . . . and that the motive for filing was for an improper purpose, such as harassment."[166] Furthermore, substantive bad faith can even be inferred from a particular set of facts.[167]

---

159. 617 F.2d 18 (2d Cir. 1980).

160. *Id.* at 19. The plaintiff, lessees and developers of a proposed shopping area, brought an antitrust action against the city, city officials and a commercial competitor, but these plaintiffs had brought a similar action on the same theory and lost. *Id.* at 20.

161. *Id.* at 21.

162. *Nemroff*, 620 F.2d at 348.

163. *Browning*, 560 F.2d at 1088 (harassment and delay are improper purposes).

164. *See* JOSEPH, *supra* note 92, at 389.

165. Health-Chem Corp. v. Hyman, 523 F. Supp. 27, 32 (S.D.N.Y. 1981).

166. Smith v. Detroit Fed'n of Teachers Local No. 231, 829 F.2d 1370, 1375 (6th Cir. 1987).

167. Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987).

Examples of when substantive bad faith has been inferred:

(a) Under the threat of numerous depositions. *See Browning*, 560 F.2d at 1089; *In re* Ruben, 825 F.2d 977, 989 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1108 (1988).

(b) When filing actions plainly barred by res judicata or other preclusion doctrines. *See* Van Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986); Di Silvestro v. United States, 767 F.2d 30, 32 (2d Cir.), *cert. denied*, 474 U.S. 862 (1985).

(c) When allowing a bankruptcy appeal to the district court "to atrophy for more than nine months [after a brief was due], failing to properly respond to a court order [to support their appeal or face dismissal], and then failing to respond to a motion to dismiss." *In re* AOV Indus., 798 F.2d 491, 498 (D.C. Cir. 1986).

However, the mere length of litigation,[168] and the loss on the merits has been held inadequate to demonstrate sanctionable bad faith conduct.[169]

Not surprisingly, the standard against which a substantive bad faith exception is found is very high.[170] There must be "clear evidence" that the challenged actions are without color and are taken for reasons of harassment or delay or for other improper purposes.[171] Several courts have indicated that this rigorous standard is necessary to ensure that plaintiffs with meritorious or colorable, but novel, claims are not deterred from bringing suit.[172] Without such a standard, those with meritorious claims may be deterred in their access to the judicial system while those who know, because of their improper motives, that a suit is impermissible, continue to abuse the judicial process and its resources.[173]

An increasing number of state statutes and court rules which permit or require fee-shifting in specific instances have essentially done away with the American Rule.[174] This trend questions the ability that a federal court sitting in diversity has to impose a fee award pursuant to its inherent power,[175] since a court may characterize a fee-shifting provision as either substantive or procedural.[176] In *Alyeska*,[177] after the Court discussed the American rule and the bad faith exception, it noted that when a federal court sits in a diversity case, a different situ-

---

(d) Engaging in dilatory tactics during discovery and courtroom proceedings, failing to meet scheduled deadlines, and misleading the court. *Lipsig*, 663 F.2d at 181-82.

168. Templeman v. Chris Craft Corp., 770 F.2d 245, 250 (1st Cir), *cert. denied*, 474 U.S. 1021 (1985) (admiralty setting).

169. *Autorama*, 802 F.2d at 1288.

170. *Adams*, 521 F.2d at 170.

171. Weinberger v. Kendrick, 698 F.2d 61, 80 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *accord Autorama*, 802 F.2d at 1287-88; Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).

172. *Nemroff*, 620 F.2d at 349-50; *Browning*, 560 F.2d at 1088.

173. *See* MALLOR, *supra* note 97, at 642.

174. Note, *State Attorney fee shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 323 (1984). The survey revealed 1,974 attorney fee-shifting statutes in the code of 50 states.

175. *See* JOSEPH, *supra* note 92, at 376.

176. Jeffrey A. Parness, *Choices About Attorney Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere*, 49 U. PITT. L. REV. 393, 414 (1988). Attorney fee-shifting statues may be classified into two groups: (1) procedural or general litigation statutes which discourage abuse of the judicial process; (2) non-procedural statutes which seek to protect certain parties. *Id.*

177. 421 U.S. 250, 259 n.31 (1975).

ation occurs.[178] In footnote thirty-one, the Court stated that " 'in an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, . . . 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.' "[179]

However, some federal courts in diversity settings have misinterpreted this language and have applied this limitation not only to fee shifting rules that embody a substantive policy of the state, but to procedural fee-shifting laws as well.[180] These courts have held that even though federal courts can use their inherent powers to assess attorney's fees as a sanction in some cases, they cannot do so in a diversity setting unless applicable state laws recognize a bad faith exception to the American rule prohibiting fee shifting.[181] *Tryforos v. Icarian Dev. Co.*,[182] represents one instance where a federal court sitting as a state court erroneously applied a state procedural fee-shifting law. In this case, the Seventh Circuit Court of Appeals considered section forty-one of the Illinois Civil Practice Act,[183] and denied a request for attorney's fees.[184] However, the court's denial was not based on a determination

---

178. *Id.*

179. *Id.* (quoting 6 J. MOORE, Federal Practice ¶ 54.77 [2] pp. 1712-13 (2d ed. 1974)). The Court considered only the situation in which state law might permit attorneys' fees while a federal court would not and concluded that such an award would be permissible in a diversity action when necessary to effectuate a substantial policy of the state. *Id.*

180. *See* PARNESS, *supra*, note 176. (contending that state laws on attorney's fees which are procedural in nature are inapplicable in diversity cases). The author notes that lower federal courts which sit as state courts should not utilize footnote thirty-one as authority for applying all state fee shifting laws, but must distinguish between substantive and procedural provisions. *Id.*

181. *See* Tryforos v. Icarian Dev. Co., 518 F.2d 1258, 1265 (7th Cir. 1975), *cert. denied sub nom.* Mantana v. Tryforos. 423 U.S. 1091 (1976); Lewis v. S.L. & E., Inc., 629 F.2d 764, 773 (2d Cir. 1980).

182. 518 F.2d 1258.

183. ILL. REV. STAT. CH. 110 § 41 (1973) provided:

> Allegations and denials, made without reasonable cause and good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred, by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at trial.

Id.

With recent amendments, the Illinois law now conforms to Rule 11 of the Federal rules of Civil Procedure. *See* ILL. REV. STAT. CH. 110 § 2-611 (Smith-Hurd Supp. 1987).

184. *Tryforos*, 518 F.2d at 1265-66.

that section forty-one was procedural and therefore inapplicable in federal court. The court drew no distinction between state fee shifting laws which do and do not reflect a substantial policy of the state.[185] Rather, the court held that the lower court's findings did not indicate that the suit was brought in bad faith, and thus the conduct did not fall within the ambit of section forty-one.[186] The court rejected that the lower court's award was nonetheless supportable under the exception to the American Rule, relying on footnote 31 in *Alyeska*.[187] Lower federal courts should not interpret footnote thirty-one as authority for applying procedural fee shifting laws in a diversity context, but should interpret footnote thirty-one as requiring deference only to state substantive law.

As previously discussed, federal courts are interpreting footnote thirty-one as requiring application of all state fee shifting provisions in diversity cases, whether procedural or substantive. Furthermore, federal courts are also excluding the federal procedural common law which allows fee shifting in those rare cases, such as the bad faith exception.[188]

Historically, *Erie* broadly commanded federal courts sitting in diversity cases to apply state substantive law and federal procedural law.[189] After the 1945 case of *Guaranty Trust Company. v. York*,[190] the Supreme Court required federal courts in diversity cases to use state law if application of federal laws would significantly affect the outcome of the litigation.[191] Then, in 1965 the Supreme Court decided *Hanna v. Plumer*[192] and held that where no federal rule controls and choice of law analysis is necessary, the outcome determination test as established in *Guaranty Trust Co.* "cannot be read without reference to the twin aims of the *Erie* rule—discouragement of forum shopping and avoidance of inequitable administration of the laws."[193]

Some federal courts in diversity cases have failed to undertake the necessary *Erie* analysis in determining whether application of a court's inherent power to tax fees for bad faith conduct is a matter of substan-

185. *Id.* at 1266-67.
186. *Id.*
187. *Id.* at 1256 n.27.
188. *See* PARNESS, *supra* note 176, at 415 n.117.
189. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
190. 326 U.S. 99 (1945).
191. *Id.* at 109.
192. 380 U.S. 460 (1965).
193. *Id.* at 468.

tive or procedural law.[194] Such an analysis requires consideration of the twin aims of *Erie*, as well as thoughtful deliberation on the character of the misconduct for which a court is sanctioning a party. The misreading of footnote thirty-one infringes upon the power of a federal court to regulate procedure in federal courts. Furthermore, relying on footnote thirty-one for the proposition that where a state does not recognize a bad faith exception to the American Rule, federal courts may not invoke a federal common law exception is erroneous. Although federal courts are limited to using state substantive law in diversity settings, use of its inherent powers to vindicate abuses of the judicial system is essentially procedural in nature. Thus, by implication, federal courts using their inherent powers to engage in fee shifting under the bad faith exception can circumvent this limitation. Additionally, in a diversity context, the bad faith exception merely regulates the manner in which substantive rights are enforced in federal courts, and has no outcome determination implications.[195] This necessarily makes fee shifting procedural so that state substantive law cannot prevent fee shifting. Finally, the federal interest in curtailing misconduct in federal courts through sanctions, such as the bad faith exception to the American Rule, does not contravene with the policy of states adhering to a different rule.[196] Thus, federal courts hearing state law claims should only apply state substantive fee-shifting laws, otherwise, federal procedural law controls.

IV. THE *CHAMBERS* COURT'S OPINION

A. *The Majority Opinion*

The *Chambers*[197] case presented the Supreme Court with the opportunity to continue shaping the scope of federal courts' inherent powers in sanctioning a litigant for bad faith conduct. The court granted certiorari, and Justice White, writing for the five member majority,

194. *See* PARNESS, *supra* text accompanying note 176.

195. NASCO, Inc. v. Calcasieu Television and Radio, Inc., 894 F.2d 696, 705-06 (5th Cir. 1990). Under circumstance where a federal court is assessing fees as a means to vindicate judicial abuses or in an effort to control the litigation, the exercise of inherent power does not encourage forum shopping or inequitable administration of the laws. *Id.*

196. *See* PARNESS, *supra*, note 176 at 415 n.117.

197. Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991).

concluded that the district court acted within its discretion in assessing NASCO's attorney's fees to Chambers for his bad faith conduct.[198]

The Court began it discussion by noting that federal courts have the inherent power to manage and control their own proceedings and the conduct of those who appear before them.[199] Outlining the scope of the inherent power, the Court also noted that this power allows a federal court to vacate its own judgment upon a finding that fraud has been perpetrated on the court.[200] The majority stated that although the American Rule prohibits fee shifting in most cases, federal courts have created exceptions to this in narrowly defined circumstances.[201] The majority's analysis of the exceptions resulted in a determination that when a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons, a court may assess attorney's fees against them by use of their inherent powers.[202] The Court reasoned that when a party practices fraud upon the court,[203] or delays or disrupts the litigation or inhibits the enforcement of a court order,[204] the imposition of sanctions serves the dual purposes of vindicating judicial authority and making the prevailing party whole for expenses caused by his opponents obstinacy.[205]

Chambers' claimed that the sanctioning scheme of the federal statutes and rules displaced the inherent power to sanction a litigant

---

198. *Id.* at 2128 (Justices Marshall, Blackmun, Stevens, and O'Conner, JJ., joined).

199. *Id.* at 2132 (referring to United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821).

200. *Chambers*, 111 S. Ct at 2132. A federal court has the power to control admission to its bar and discipline attorneys who appear before it. *See Ex Parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824). Also, a federal court has the power to punish for contempt. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 798 (1987). Quoting Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944), the Chambers Court noted that this " 'historic power of equity to set aside fraudulently begotten judgments is necessary to the integrity of the courts, for tampering with the administration of justice in [this] manner. . .involves far more than an injury to a single litigant. It is a wrong against the institution . . . .' " *Chambers*, 111 S. Ct. at 2132.

201. *Chambers*, 111 S. Ct. at 2132-33.

202. *Id.* (citing F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974) and Hall v. Cole, 412 U.S. 1, 5 (1973)).

203. *Chambers*, 111 S. Ct. at 2133 (citing Universal Oil Products Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946)).

204. *Id.* at 2133 (citing to Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978)).

205. *Id.*

for bad faith conduct.[206] In addressing Chambers' claim, the opinion considered five factors in determining whether any basis existed for holding that the inherent powers to sanction for bad faith conduct are displaced by the scheme of the federal statutes and rules.[207]

First, the Court took into account that the inherent power extends to a full range of litigation abuses, whereas the other sanctioning provisions only reaches specific individuals or acts.[208] Thus, the inherent power must continue to fill the gaps of the statutes and rules.[209] Second, the majority considered the different standards under which sanctions may be imposed. The Court noted that the exceptions to the American Rule limit a court's inherent power to engage in fee shifting to instances where a litigant has engaged in bad faith conduct or willful disobedience of a court order.[210] Conversely, many of the other sanctioning schemes allow imposing sanctions for conduct which merely fails to meet a reasonableness standard.[211] Consequently, the majority reasoned risk would be limited when courts invoke their inherent power to deter the advocacy of litigants attempting to vindicate federal rights.[212]

Third, the majority conceded that the exercise of inherent powers could be limited by Congress since the lower federal courts were created by acts of congress.[213] However, the majority refused to acknowledge that Congress intended to depart from so well an established principle,[214] the existence and scope of which has been reaffirmed since the

---

206. *Id.* at 2134. Chambers argued that 28 U.S.C. section 1927, and the many sanctioning mechanisms in the Federal Rules of Civil Procedure reveals a legislative intent to obviate or foreclose resort to the inherent powers. *Id.* at 2131-32.

207. *Id.* at 2134-35.

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

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 2134 n.11. For example, Rule 11 imposes an objective standard of a reasonable inquiry which does not require any bad faith findings. *Id.* at 2134. Rule 11 was amended in 1983 because its subjective bad faith standard was difficult to establish, and courts were reluctant to invoke it. *See* Advisory committee notes on the 1983 amendment to Rule 11, 28 U.S.C. app. 575-76. Thus, to the extent that the risk in "chill[ing] the advocacy of litigants attempting to vindicate federal rights," exists when invoking the inherent power, this risk occurs no less than when a court invokes Rule 11. *Chambers*, 111 S. Ct. at 2134 n.11.

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

214. *Id.* (citing Weinberger v. Romero-Barcello, 456 U.S. 305, 313 (1982)); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 (determining that

most recent amendments to Rule 11 and 28 U.S.C. section 1927.[215] Fourth, the majority considered the Advisory Committee Notes on the 1983 Amendment to Rule 11. These notes stated that the Rule "build[s] upon and expand[s] the equitable doctrine permitting the court to award. . .attorney's fees to a litigant whose opponent acts in bad faith in instituting or conducting litigation."[216] Thus, the majority reasoned that Rule 11 does not alter the authority a federal court has to manage abuses under its inherent authority.[217]

Lastly, the majority considered case law involving the federal rules and the inherent powers. In *Link v. Wabash Railroad Company*,[218] the Supreme Court recognized that a federal court has the inherent power to dismiss a case *sue sponte* for failure to prosecute, despite the language of Rule 41(b) appearing to require a motion from a party.[219] In *Roadway Express, Inc. v. Piper*,[220] the Court remanded for consideration of sanctions under both Federal Rule of Civil Procedure 37[221] and the court's inherent authority after determining that 28 U.S.C. § 1927 would not allow the assessment of fees.[222] Based on these cases, the Court held that the inherent power can still be invoked even if rules exist which sanction the same conduct.[223]

The majority concluded that nothing ratified the presumption that the federal rules and statutes displace or obviate reliance on a court's inherent power to impose attorney's fees as a sanction for bad faith

---

"Congress ha[d] not repudiated the judicially fashioned exceptions" to fee shifting, which were based in the inherent powers of the courts).

215. *Chambers*, 111 S. Ct. at 2134; *see also* FED. R. CIV. P. 11 advisory committee's notes (1983).

216. *Chambers*, 111 S. Ct. at 2134-35.

217. *Id.* at 2135 (citing Zaldivar v. Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986)).

218. 370 U.S. 626, 630-32 (1962).

219. *Chambers*, 111 S. Ct. at 2135. The Court noted that it would require a much more lucid demonstration of reason than rule 41(b) to accept that it was intended to abrogate the inherent powers of the court (citing *Link*, 370 U.S. at 630-32); *see* FED. R. CIV. P. 41(b).

220. 447 U.S. 752, 755 (1980).

221. Federal Rule of Civil Procedure 37 provides for an order compelling discovery and the failure to answer, or an evasive answer, to such an order may be grounds for an award of expenses for the motion, and/or ground for sanctions. FED. R. CIV. P. 37.

222. *Roadway*, 447 U.S. at 767.

223. *Chambers*, 111 S. Ct. at 2135.

conduct.[224] However, the Court reasoned that ordinarily when the conduct at issue could be sanctioned under the rules, rather than the inherent power, reliance should be placed in the rules.[225] Thus, "when neither the statutes nor the rules are up to the task, the court may rely on [its] inherent power."[226]

The Court then addressed whether there was any abuse of discretion in resorting to the inherent power. The majority conceded that the district court could have used Rule 11 and some of the other rules to sanction Chambers for his misconduct.[227] Even though much of Chambers conduct was beyond the reach of Rule 11, section 1927, and many of the other sanctioning provisions, his conduct throughout the suit evinced bad faith; the conduct which the rules covered was intertwined with conduct that only the inherent powers could address.[228] Also, having to resort to the rules for certain violations before applying the inherent power would only have created extensive satellite litigation, which is contrary to the aim of the rules.[229]

After finding no abuse of discretion in relying on the inherent power, the Court examined whether a district court, sitting in diversity, could impose attorney's fees in a state which does not recognize the bad faith exception to the American Rule.[230] The Court referred to footnote thirty-one in *Alyeska*,[231] and interpreted the limitation on federal courts sitting in diversity to apply only to fee shifting laws which embodies a substantive state policy and does not limit federal procedural laws.[232] Only where a conflict exists among state and federal substantive laws does the *Erie* problem arise.[233] The Court found neither of the twin aims of *Erie* implicated by sanctioning Chambers for his disobedi-

---

224. *Id.* The Court's conclusion was in light of the fact that the conduct at issue was not covered by the other sanctioning provisions. *Id.*

225. *Id.*

226. *Id.* at 2136.

227. *Id.*

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

229. *Id.*; *see, e.g.*, FED. R. CIV. P. 11 advisory committee notes on the amendment to Rule 11 (1983).

230. *Chambers*, 111 S. Ct. at 2136. For example, as a general rule, attorney's fees are not allowed to a successful litigant in Louisiana except where authorized by statute or contract. Rutherford v. Impson, 366 So. 2d 944, 947 (La. Ct. App. 1978).

231. *Alyeska*, 421 U.S. at 247.

232. *Chambers*, 111 S. Ct. at 2136. A state statute which permits a prevailing party in certain types of suits to recover attorney's fees may embody a substantive state policy. *See* People of Sioux County v. National Surety Co., 276 U.S. 238 (1928).

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

ence of court orders and his attempt to defraud the court.[234] The award of attorney's fees is akin to a remedial fine for civil contempt since it vindicates a courts authority over a recalcitrant litigant. The majority viewed the impositions of attorney's fees as a sanction for Chambers' fraud on the court, and his bad faith toward his adversary and the court throughout the proceedings.[235] Thus, it reasoned the inherent power to tax fees for this conduct could not be subservient to the state's policy without transgressing the limits of *Erie*,[236] *Guarantee Trust Company*,[237] and *Hanna*,[238] since "fee shifting in this instance was matter of vindicating judicial authority," which is procedural, and not a substantive remedy.[239] Thus, the Court agreed with the appellate court that the inherent power to assess fees in response to punishing for abuse of the judicial process was a procedural response well within the powers set forth in *Erie*,[240] and not substantive.

B. *The Dissenting Opinion*

Justice Scalia, in a separate opinion, dissented primarily because of his disagreement with the majority's characterization of the scope of the inherent powers.[241] Justice Scalia did not agree that the inherent power to sanction a litigant reaches conduct "beyond the court's confines regardless of whether such obedience interfered with the conduct of the trial."[242]

Justice Kennedy's dissent was joined by Justice Souter and Chief Justice Rehnquist.[243] Justice Kennedy and the dissenters accepted that

---

234. *Id.* The Court noted that the imposition of sanctions under the bad faith exception depends not on which party wins the lawsuit, but on the parties' conduct during the course of the litigation; thus, the Court found that the exception does not lead to forum shopping. *Id.* The Court also found it was not inequitable to apply the exception to citizens and noncitizens, since a party has the ability to determine whether sanctions will be assessed by acting accordingly. *Id.*

235. *Id.* at 2138.

236. 304 U.S. at 64

237. 326 U.S. at 99.

238. 380 U.S. at 468.

239. *Id.* at 2138; *see NASCO, Inc.*, 894 F.2d at 705.

240. 304 U.S. at 64.

241. Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2141 (1991) (Scalia, J., dissenting).

242. *Id.* Justice Scalia was referring to what he believed the district court appeared to have sanctioned Chambers for his flagrant bad faith breach of contract. *Id.*

243. *Chambers*, 111 S. Ct. at 2141 (Kennedy, Souter, JJ., and Rehnquist, C.J.,

Chambers engaged in sanctionable conduct. However, they did not agree that the inherent powers could be invoked without first resorting to the federal rules and statutes.[244] Furthermore, they opposed using the inherent power to sanction Chambers for his bad faith breach of contract.[245] Justice Kennedy stated that the American Rule recognizes that Congress has defined and provided more than adequate rules and statutes which enable the federal courts to curtail abuses.[246] It was also argued that by allowing federal courts to exercise their inherent power even when rules exist which sanction the same conduct, the Court is treating the inherent powers as the norm and the legislative basis of authority as the exception.[247] The reasoning of the dissent was that the exercise of inherent power to sanction a bad faith litigant stems from that power which is necessary to permit the courts to function.[248] Thus, the dissents' position was that inherent powers should only be exercised when congressional powers fail to protect the process of the court and that there is no need to use the inherent powers if a rule or statute provides a basis for sanctions.[249]

Justice Kennedy criticized the majority for ignoring prior precedent and misreading others. He noted that in prior cases, federal courts could not invoke their inherent power when a rule existed which covered the same conduct.[250] He argued that the majority's reliance on

---

dissenting).

244. *Id.* (Kennedy, J., dissenting).

245. *Id.*

246. *Id.* at 2141-42. For example, a district court can sanction a party and/or his attorney for a baseless discovery request. FED. R. CIV. P. 26(g). A district court can award expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith, or for purposes of delay. FED. R. CIV. P. 56(g). A district court can punish contempt of its authority by fine or imprisonment. 18 U.S.C. § 401 (1988). A district court can award costs, expenses, and attorney's fees against attorneys who multiply proceeding vexatiously. 28 U.S.C. § 1927 (1988).

247. *Id.* at 2142-43.

248. *Chambers*, 111 S. Ct. at 2143. Of the three possible bases of inherent power, the dissent is referring to the power necessary to preserve the authority of the court; "[T]hose which are necessary to the exercise of all others." *Id.* (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

249. *Id.* at 2141.

250. *Id.* at 2143. In Societe Int'l Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207 (1958), the Court held that the power to dismiss a complaint due to noncompliance with a production order depends solely on Rule 37. In Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988), the Court held a federal court could not employ its inherent power to bypass the harmless error inquiry prescribed by Federal Rule of Criminal Procedure 52(a).

Roadway and *Link* were misplaced.[251] He also observed that in *Roadway*, the decision did not even discuss the relation between Rule 37 and the inherent powers,[252] while in *Link*, the issue centered on the permissive language in Rule 41(b).[253] Consequently, the dissent explained that since Federal Rules 11 and 26(g) are cast in mandatory terms, they require the imposition of sanctions when litigants violate the certification standards.[254] The dissent urged that these standards give a litigant notice of the proscribed conduct and make review for misuse of discretion possible.[255] Furthermore, the dissent stated that the majority's bad faith standard fails to inform litigants as to what is required and therefore violates the mandates of due process.[256]

The dissent observed that by resorting to the inherent power whenever conduct sanctionable under the rules is intertwined with conduct only sanctionable by inherent power, severe consequences would follow.[257] Such consequences are: federal courts would be encouraged to find bad faith conduct and eliminate the need to rely on specific textual provisions; the uncertain development of the meaning and scope of express sanctioning provisions; and the defeat of Congress' goal in the enactment of the Federal Rules— uniformity in the federal courts.[258] Justice Kennedy suggested that the district court could have relied upon many other sources of authority to award attorney's fees for the abuse of its process.[259]

---

251. *Chambers*, 111 S. Ct. at 2143.

252. *Id.* at 2144. The majority cited *Roadway* for the proposition that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct. *Id.* at 2135 (citing *Roadway*, where the Court remanded for a consideration of sanctions under both Federal Rule of Civil Procedure 37 and the inherent power); Roadway Express, Inc. v. Piper, 447 U.S. at 752, 767 (1980).

253. *Chambers*, 111 S. Ct. at 2144 (Kennedy, J., dissenting). *Link* held that neither the permissive language of Rule 41(b) nor its policy abrogated the inherent power of a court to dismiss a case *sua sponte*. Link v. Wabash R. Co., 370 U.S. 626, 630 (1962).

254. *Id.* at 2144-45. Justice Kennedy thereby concluded that the rules themselves dispose of the idea that they may be discarded in the discretion of a court. *Id.*

255. *Id.*

256. *Id.* at 2145.

257. *Id.*

258. *Chambers*, 111 S. Ct. at 2146-47.

259. *Id.* at 2146-47. Justice Kennedy observed that Rule 11 could have been used as a basis for all of the sanctions imposed. *Id.* at 2146. Furthermore, Rule 16(f) could have sanctioned Chambers for his intentional pretrial delays which enables a court to award attorney's fees when a party fails to participate in certain pretrial proceedings in good faith; Rule 26(g) could have been used to sanction Chambers for his

Finally, the dissent urged that the Court's opinion would result in an expansion of the power of federal courts. Although the majority stated that the district court imposed sanctions for the fraud Chambers perpetrated on the court and his abuse of process, the dissent believed that Chambers was sanctioned in part, for his bad faith breach of contract.[260] The dissent stated that a district court cannot sanction pre-litigation conduct pursuant to its inherent authority,[261] possibly implying that a district court simply has less power here. The Court's inherent powers extend only to rectify abuses of the judicial process, and do not reach awarding damages for violations of substantive law.[262]

The dissent also criticized the majority for not adhering to the tenets of Federalism announced in *Erie*.[263] To the extent Chambers was punished for his breach of contract, the award is one of punitive damages for the breach, which is prohibited by Louisiana.[264] Thus, the dissent concluded that since Louisiana law prohibits such an award, had NASCO brought suit in state court, it would not have received the excess damages for the so-called bad faith breach.[265]

V. CRITIQUE AND IMPLICATIONS

The *Chambers* decision represents an expansion of the bad faith exception to embrace bad faith inherent in the cause of action itself, something which the Supreme Court has never clearly sanctioned.[266] The majority's affirmance of sanctioning Chambers' pre-litigation conduct, which was related to the enforcement of NASCO's contract rights, is in essence a fee award against Chambers for his bad faith in

---

abuse of the discovery abuses; under Rule 56(g) attorney's fees could be awarded for filing affidavits in bad faith in the motion for summary judgment; and 18 U.S.C. section 401 (1988) could have been used to punish Chambers for his contempt of the court and disobedience of its process. *Id.* at 2147.

260. *Id.* The majority made reference to "Chambers' arbitrary and arrogant refusal to honor and perform this perfectly legal and enforceable contract." *NASCO, Inc. v. Calcasieu*, 124 F.R.D. 120, 136 (W.D. La. 1989); *see also id*, at 143 (Chambers refused to perform without any legal cause, forcing NASCO to bring its suit for specific performance).

261. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting).

262. *Id.*; *see* Marek v. Chesny, 473 U.S. 1, 35 (1985) (Brennan, J., dissenting).

263. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting).

264. *Id.* at 2147-48.

265. *Id.*

266. *See* Fleischmann Distilling, v. Maier Brewing Corp, 386 U.S. 714 (1967).

provoking the original dispute.[267] In its understandable desire to achieve the appellate court's ordered relief, the Court may have sent a misleading signal to the federal courts not based on precedent.

While the *Chambers* Court presented a convincing analysis that the sanctioning scheme of the federal rules does not displace the inherent power of a court to impose sanctions, its expansion on that analysis may have well defeated Congress' purpose in enacting the federal rules - uniformity among the federal courts.[268] The majority's reasoning is persuasive in that the federal rules and statutes do not displace the inherent powers to sanction a litigant for their bad faith conduct.[269] Furthermore, the inherent power does serve an extremely important function where the conduct at issue is not covered by one of the congressionally created sanctioning provisions.[270] In this respect, the inherent power is "both broader and narrower" than these other sanctioning provisions, and this power must be used to fill in the gaps which the federal rules and statutes simply do not cover.[271] However, by permitting a federal court to employ its inherent authority to sanction bad faith conduct when that conduct is equally sanctionable under the federal sanctioning scheme, the Court commits several errors.

The first difficulty is with due process requirements. The Court simply stated that when invoking the inherent powers, federal courts must exercise caution in complying with the mandates of due process in determining that the requisite bad faith exists.[272] Due process requires that everyone is entitled to be informed "as to what the state commands or forbids."[273] However, upon a finding of bad faith, since courts may resort to their inherent powers to impose sanctions,[274] parties who litigate before tribunals have no notice as to the standards which are required for them to avoid sanctions, until the litigation proceedings are complete. Imposing sanctions under this rudimentary standard thwarts the requirements of due process since the courts do not require any notice or limiting provisions, as do congressionally created

---

267. *See* MALLOR, *supra* note 97, at 634-36. This is essentially a punishment for Chambers' role in the substance of the dispute; in other words, bad faith inherent in the cause of action itself. *Id.*

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

269. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2134 (1991).

270. *Id.* at 2135.

271. *Id.* at 2134.

272. *Id.* at 2136.

273. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

274. *Chambers*, 111 S. Ct. at 2135.

powers.[275] The difficulty is that reasonable federal judges may differ as to what amounts to bad faith conduct. Consequently, a litigant might never know when to curtail vigorous litigation, and one federal court may regard certain conduct as bad faith while another may not.

Aside from due process concerns, the Court failed to adhere to the limits which the inherent power imposes on itself. The authority to apply inherent powers as a sanction for bad faith litigation practices can only be exercised when necessary to preserve the court's authority.[276] However, the majority simply did not address this limitation. Nonetheless, the dissent aptly pointed out that invoking the inherent power is not necessary when congressional rules and statutes exist to sanction the same conduct.[277] Furthermore, the American Rule itself accepts Congress' role in defining the procedural and remedial powers of the federal courts,[278] as Congress has provided the federal courts with an abundance of rules and statutes to protect and preserve its authority.[279] However, by allowing federal courts to ignore such rules and statutes,

---

275. For example, FED. R. CIV. P. 11 stipulates that the *signature* of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of his or her knowledge, information, and belief, formed after a reasonable inquiry it is well grounded in fact and warranted by existing law. . .and if such a document is signed in violation of the rule, the court may assess attorney's fees. *Id.* This rule puts the signer on notice of the standards which are expected in filing such documents, and the types of sanctions which can be imposed. However, by allowing the standardless exercise of inherent powers, a court can impose sanctions upon a litigant who is unaware that his specific conduct is sanctionable until after he has committed such acts.

276. *Chambers*, 111 S. Ct. at 2132 (citing Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962) for the proposition that inherent powers are those "necessarily vested in courts to manage their own affairs so as to achieve the orderly, expeditious disposition of cases"); *see* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (inherent powers "are those which are necessary to the exercise of all others"); Young v. United States *ex rel.* Vuitton *et Fils*, 481 U.S. 787 (1987) (Scalia, J., concurring in judgment) (inherent powers are those which are necessary to allow the courts to function); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (inherent powers are those "necessary to the exercise of all others").

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

278. Sibbach v. Wilson & Co., 312 U.S. 2, 9-10 (1941).

279. *E.g.*, 18 U.S.C. § 401 (1988) (allows a federal court to punish contempt of its authority and abuse of process); 28 U.S.C. § 1927 (1988) (requires a federal court to award attorney's fees against an attorney who multiplies proceedings vexatiously); FED. R. CIV. P. 16(f) (allows a court to impose sanctions against a party for failure to follow pretrial orders); FED. R. CIV. P. 11 (allows a court to impose sanctions on a party or attorney for filling groundless pleadings, motions, and other papers); FED. R. APP. P. 38 (grants a federal court power to award costs for a frivolous appeal).

and to permit the exercise of inherent powers "even if procedural rules exist which sanction the same conduct,"[280] inconsistencies are inevitable. With such an amorphus and broad concept as the inherent power, this self imposed limitation must be defined if these inconsistencies in the federal system are to be avoided.

Another problem with the *Chambers* opinion[281] is that, implicitly, it represents an expansion of the bad faith exception to sanction a litigant for pre-litigation conduct.[282] The majority's application of the bad faith exception to the American Rule is, for the most part, correct. The Supreme Court has held that a court may assess attorney's when a party has " '*acted* in bad faith, vexatiously, wantonly or for oppressive reasons.' "[283] However, the language of this standard has been strictly applied to instances where fraud has been practiced upon the Court,[284] and when litigation practices have delayed or disrupted the judicial process.[285] Along these lines, the majority's application of this standard to Chambers' filing of false and frivolous pleadings, and his tactics of delay, oppression and harassment are right on point. Nevertheless, the Court's affirmance of the district court's opinion, and its broad analysis of the inherent authority implies that the bad faith exception has been extended beyond litigation tactics and now can explicitly reach a litigant's pre-litigation conduct.[286]

The district court's opinion reveals that Chambers was partly sanctioned for his arbitrary and arrogant refusal to honor and perform the contract,[287] and for his role in the breach of contract.[288] A fee

---

280. *Chambers*, 111 S. Ct. at 2133.

281. *Id.* at 2131.

282. *Id.* at 2141.

283. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (quoting F.D. Rich Co. Inc. v. United States *ex rel.* Indus. Co. Inc., 417 U.S. 116, 129 (1974)); *see also Hall v. Cole*, 412 U.S. 1, 5 (1973); Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402, n.4 (1968) (*per curiam*).

284. Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946).

285. Hutto v. Finney 437 U.S. 678, 689 n.14 (1978).

286. *Chambers*, 111 S. Ct. at 2147 (Kennedy J., dissenting). As the dissent points out, the majority insists that the lower court did not sanction Chambers for his role in the breach of contract, but for the fraud and abuse of process practiced on the district. *Id.* at 2138 nn.16-17.

287. *NASCO, Inc.*, 124 F.R.D. at 136 ("Chambers arbitrarily and without legal cause refused to perform forcing NASCO to bring this suit.").

288. *Id.* at 143 ("There is absolutely no reason why Chambers should not reimburse in full all attorney's fees and expenses that NASCO, by Chambers' *actions*, was forced to pay.") (emphasis added). The lower court's opinion is full of statements

award in this respect is essentially a punishment for Chambers' role in the substance of the dispute and his bad faith in the cause of action itself.[289] Consequently, any award of attorney's fees on this ground is actually a substantive remedy and state law should have been applied. Under this line of thought, an award of attorney's fees would have been inconsistent with and undermined those principles espoused in *Erie* and its progeny.

These principles are embedded in the American Rule as it bars federal courts from engaging in fee shifting as part of the merits of the award, but allows fee shifting to the extent necessary to protect the judicial process.[290] By expanding the bad faith exception to a party's role in substance of the dispute, several other concerns immediately surface.

First, although an award on this basis arguably is within the court's equitable authority, a potentially confusing overlap with the law of punitive damages is presented[291] as punitive damages are imposed for a broad range of conduct, ranging from oppression, fraud, or malice on one end to mere caprice on the other.[292] Second, an award of attorney's fees on this basis will run counter to the underlying policy of the American Rule. The American Rule protects a litigant's right in court by vindicating his substantive rights.[293] Since litigation is never clear, no one should be penalized for merely defending or prosecuting a lawsuit.[294] Awarding fees based on a party's bad faith pre-litigation conduct disrupts the American Rule's balance between free access to the federal system and penalties for abuses of it. If substantive fee shifting is permitted, anyone with a novel, disputed, or uncertain claim involv-

---

which sanction Chambers for his role in the breach of the contract. *Id.* at 125. The district court noted Chambers' "unjustified and arbitrary refusal to file" the FCC application pursuant to the Purchase Agreement was in absolute bad faith. *Id.* The court also stated that the attorney's fees and expenses charged to NASCO was a *direct result and flowed directly from the suit for specific performance. Id.* at 142 (emphasis added).

289. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting). Awarding damages for violation of binding contract, is a matter of substantive law. Marek v. Chesny, 473 U.S. 1, 35 (1985) (Brennan, J., dissenting).

290. *Chambers*, 111 S. Ct. at 2148 (Kennedy J., dissenting).

291. *See* Oakes, *supra* note 136, at 175.

292. John D. Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 881 (1976).

293. *Chambers*, 111 S. Ct. at 2148 (Kennedy, J., dissenting) (construing the majority's application of the bad faith exception to Chambers' pre-litigation conduct).

294. Fleischmann Distilling Corp. v Maier Brewing Corp, 386 U.S. 714 (1967).

ing a substantial possibility of an adverse judgment will be deterred from bringing suit because of the possibility that he could be taxed with his opponent's fees. Finally, a fee award based on a litigants bad faith pre-litigation conduct, where a state does not recognize the bad faith exception, destroys the notions of federalism, as it is in essence a substantive and not procedural remedy. *Erie* and its successors guarantee that if a litigant takes his state law cause of action to federal court, and follows the rules of that court, the result in his case will be same as if he had brought it in state court.[295] To the extent that the Court affirmed the imposition of sanctions which was based on Chambers' bad faith pre-litigation conduct, the decision to file suit in federal, rather than state court, expanded the scope of NASCO's remedy.[296]

VI. CONCLUSION

If uniformity in the federal court system is our goal, courts must exercise great care when invoking their inherent power. The *Chambers* decision exemplifies the present confusion in the application of the federal bad faith exception to the American Rule. The Supreme Court reached a fair result for the wrong reasons. When conduct is not covered by federal rules or statutes, a federal court should use its inherent powers. However, the Court's notion that inherent powers can be invoked to sanction a litigant even when federal rules and statutes exist, which cover the same conduct, is misplaced. The American Rule recognizes that Congress, not the judiciary, controls costs and sanctions. Further, the Court's superficial discussion of the necessity limitation is a contributing factor in its reluctance to adhere to text-based authority. The award of attorney's fees because Chambers acted in "bad faith," rather than his violations of Congressionally mandated rules sends a misleading signal to the federal courts. Likewise, imposing sanctions which are in part based on a litigants pre-litigation conduct represents for the first time, the Supreme Court's explicit expansion of the bad faith exception, which subverts the American Rule and impinges on the notions of Federalism. If the federal courts are willing to utilize their inherent power as a means to impose sanctions, they must have some guidance as to the circumstances that this undefined and ambiguous

295. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
296. *Chambers*, 111 S. Ct. at 2149 (Kennedy, J., dissenting).

power can be employed. Perhaps a better solution would be for a legislative mandate to ultimately decide when fees can and cannot be imposed.

Alexander B. Rotbart