Legal Opinion Letter

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

Vol. 4 No. 6 March 25, 1994

THE INHERENT POWER TO IMPOSE SANCTIONS: HOW A FEDERAL JUDGE IS LIKE AN 800-POUND GORILLA

by
Thomas E. Baker

Barrels of ink have been spilled over Federal Rule of Civil Procedure 11, the rule that empowers federal judges to impose sanctions for frivolous litigation and misconduct. Each time Rule 11 is amended, most recently this past December and before that in 1983, the debate over sanctions captures the attention of the legal profession. But in one sense, all that debate and controversy is beside the point.

Suppose you were told that a federal judge has the power to impose sanctions independent of Rule 11 and would have the power even if Rule 11 were abolished?

We have this on the highest authority. In a 1991 decision, *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), the Supreme Court held that a federal judge is like the proverbial 800-pound gorilla. The majority held that federal judges have all the judicial power necessary to manage their own proceedings and to control the conduct of those who appear before them, including the inherent power to punish abuses of the judicial process, without regard to any limits in the rules and statutes.

Most every litigator is aware that Rule 11 is not the exclusive source of sanctioning authority. Other specific rules of procedure authorize sanctions at trial and on appeal. There are also general statutes that authorize the imposition of sanctions. Several federal statutes authorize the award of attorney's fees to prevailing parties in particular kinds of cases. And there is always the possibility of initiating an independent action for malicious prosecution or abuse of process.

But the *Chambers* Court recognized an *inherent* power that exists in federal courts *qua* courts, although this somewhat curious power — analogous to the contempt power — may be less familiar to litigators and perhaps some judges. The plaintiff in *Chambers* certainly learned an expensive lesson when the Supreme Court approved the district court's order to pay the defendant's expenses and attorney's fees totaling nearly $1 million.

In imposing such sanctions, a federal court may act *sua sponte* or upon motion to conduct an independent investigation, consonant with basic procedural due process guarantees of reasonable notice, a meaningful opportunity to be heard, and particularized findings. Appropriate sanctions can be as extreme as dismissing the lawsuit or vacating a previously entered judgment upon demonstrated fraud on the court; lesser sanctions, including the award of attorney's fees and costs and various forms of attorney discipline, also are within the district court's informed discretion. Presumably, any sanction

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Thomas E. Baker is the Alvin R. Allison Professor at the Texas Tech University School of Law, Lubbock, Texas. He is a member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The views expressed here are those of the author alone.

contemplated under federal statutes and rules can be imposed incident to the inherent power as well.

Inherent sanctions can be imposed against any person who is responsible for the wrongdoing, whether a litigant or an attorney. Sanctionable wrongdoing may include pre-litigation misconduct and abuses of process that occur beyond the courtroom, such as the willful disobedience of an otherwise valid court order. Inherent sanctions are justified to further goals of deterrence, punishment, and compensation.

The Supreme Court explicitly distinguished the inherent power from other authorizations of sanctions. The general scheme of authorizations under statutes and rules does *not* displace the inherent power. While ordinarily bad-faith misconduct should be dealt with under the rules, in the words of the Supreme Court, "if in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power." Even when the misconduct could properly be sanctioned under the Rule, however, the court may still rely on its inherent power. The power is inherent in the court, not the case, and applies even in a diversity case in which the controlling state law would not allow a sanction. Finally, the Supreme Court held that the decision to impose sanctions under the inherent power was subject to review only under the rather deferential abuse of discretion standard.

While the Supreme Court itself has not revisited the issue since 1991, it is noteworthy that the lower federal courts have internalized the inherent power to sanction. Seventeen different District Courts, all around the country, have invoked the inherent power recognized in *Chambers*. Ten of the thirteen Courts of Appeals have applied the rationale of the decision to affirm or uphold sanctions under various circumstances, as for example: fee-shifting as a sanction for misconduct that included plaintiff's repeated failure to attend hearings; requiring counsel to serve, without compensation, as standby counsel for a criminal defendant; sanctioning a lack of candor with the court; dismissing a lawsuit based on plaintiff's destruction of evidence in violation of a protective order; imposing monetary sanctions against counsel for impermissible ex parte contacts in violation of ethical rules; excluding expert witness testimony and allowing an adverse inference to be drawn from a party's spoliation of evidence; dismissing a pro se §1983 action for failure to obey a court order; and fining both defendant and counsel $5,000 each for repeated discovery abuses.

Caveat Litigator! The inherent power to impose sanctions is well-established today and is being used widely but judiciously.

Vigorous and widespread use of sanctions does not depend on the construction — or the deconstruction — of the language in Rule 11. The 1993 amendments were intended to make that Rule "kinder and gentler," *i.e.*, to decrease the likelihood and the severity of sanctions. Indeed, Justice Scalia dissented from approving them because he worried the changes would "render the Rule toothless." Those amendments, however, took nothing away from the inherent power to impose sanctions, which may be more frequently invoked and more commonly applied, now that Rule 11 sanctions have been somewhat deemphasized.

As a Madisonian "p.s.," it is submitted that we should always look askance upon any assertion of an inherent power by any branch of the federal government. This is more obvious of such claims by the political branches, but the Article III "judicial power of the United States" is likewise merely an enumerated power. Under the Constitution, federal tribunals are limited courts of the same limited sovereign. Furthermore, the principle of separation of powers cautions federal judges from acting contrary to, or inconsistent with, federal statutes and federal courts are obliged to follow the rules of procedure promulgated under the Rules Enabling Act process.

Nevertheless, federal courts *are* courts, and consequently federal courts *are* possessed of an inherent power to impose sanctions, separately and independently of any rule or statute. So says the highest Court of 800-pound gorillas.

  ISSN 1056 1137