OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: G. RUSSELL CHAMBERS, Petitioner

v. NASCO, INC.

CASE NO: 90-256

PLACE: Washington, D.C.

DATE: February 27, 1991

PAGES: 1 - 46

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - - X

3 G. RUSSELL CHAMBERS, :

4 Petitioner :

5 v. : No. 90-256

6 NASCO, INC. :

7 - - - - - - - - - - - - - - - - - - - X

8 Washington, D.C.

9 Wednesday, February 27, 1991

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:03 a.m.

13 APPEARANCES:

14 MACK E. BARHAM, ESQ., New Orleans, Louisiana; on behalf of

15 the Petitioner.

16 JOEL I. KLEIN, ESQ., Washington, D.C.; on behalf of the

17 Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in No. 90-256, G. Russell Chambers v. NASCO.

5 Mr. Barham, you may proceed whenever you're

6 ready.

7 ORAL ARGUMENT OF MACK E. BARHAM

8 ON BEHALF OF THE PETITIONER

9 MR. BARHAM: Mr. Chief Justice, and may it

10 please the Court:

11 This, or the issues for this Court arise out of

12 a suit for a specific performance for breach of a contract

13 in a Federal court in Louisiana. A Louisiana resident

14 owned a television station in Lake Charleston, Louisiana,

15 and it was a contract to purchase on that station. There

16 was a nonresident purchaser, and that nonresident

17 purchaser filed suit in Federal court under the diversity

18 jurisdiction to enforce, by specific performance, the

19 contract.

20 The Louisiana Civil Code provides for the

21 concepts of breach of contract, and also for the remedies

22 for breach of contract, including specific performance or

23 damages, or specific performance and damages, or specific

24 performance with delay damages. The damages in Louisiana

25 are economic damages. We do not have punitive damages,

1 and the only damages allowed are for economic loss. They
2 -- Louisiana prohibits attorneys' fees unless they are
3 specially provided for either in the legislation or in the
4 contract, and neither were provided here. And Louisiana
5 does not have any acceptance of the bad faith exception to
6 the --
7 QUESTION: Well, Mr. Barham, does Louisiana
8 recognize any inherent right of a trial court judge to
9 impose sanctions on parties for conduct of litigation?
10 MR. BARHAM: The only ones, Your Honor, are the
11 ones that are in the higher tiers, like contempt, those
12 kind of inherent powers which have, as, you know,
13 generally across the country they have been put into
14 legislative form. But it's that high tier of inherent
15 power that is recognized, and that only. Not the
16 necessary -- useful, in the sense of useful. Only those
17 necessary for the court to carry out its functions.
18 QUESTION: So, so if an attorney knowingly
19 introduced perjured testimony or falsified documents in a
20 Louisiana State court, the Louisiana State court could
21 impose monetary sanctions?
22 MR. BARHAM: The Louisiana State court could,
23 under its, the fact that all lawyers are in an integrated
24 bar and therefore the court rules the lawyers, they could
25 take care of the lawyers under that power that's given to

1 them as a court. They could take care of them under a
2 criminal charge referral. They could take care of them
3 under contempt or a fine. They do not have a fee
4 shifting.
5 QUESTION: Well, but they could impose monetary
6 sanctions, I take it, measured by the amount of the
7 attorneys' fees incurred by the injured party, under your
8 --
9 MR. BARHAM: We have no cases --
10 QUESTION: -- under your first inherent power
11 explanation?
12 MR. BARHAM: Under the, under the contempt -- I
13 don't believe, I don't believe Louisiana has that power.
14 I question even whether the fine for contempt could carry
15 with it, even under Federal law, I would have to say I
16 question even whether it could carry attorneys' fees that
17 were attendant upon the fine in Federal law. But we do
18 not recognize the bad faith exception for shifting
19 attorneys' fees, and we do --
20 QUESTION: Well, this case, of course, was tried
21 in Federal court.
22 MR. BARHAM: Yes. Under diversity, not under a
23 Federal question.
24 QUESTION: Right. And you take the position
25 that the Federal court has no inherent powers to control

1 what goes on in the litigation in its court?

2 MR. BARHAM: No. I say that it has inherent

3 powers, and those have been defined in Alyeska. Justice

4 White discussed the inherent power in question about a pot

5 to be divided --

6 QUESTION: Well, haven't we said in Alyeska and

7 Roadway effectively that a Federal court has inherent

8 power to impose monetary sanctions for bad faith

9 litigation in its court?

10 MR. BARHAM: But you have also said very clearly

11 in Alyeska that not for that -- not in diversity. That's

12 the footnote --

13 QUESTION: You mean footnote, the footnote, the

14 famous footnote?

15 MR. BARHAM: Yes.

16 QUESTION: Well, aren't you reading something

17 into that footnote that might not be there?

18 MR. BARHAM: Well, I read it as in an ordinary

19 diversity case where the State law does not run counter to

20 a valid Federal statute or rule of court, a State denying

21 the right to attorneys' fees, which reflects a substantial

22 policy of the State, should be followed.

23 QUESTION: Well, why doesn't that just mean in

24 an ordinary fee shifting situation where you have to

25 determine whether a cause of action carries with it fee

1 shifting in attorneys' fees, and the State doesn't allow
2 it, we're not going to impose it in Federal court sitting
3 in diversity. What does that footnote have to do with any
4 inherent power situation of the Federal court to control
5 bad practices going on in its courtroom? I don't see that
6 that footnote has anything to do with that.

7 MR. BARHAM: Well, may it please Your Honor, it
8 is a footnote to an exception to the general American rule
9 against fee shifting, which is the bad faith exception,
10 which means bad faith, vexatious conduct, during
11 litigation. So if it's attached to that footnote, I would
12 assume Justice White, speaking for the Court, intended
13 that that would be a meaning carried down into that
14 footnote, which is very clear and plain and goes on to say
15 the same would clearly hold for a judicially created rule,
16 which is the inherent power.

17 QUESTION: Mr. Barham, in a diversity case
18 suppose a lawyer was in obvious contempt of the court.
19 Would the court be denied the right to punish him because
20 it was a diversity case?

21 MR. BARHAM: No. There are so many ways to
22 punish him. You now have, I believe there are 12
23 sanctions in the rules. There is 28, for the lawyer there
24 is 28 1927.

25 QUESTION: But isn't it true that once the



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1 lawyer is in the Federal court, his conduct is controlled
2 by Federal and not State? Is that right or wrong?
3 MR. BARHAM: The conduct --
4 QUESTION: His conduct --
5 MR. BARHAM: Yes.
6 QUESTION: -- in the presence of the Federal
7 court.
8 MR. BARHAM: I would have to agree, it is. It
9 is.
10 QUESTION: Thank you.
11 MR. BARHAM: In this case the -- we went through
12 the merit trial. There was a judgment for specific
13 performance. The Fifth Circuit set this for argument, and
14 in the midst of arguments set the -- placed the lawyers at
15 ease and immediately imposed sanctions for a frivolous
16 appeal. In the whole process of the merit trial there was
17 one sanction imposed, and that was a contempt sanction for
18 violation of an order of court imposed on the client.
19 That was an area part of the proceeding, it went 2 years
20 and nothing else happened.
21 The Fifth Circuit said that they would hold
22 double cost and attorneys' fees as sanctions for the
23 frivolous appeal, and it remanded to the district court
24 saying would you look for casting costs or attorneys' fees
25 under Rule 11, on the client and attorneys are under 28



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1 U.S.C. 1927 for the attorneys. And when it went back to
2 the district court -- before we got to that there was a
3 motion to indicate some of the extent of damages in this
4 case which are not really permitted except for economic,
5 there was a motion for assistance before we got to the --
6 to this motion. And the district court in that motion for
7 assistance ordered $2 million worth of assets, equipment
8 that had been added to the television station since the
9 list was made up for what would be transferred, to also be
10 transferred for the same consideration.
11 Then NASCO, the respondent, urged the court to
12 reject Rule 11 and reject 28 1927, and to go to the
13 inherent power. And that court said we find and agree
14 with the parties to this sanctioning proceeding -- that's
15 NASCO -- that Federal Rule of Civil Procedure 11 does not
16 furnish a basis for the consideration of the sanctionable
17 acts alleged by NASCO. We find that Federal Rule of Civil
18 Procedure 11 for the levying of sanctions at this time, at
19 the time of the appellate court's decree on August 6th,
20 1986, and at the time of the acts themselves were
21 committed, to be insufficient for our purposes here.
22 So what happened is you have them rejecting any
23 conduct that could be sanctioned under 11, and none was
24 sanctioned under 11 during the proceedings, and none was
25 sanctioned under 1927 during the proceedings. It was only



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1 after the court of appeal jogged the mind of the district
2 court judge that you may impose sanctions that it came
3 into being. And almost 2 years later, that's after the
4 appeal, those sanctions were imposed. And what happened
5 is one lawyer was disbarred for 3 years, one lawyer was
6 suspended for 5 years, one for 6 months, and they are not
7 before this Court. And then $1 million of attorneys'
8 fees, more or less, were imposed on the client, given to
9 the movant.
10 QUESTION: Suppose that, suppose, Mr. Barham,
11 that there was a Federal statute which said that in
12 diversity cases the Federal court has inherent power to
13 impose -- to shift attorneys' fees as a sanction for bad
14 faith conduct during trial. Would that statute be
15 invalid?
16 MR. BARHAM: That's what you were kind of
17 considering yesterday, and we got copies of this opinion.
18 When you're looking under the rules of the Enabling Act,
19 you know, that's, to me, different --
20 QUESTION: Well, it's an Erie case, diversity --
21 MR. BARHAM: It's an Erie case whether it's
22 under the rule or whether it's under a statute or what.
23 QUESTION: (Inaudible) it's a diversity case,
24 I'd say --
25 MR. BARHAM: Yes, sir.

1 QUESTION: It's a diversity case. And I suppose
2 whatever answer you give to that question, I suppose you
3 would give the same question if there was a rule of court?
4 MR. BARHAM: Yes, sir. First you'd have to
5 examine is the rule within the Enabling Act, or is the
6 rule constitutional. That's the only thing.
7 QUESTION: Well, of course, the famous footnote
8 in Alyeska said that where a State law that does not run
9 counter to a valid Federal statute, then all this follows.
10 But I suppose if there was a statute like that, your --
11 what you're urging would be counter to a Federal statute,
12 and then the question would be whether it was valid.
13 MR. BARHAM: I think that's what you would have
14 to, to look to, and I don't believe you would hold that
15 valid. My understanding of this Court's approach to the
16 rules --
17 QUESTION: Well, you would, you would if you
18 thought it was just a procedural housekeeping matter.
19 MR. BARHAM: Well, procedural housekeeping is
20 hardly what you said is applicable to fee shifting when
21 that's State policy. That is State policy, that we don't
22 believe that people should pay other people's attorneys'
23 fees. We believe that's a cost of doing business, and we
24 don't agree that other persons ought to be made to pay
25 attorneys' fees. It makes coming to court less desirable.



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1 It has a chilling effect.

2 QUESTION: What, Mr. Barham, if the court had

3 simply held your client in contempt and fined him this

4 amount of money, and said I'm going to fine you an amount

5 equivalent to the attorneys' fees?

6 MR. BARHAM: If you pay that into the court, I

7 only can question the amount.

8 QUESTION: But what is --

9 MR. BARHAM: I can't question your power.

10 QUESTION: And what -- even if -- what if it

11 were done as a form of civil contempt, where you would

12 presumably pay the money to the other side?

13 MR. BARHAM: If it's under contempt, I don't

14 know that what -- I'm not sure that I could agree that I

15 would, I would not have to argue against that. The fee

16 shifting is what bothers me, because there is such a very

17 strong policy consideration, not only in Louisiana but in

18 most States against fee distribution by a court. It is

19 determined by either the legislation or the parties

20 themselves if there is going to be fee shifting.

21 QUESTION: This isn't fee shifting, as I

22 understand what the Fifth Circuit did here, or the

23 district court, simply because you have lost a case, in

24 the English tradition of fee shifting. This is fee

25 shifting, if that's what you call it, because of very bad

1 behavior during the course of litigation. Don't you see
2 some difference?
3 MR. BARHAM: Well, it's also outcome involved
4 because only the loser is going to get this fee shift.
5 Only the loser.
6 QUESTION: Yes, but the great majority of losers
7 won't get it, only losers who behave the way your client
8 did.
9 MR. BARHAM: Well, but it does run counter to
10 that outcome look under Erie.
11 QUESTION: Why, why is it that only the loser
12 will ever get it? Don't you think that a winner, in the
13 course of winning could have --
14 MR. BARHAM: I don't believe you can shift --
15 QUESTION: -- could have been so -- could have
16 had such outrageous conduct that the court can -- which
17 causes additional expenses to the other side, even though
18 he wins, and the court can say, you know, in the course of
19 getting there you violated the rules?
20 MR. BARHAM: That is not the concept of the
21 equity power, the equity inherent power for shifting fees.
22 The concept is that you make whole the party who is the
23 victor, so the loser always pays, the victor pockets.
24 QUESTION: But as the Chief Justice suggested,
25 maybe we're not talking about that power. Maybe we're

1 talking about some different power, which is the power of
2 the court to protect itself from being imposed on by the
3 parties, to protect its processes.
4 MR. BARHAM: If you don't use one of the rule
5 powers, which are so numerous now and cover every piece of
6 conduct -- in fact despite the statement by the court, if
7 you read what he enumerates is the conduct, it could have
8 been sanctioned at the time under Rule 11, but --
9 QUESTION: What if Rule 11 only applies to
10 signed pleadings? Rule 11 applies to signed pleadings.
11 MR. BARHAM: Well, almost -- litigation begins,
12 proceeds, the discovery, everything is -- was signed
13 pleadings in this case as in every other case.
14 QUESTION: Your only complaint is that it was
15 shifting of a fee. If it had just been a charge of that
16 amount of money you wouldn't be complaining.
17 MR. BARHAM: I would be complaining, but if you
18 did it under your --
19 QUESTION: But I mean, what's the magic of
20 shifting fees? There's no magic to that. You're being
21 punished for doing wrong.
22 MR. BARHAM: There is a general American rule
23 which says it is wrong to shift fees.
24 QUESTION: Well, if you give the same amount of
25 money, and says in the order this is not a shifting of

1 fee, would you have a complaint?

2 MR. BARHAM: If -- if it's going to be contempt

3 --

4 QUESTION: If the fee is $15,000, and the court

5 says for the harm that you have done by your misconduct

6 you must pay $15,000, but this is not a shift in the fees,

7 would you be complaining?

8 MR. BARHAM: Is it going to be paid to the

9 court?

10 QUESTION: Sir?

11 MR. BARHAM: Is it going to be paid to the

12 court?

13 QUESTION: Yes.

14 MR. BARHAM: Then I have -- I cannot complain.

15 QUESTION: Then you wouldn't be complaining?

16 MR. BARHAM: I'd complain about the amount.

17 QUESTION: Well then you would just complain.

18 (Laughter.)

19 QUESTION: But you concede that substantially

20 all of the conduct here could be sanctionable under Rule

21 11?

22 MR. BARHAM: This court could have sanctioned,

23 if it thought it necessary, any time. This court never

24 lost control of this case. This court had full control

25 throughout the proceedings, and it carried it through to

1 the very end without any difficulty whatsoever. It was
2 only when the court of appeal imposed the frivolous --
3 QUESTION: Well, set that aside.
4 MR. BARHAM: All right.
5 QUESTION: The district court had a very
6 extensive opinion detailing the misconduct by the attorney
7 concurred in, if not directed, by the client. And I
8 thought you agreed that substantially all of that conduct,
9 if it did in fact occur, was sanctionable under Rule 11?
10 MR. BARHAM: I have to -- I have to take back --
11 if I said that, I have to take it back to this extent.
12 Much of the conduct was pretrial, prepetition conduct as
13 is discussed by the court, then --
14 QUESTION: Well, it began --
15 MR. BARHAM: -- there is some litigation --
16 QUESTION: -- it was the Friday, Saturday,
17 Sunday conduct that led up to a pleading --
18 MR. BARHAM: Yes, sir.
19 QUESTION: -- that was filed in the following
20 week.
21 MR. BARHAM: Then litigation conduct, yes.
22 QUESTION: And I think you were correct to say
23 that this is within the ambit of Rule 11.
24 MR. BARHAM: Yes.
25 QUESTION: Well, then why can't we just affirm,

1 based on the fact that it -- the judge could have made
2 these findings under Rule 11?
3 MR. BARHAM: I have trouble with a district
4 court rejecting your Federal rule and reaching for
5 inherent powers because the Rule 11 says --
6 QUESTION: Well, we'll say he's right in finding
7 that there was wrongful conduct, he just found the wrong
8 rule. Rule 11 would have served just fine, and so we
9 affirm, or at least remand it and tell him to impose a
10 sanction under Rule 11 if he chooses.
11 MR. BARHAM: Well, in your dissent yesterday you
12 had trouble with even the discrete pact shifting of
13 attorneys' fees, and this is --
14 QUESTION: But you don't need to have that
15 trouble because the majority opinion ruled to the
16 contrary.
17 (Laughter.)
18 MR. BARHAM: But this was not a discrete act.
19 This was a massive imposition of an amount of money, not
20 accountable act by act by act by act. I don't know what I
21 got wrong. There was no deterrence, there was no flag
22 waving anytime during this, like your rules are, to say
23 don't do this and if you do I will punish because you
24 didn't see the flag. What we have is punishment for
25 punishment's sake. We have a vindication, if you will, or

1 -- it is totally without regard to the deterrence upon
2 future litigants or attorneys, or even upon --
3 QUESTION: I thought -- I thought in this record
4 it disclosed that the district court gave notice at
5 several times during the proceedings that sanctions were
6 being contemplated if certain behavior continued.
7 MR. BARHAM: Well now, Mr. -- when there was a
8 publication of some article in regard to sanctions he
9 called it to the attention of counsel, is my
10 understanding. When a Mr. McCabe from Massachusetts came
11 in and was not associated with counsel before he got into
12 the courtroom, he was somewhat lectured and then told that
13 his conduct would have to be up to par, but he had not
14 even been there before. I'm trying to think of another
15 instance -- that's all I can think of, other than the one
16 instance of the contempt for violation of an order.
17 And what is so befuddling to me is that the
18 conduct of the trial did not disturb the judge until it
19 was over. It went to its conclusion fairly well, and he
20 never had need for this. When he ordered something, it
21 happened. When they were at the FCC and he told them to
22 not be at the FCC, they removed themselves. Order is all
23 that he needed.
24 It always seemed to me that the least that you
25 have to do to control a court is the most effective



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1 control, and the more quickly you control the court and
2 that you keep it in order, the better order you have.
3 There is no order in court when you only tell them after
4 court is through, you did wrong. It is the manner in
5 which you conduct the court during the trial, during the
6 argument, during the hearing, which is conducive to the
7 good conduct and accord. And that's why the rules
8 generally say it must be timely, and you say it has to be
9 the discrete, or that act --
10 QUESTION: Don't at least some of our cases
11 dealing with contempt committed in the presence of the
12 court during a trial say that it's better for the court to
13 perhaps wait until the trial is over rather than just do
14 it instantaneously, kind of perhaps in the heat of
15 passion?
16 MR. BARHAM: I believe what it -- what do though
17 is we say I hold you in contempt, but you wait to impose
18 that contempt, put penalty, fine, or other. But I think
19 you give notice.
20 QUESTION: You say defer the penalty?
21 MR. BARHAM: Yes, sir. It's the penalty. It's
22 not that -- I want you to know you passed the red flag in
23 my court, you're in contempt. But you don't necessarily
24 have to impose the penalty then. That would be -- it's
25 time consuming. It's much like this breeding of a lot of

1 different litigation when you go into this inherent power
2 and you have no restrictions on it. I say, one, that in a
3 diversity case you can't have it. I say, two, you can't
4 have this kind, you wouldn't permit this kind of sanction
5 -- not a sanction, you wouldn't permit this kind of fee
6 shifting. There is no rule to permit it. The rule is
7 against this fee shifting.
8 The general American rule says you don't shift
9 fees, and yesterday you, both the majority and the
10 minority, discussed very much the interference with the --
11 the whole procedure and all the things that happen from
12 it. Your dealing with Alyeska, if it please Your Honor,
13 was that we don't have to apply Alyeska, look to it here,
14 because that was under the Court's inherent power, not the
15 rule's Enabling Act. And then you found three reasons
16 that it did not constitute a kind of fee shift at issue in
17 Alyeska, and one, it was not tied to the outcome of that
18 litigation, and two, it did not shift the entire cost to
19 get litigation, only for the discrete event.
20 And then finally, it wasn't necessarily a fee
21 shifting statute. It wasn't, because it had no -- movant
22 had no entitlement to fees or other sanction, explained in
23 Cooter v. Gell in citing that.
24 Then, what I understand, Justice Kennedy, is
25 that any mechanism for redistributing cost, even the



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1 inherent sanctioning authority of the Federal court has
2 the potential to affect decisions concerning whether and
3 where to file suit. If we get to there, we can't get past
4 Erie. You cannot use the inherent power in an Erie case.
5 You can't use it in a rules of decision case.
6 Whether you can do it under the Enabling Act, I
7 have my problems, but I don't have to address that because
8 we have no rules here. You have a judge-made law, and
9 that law comes peculiarly from almost nowhere, out of the
10 Atkinson case which did deal and own up and finally is
11 inherent power.
12 But I do not say there is not inherent power,
13 and this Court doesn't need inherent power. It does not
14 need this, nor can a Federal court sitting in Louisiana,
15 Texas, or wherever, if they don't have fee awarding, a
16 Federal court can't make a decision like this, which is
17 outcome dictating, a million dollars' worth of sanction,
18 when a court across the street, sitting as a State court
19 could not do the same. And if that won't take in forum
20 shopping, if that won't be an inequitable practice --
21 QUESTION: Is there any case you can give us
22 which says, quote, "Rule 11 does not apply in diversity
23 cases," end quote?
24 MR. BARHAM: Rule 11 does --
25 QUESTION: Apply -- does not --

1 MR. BARHAM: Does apply.

2 QUESTION: Do you have any case that says Rule

3 11 does not apply to diversity cases?

4 MR. BARHAM: No, Sir. No, Sir. And in fact --

5 QUESTION: So you want some new law?

6 MR. BARHAM: No, sir. Rule 11, as I understand

7 it, does apply in diversity because it, it fits the

8 category of everything I'm saying. It's not this kind of

9 inherent power. It is not a fee shifting. It is taking

10 care of -- it's sanctions. It's deterrence. This was not

11 deterrence. This was not sanctions. This was punitive,

12 retributive. I suggest there's a difference.

13 Rule 11, I believe, applies in diversity cases,

14 as it has been enunciated by this Court. I don't think

15 you'll have a problem applying it, as you enunciated it

16 yesterday.

17 Mr. -- Justice Kennedy, you went on to say that

18 it's not the business of this Court to proscribe rules

19 redistributing litigation costs in a manner that

20 discourages good faith attempts to vindicate rights

21 granted by substantive law. And the allocation of costs

22 accruing from litigation is a matter for the legislature,

23 not the courts. Our potential incursion into matters

24 reserved to the States also counsel --

25 QUESTION: Now, that point of view didn't carry

1 the day yesterday.

2 MR. BARHAM: Well, he didn't. He didn't, but he

3 is quoting a fear that I think every member of the Court,

4 including the majority, did have a feel for. I don't

5 believe the majority was disregarding a thought, does this

6 have any incursion on the States, and as an enunciated

7 rule, I don't have a problem with Rule 11 being applied in

8 the diversity case.

9 Thank you.

10 QUESTION: You would like to reserve the

11 remainder of your time, Mr. Barham?

12 MR. BARHAM: Yes.

13 QUESTION: Very well.

14 Mr. Klein.

15 ORAL ARGUMENT OF JOEL I. KLEIN

16 ON BEHALF OF THE RESPONDENT

17 MR. KLEIN: Mr. Chief Justice, and may it please

18 the Court:

19 The question in this case is whether petitioner

20 was improperly sanctioned for his bad faith litigation

21 conduct. We submit that he wasn't, based on the following

22 analysis. First, the authority to impose attorneys' fees

23 for abusing the court's processes is clearly on of the

24 several inherent sanctioning powers that Federal courts

25 possess, in this Court's words, for the specific purpose

1 of managing their affairs so as to achieve the orderly and
2 expeditious disposition of cases.
3 Second, that kind of sanctioning power, by
4 definition, protects core judicial process concerns, and
5 therefore applies in diversity cases just as it applies in
6 all other cases. And third, the district court didn't
7 abuse its discretion in this case in setting the amount of
8 petitioner's sanction to reflect the full cost of
9 respondent's attorneys' fees. That determination properly
10 rested on the factual finding that petitioner's entire
11 litigation effort was designed to obstruct, impede, and
12 indeed prevent judicial resolution of respondent's claim
13 in the belief that through fraud, delay, harassment, and
14 increasing legal fees, respondent would abandon its claim.
15 QUESTION: At some point during your argument,
16 Mr. Klein, perhaps we could discuss or you could tell me
17 why the district court couldn't have done all of this, or
18 substantially all of it, under Rule 11. I am very
19 troubled by that. It seems to me that Rule 11 classically
20 covers this conduct.
21 MR. KLEIN: Well, Your Honor, I think there are
22 two points that I'd like to say. First of all, I would
23 agree with the point you made before, that is if this
24 conduct was all sanctionable under Rule 11 and the
25 district court simply invoked the wrong rule, then I think

1 the case ought to be affirmed on that basis.

2 I will suggest to you why I think the court

3 thought that he could not, and that is I think there has

4 been some dispute among the circuits about just how far

5 Rule 11 applies in terms of signings and parties, also in

6 terms of, for example, in this case there was a

7 fabrication of a fraud, as you pointed out ahead of -- in

8 the other argument, there is a fabrication of a fraud

9 designed to mislead and abuse the court.

10 Now, in that situation a lot of events occurred

11 that were in some respects reflective of a pleading, but

12 not necessarily. And so I think the court was simply

13 being cautious, given the fact that the circuits have had

14 a more limited view of Rule 11, and I would suggest the

15 majority did suggest yesterday that Rule 11 had a kind of

16 discrete power analysis rather than a generic.

17 QUESTION: Rule 11 certainly is basically

18 limited to filed papers, isn't it?

19 MR. KLEIN: That is my understanding of it, and

20 I think the behavior here went far beyond filed papers.

21 QUESTION: So if, if the court below had been

22 limited to Rule 11 it could not have imposed the extensive

23 -- the extent of sanctions that it did?

24 MR. KLEIN: I think that is correct. I think

25 that is -- it applies to particular filings, and I think

1 there would be limits on what the court could have awarded
2 here. However, I don't want to be in a position of
3 suggesting that something close to this award isn't
4 sustainable on Rule 11. I think the court was right in
5 putting it on the power that he did have, and I think --
6 and I think that you're right, Mr. Chief Justice, in
7 pointing out that I think this Court and certainly the
8 circuit courts have taken a more limited view of what Rule
9 11 is addressed to. After all, it's only one of several
10 sanctions in the course of the entire rules directed at a
11 particular phase in the proceedings.
12 QUESTION: Mr. Klein, there's another problem
13 besides the fact that Rule 11 only applies to particular
14 filed papers. There is also the problem that, as I read
15 Rule 11, there has to be some assessment of how much harm
16 the particular filing caused to the other side, and the
17 award here was all the attorneys' fees, wasn't it?
18 MR. KLEIN: Yes, it was.
19 QUESTION: Did the court seek to calculate what
20 incremental additional attorneys' fees were caused by --
21 MR. KLEIN: I believe he did. And that's what I
22 think the essential finding is, Justice Scalia, that is I
23 think this determination rests on the finding that the
24 whole effort, that what the petitioner set out to do is to
25 say, look, when we go to court we are going to tie this

1 process in knots. We are going to use every abusive
2 power. By the time they sort this out there is going to
3 be $1 million worth of fees. And many years later, this
4 guy will cave. I think the district court found that, the
5 court of appeals affirmed it, and I think that it should
6 be --
7 QUESTION: Well, they might have had that in
8 mind, but that's quite different from saying that this
9 amount of damage was caused by these particular abuses.
10 They might have wanted, you know, had willfully in mind to
11 run up attorneys' fees through abuses and through
12 nonabuses. But what Rule 11 says is that it can, an order
13 to pay the other party the amount of the reasonable
14 expenses incurred because of the filing, not all
15 attorneys' fees.
16 MR. KLEIN: Well, that's what I was suggesting,
17 I thought, before. That is, I think the consequences of
18 what Rule 11 would allow you to recover are more limited.
19 QUESTION: Why don't we -- why shouldn't we take
20 Rule 11 as being a limitation upon the way the more
21 general discretion of the court to impose costs. You
22 acknowledge the court, or you assert that the court has an
23 inherent power. If it does, why shouldn't we think that
24 that inherent power has been limited by Rule 11 --
25 MR. KLEIN: Well, I think --

1 QUESTION: -- so that you can't shift fees, but
2 you can only require the other side to pay the amount of
3 the fees that are attributable to the misconduct?
4 MR. KLEIN: I want to say two points, Justice
5 Scalia, because I may have confused at first. I think
6 this award is based on the amount of fees attributable to
7 the misconduct. I think that's what the district court
8 found and clearly was affirmed by the court of appeals.
9 The whole --
10 QUESTION: The misconduct before the court?
11 MR. KLEIN: The misconduct before the court, the
12 contempt of courts that were held. In other words, it was
13 misconduct in the FCC, but that was in contempt, in
14 violation of the court's order. Everybody recognized
15 that. It wasn't that those were extraneous proceedings.
16 There was a TRO that was outstanding when he violated it,
17 there was a preliminary injunction that was outstanding.
18 Every bit of this behavior was not for the purpose that
19 courts are open for, and that is to resolve legal
20 disputes. Every bit of it was to frustrate and thwart the
21 court's effort at doing that. He litigated for 3 years
22 over a series of counterclaims and affirmative defenses.
23 On the eve of trial, voluntarily, after this
24 whole process, he stipulates that the contract was valid,
25 that he had no defense to the contract, and that we had

1 not violated the contract. That, I think, is the
2 essential finding, and I think that's the basis that this
3 Court should affirm on.
4 Now, I think the second issue, to the extent --
5 let me say, I don't want to be in this box. If Rule 11 is
6 coextensive with this inherent power, based on that fact
7 finding, then I think I am perfectly happy to have the
8 Court rest the judgment on Rule 11.
9 I would also say the inherent power, if it
10 awarded, Justice Scalia, for legitimate fees, that is it
11 didn't -- it used, so to speak, a sledge hammer, when a
12 more careful approach would be necessary, I don't think
13 that would be a prudent and might indeed be an abuse of
14 discretion of the inherent power. So I don't want to get
15 into the box of trying to argue which particular sanction,
16 because I think --
17 QUESTION: Well, Mr. Klein, I think perhaps you
18 ought to, because I think Justice Scalia's question to you
19 was why doesn't Rule 11 limit inherent power. My question
20 to you is take a look at Section 1920 -- 1927. In June of
21 1980 this Court decided in Roadway that 1927 did not
22 extend to the imposition of attorneys' fees. In September
23 of 1980 Congress comes along and says -- and amends 1927,
24 and says yes, it does. Now, was that just brutum fulmen
25 on the part of Congress? I mean, could Congress -- could

1 the Court have done whatever it wanted under inherent
2 powers anyway? I think inherent powers may disappear as
3 Congress steps in, or as the rules committee --
4 MR. KLEIN: Let me answer it this way. First of
5 all, there were two aspects to Roadway, Mr. Chief Justice.
6 The initial aspect was the inherent sanctioning power
7 against parties. That was what the Court built upon to
8 extend to attorneys. Now, that -- then, subsequent to
9 that, this Court, Congress, as you point out, amended 1927
10 to cover parties. And I would say, quite frankly, that
11 1927, as I read it, is coextensive with the Roadway power
12 that was applied to attorneys.
13 However, this other power in Roadway, which I
14 think traces back much earlier, for example to Chief
15 Justice Taft's opinion in Toledo Scale, that power
16 Congress has never touched. It has not amended, it has
17 not changed.
18 Second, the Court is also clear in Link v.
19 Wabash, Justice Harlan's opinion, he says when Congress or
20 the rulemakers want to limit or eliminate an inherent
21 power, one that this Court has recognized, it has to speak
22 with unmistakable clarity. Now, Congress, certainly in
23 passing 1927, never suggested, never suggested that it was
24 attempting to divest the Federal courts of their ability
25 to sanction parties; 1927 is purely attorneys. And second

1 of all, the rulemakers, when they amended Rule 11 in 1983,
2 flat out said they were, quote, "building on and
3 expanding" the -- inherent power recognized in Roadway.
4 So it seems to me --
5 QUESTION: If the power was already there, why
6 did the rulemakers fuss with it at all?
7 MR. KLEIN: They made it -- they imposed a
8 higher standard. What the rulemakers did in 1983, Mr.
9 Chief Justice, is that they said under the inherent power
10 you need to have a showing of bad faith, subjective bad
11 faith. We are now imposing a higher standard on counsel,
12 and as the Court has found, on parties to require more of
13 an objective. That was what the rule did.
14 QUESTION: So the inherent power only went to
15 one state of mind. To get to another state of mind you
16 had to have legislation?
17 MR. KLEIN: Precisely.
18 QUESTION: That's a strange definition of
19 inherent power.
20 MR. KLEIN: Well, the inherent power, I think,
21 was a more limited one. It was for, frankly, I think, the
22 concerns that were articulated in the opinion yesterday.
23 That is, that the inherent power was saying if you act in
24 bad faith, you intentionally misuse the processes of this
25 court. The court needs that power to defend itself, to

1 protect its integrity and to protect its processes. That
2 is the scope of it. That was what was applied here.
3 Now, I think that's unequivocal in Roadway. I
4 mean, I think what Roadway says, and it seems to me this
5 is the key to the holding, that there are inherent powers
6 governed not by rule or statute, but by the control
7 necessarily, necessarily vested in courts to manage their
8 affairs. And it seems to me if that's the power we're
9 talking about, then it must be clear -- it must be clear
10 it applies in diversity cases just as it does in all other
11 Federal cases.
12 For example, the conduct that was condemned in
13 Roadway itself, those abuses, is it conceivable that the
14 Court would have said that they were not sanctionable in a
15 case that was based on 1332 rather than 1331? That's not
16 at all possible.
17 And let me suggest when we're dealing with, as I
18 think Justice Marshall pointed out before, we're dealing
19 with the court running its business. That is such a core
20 concern that it seems to me, even if a State thinks that a
21 different set of powers is appropriate in its court, that
22 you don't need this power.
23 If the Federal courts have made that
24 determination, the State has no legitimate interest,
25 cognizable under Erie or any other doctrine, that would

1 divest the Federal courts of that power, just as it has no
2 interest that would allow them to take away the full
3 measure of contempt power, even if they insisted different
4 contempt proceedings were held in their courts, or the
5 power recognized in Link v. Wabash to dismiss a case sui
6 sponte, even if they had a different view in their courts.
7 Now, I think to some degree, I just want to
8 point out a couple of other quick points here, but I think
9 petitioner is confusing a variety of different powers, and
10 I will be the first to concede that Federal courts have
11 lots of powers that are not clearly defined either by
12 statute or by the Constitution, for example, the power to
13 invoke an injunction or deny an injunction in an equitable
14 case. And I admit, each of those powers presents its own
15 individual Erie question. But I would suggest that while
16 some of those powers raise complex Erie questions, a power
17 that this Court has found as a fundamental sanctioning
18 power to control the processes presents a very simple Erie
19 question.
20 And as I think Justice O'Connor has amply
21 pointed out, I don't think anything in Alyeska was
22 intended to detract from that point whatsoever.
23 Petitioner's reliance on Alyeska, it seems to me, confuses
24 two very different bases of authority for directing a
25 party to pay fees. One is to impose sanctions on an

1 abusive -- litigant. That's the power at issue in this
2 case.
3 Now there is another power, and that is a power
4 to shift fees to a prevailing party, having nothing to do
5 with whether that party abused the process or not. And
6 that power has substantitive impact in the following ways.
7 It either is designed to bring, encourage bringing certain
8 title litigation, or frankly, it may be designed to
9 discourage certain kind of conduct.
10 That kind of power, we acknowledge, is probably
11 substantitive under Erie, and that's the kind of power, by
12 citing the Sioux City case in this footnote, that the
13 Court had in mind in Alyeska. Alyeska itself had nothing
14 to do with judicial sanctioning powers. Alyeska was
15 concerned, pure and simple, with basic prevailing party
16 situations.
17 Finally, if I can just take a moment --
18 QUESTION: Mr. Klein, before you get to that,
19 because it relates to the point you have been talking
20 about, as I read the district court opinion which
21 calculated the amount of this award, much of that was not
22 only not based upon how much specific harm had been
23 caused, but it was not even entirely based upon conduct
24 before the court. As I read the district court opinion,
25 part of -- part of what they say, it's page 51 of the

1 appendix, Chambers and Gray -- Chambers, knowing that
2 NASCO had a good and valid contract, hired Gray to find a
3 defense and arbitrarily refused to perform. In other
4 words, I think that there, some of these sanctions are
5 indeed the substantive-type sanctions you are talking
6 about --
7 MR. KLEIN: With respect --
8 QUESTION: -- at the district court level,
9 anyway.
10 MR. KLEIN: With respect, Your Honor, I'll
11 disagree with that, and if I might explain. That is to
12 say, it is -- the fact that Gray was hired by Chambers
13 didn't lead to the imposition of any fees in and of itself
14 by, to our client. What the court has sanctioned this
15 person for is saying look, you came into my court, the
16 first thing you did was you tried to defraud me by
17 suggesting you had made a bona fide sale, and therefore
18 preventing specific performance. That didn't happen.
19 That was a fraud. You misled me and you misled the
20 public. You registered certain recordation papers that
21 claim to be a cash sale.
22 Now, everything that happened, Justice Scalia,
23 grew out of that process, and the court's -- except for
24 one exception which I'll come to __ and the court's
25 basically saying in that situation look, we understand



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1 what went on here. You never showed up to resolve a legal
2 claim. It didn't happen. You showed up to tie this
3 process in knots. I'm not going to tolerate it.
4 The one exception that I think is for out-of-
5 court conduct has to do with the violations of the orders.
6 That is to say, in its expanded power, if he goes to the
7 FCC and seeks to change the status quo, that is a standard
8 contempt remedy, and the court clearly could have done it
9 on that basis.
10 QUESTION: Were 100 percent of the fees awarded
11 as sanctions?
12 MR. KLEIN: 100 percent of the fees were awarded
13 as sanctions, yes, Your Honor.
14 QUESTION: And was -- is there a finding, either
15 implicit or explicit, that Chambers, the client, directed
16 100 percent of that conduct?
17 MR. KLEIN: I think that the finding was that
18 Chambers -- explicit finding that Chambers was the
19 engineer, that is, he was the strategist and the lawyer
20 was the tactician. And that is to say there may be
21 individual motions that were filed, defenses that were
22 raised, that were designed by the lawyers, but what the
23 district court found was that was part of Chambers'
24 overall plan to misuse this litigation to delay, harass,
25 and impose fees on our client. And I think that's what

1 the court of appeals affirmed.

2 QUESTION: Mr. Klein, I'm not sure the district

3 court's statement at least bears the reading you're giving

4 it. I mean, the district court says that the full amount

5 of $996,000 --

6 QUESTION: Where are you reading from?

7 QUESTION: It's from A-52, Mr. Chief Justice.

8 It says that the full amount is $996,000. This sum is

9 exclusive, and does not include fees and expenses awarded

10 by the court in the contempt proceedings. Okay. It does

11 include, however, $53,000 in attorneys' fees and expenses

12 paid by NASCO for services rendered in connection with the

13 sanctions portion of this suit. This latter portion of

14 the fees and expenses, the district court says, like the

15 balance of such fees and expenses included in the

16 sanctions -- like the balance -- would not have been

17 incurred by NASCO if Chambers had not defaulted and forced

18 NASCO to bring this suit.

19 MR. KLEIN: Well, Your Honor --

20 QUESTION: Now, what he's saying, it seems to

21 me, is that Chambers is a bad actor. He knew he didn't

22 have a leg to stand on in the contract and he forced the

23 thing to go to litigation. That's -- that's not the

24 contempt type of a sanction that --

25 MR. KLEIN: I don't think that's right. I would

1 refer the Court further. I want to comment to that
2 specific language, but I would refer the Court, on page A-
3 51 he says the sanctions assigned and established in this
4 --
5 QUESTION: Whereabouts on A-51?
6 MR. KLEIN: A-51 at the bottom of the first
7 incompleted paragraph. The sanctions assigned and
8 established in this paragraph -- these are the sanctions
9 against Chambers -- apply only to sanctionable acts which
10 occurred in connection with proceedings in the trial
11 court. Court of appeals affirmed, on page A-79, it says,
12 "Finally Chambers contends the amount of the sanction was
13 an abuse of discretion. We disagree. NASCO's expenses
14 throughout this litigation were without exception the
15 product of Chambers' bad faith tactics. The award
16 reflects the amount of these expenses."
17 And I would suggest to you, Justice Scalia, he
18 could have sat back and made us sue him, but once he
19 showed up in court, if he has no defenses he can't defraud
20 the court and he can't play games and he can't manufacture
21 defenses. That, I think, is the difference.
22 QUESTION: But you have to pay the lawyer at
23 least 50 bucks for showing up to move for summary
24 judgment. I mean, you've got to subtract something.
25 You're clearly penalizing him for forcing a lawsuit to be

1 filed. He's entitled to force a lawsuit to be filed. He
2 only has to be an honest man once he gets before the
3 court, as far as sanctions are concerned.
4 MR. KLEIN: I agree with that, and if the
5 argument is it's an abuse of discretion not to deduct the
6 cost of the complaint, I really don't think that, under
7 these circumstances, given the pervasiveness and given the
8 sanctioning power -- it is, after all, a deterrent remedy,
9 not a --
10 QUESTION: But the omission of that, you know,
11 it suggests that the court wasn't, didn't have its eye on
12 the ball. It isn't just the $50 I'm worried about. It
13 casts the whole sum into, into doubt.
14 MR. KLEIN: But I'd like to discuss that with
15 you, because I think that is wrong, and I think the record
16 couldn't be clearer about it. And the reason I think
17 that's wrong is he starts out -- let's look at what he --
18 what took these proceedings so long. He starts out by a
19 clear fraud, intentionally designed to abuse and mislead
20 the court. That's indisputable.
21 All right, that -- now, then we have 2 years of
22 discovery on affirmative defenses, okay, as well as on, on
23 counterclaims that he filed, which are really just
24 completely manufactured. They're frivolous. Then we have
25 endless motions for stays. Then we have a recusal, we

1 finally get a trial date, he files a recusal motion before
2 the district court mandamuses him in the court of appeals.
3 Now I suggest to the Court, what went on that
4 was the business of the litigation in this 2 year process?
5 The whole time he is doing depositions, he takes
6 depositions of people in Boston about whether we could
7 finance the deal or not. The whole time he is pursuing
8 his counterclaims, the whole time that he is pursuing his
9 affirmative defenses, fees are running up. The night
10 before trial, literally, he says oh, all of that I
11 stipulate away.
12 What's left? What's his whole defense? It's
13 his fraudulent defense, which the Fifth Circuit found was
14 so offensive that they affirmed from the bench, sanctioned
15 him, and described his conduct as manipulative. That was
16 the only issue when all this was sorted out, and none of
17 the other issues, none of the other issues he even thought
18 were meritorious enough to proceed to trial.
19 So I suggest to the Court that everything he
20 did, and I think that finding is absolutely safe on this
21 record, everything he did was an abuse of the process. I
22 think his strategy was clear, and it almost succeeded. He
23 said if he can tie these guys up in knots -- these are not
24 people with a lot of means, if I can tie them up in knots,
25 they'll cave, they'll give in. And I think that's



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1 intolerable, and I thought the Court was exactly right in
2 sanctioning it. And I would urge this Court to affirm it.
3 QUESTION: Is the rule you propose that if a
4 fraud is designed for specific judicial proceedings, that
5 that is within the inherent power of the court to
6 sanction?
7 MR. KLEIN: Absolutely. That is what's called
8 by this Court in Universal Oil, perpetration -- a
9 perpetration of a fraud on the court, and that is what
10 this was. Yes, Your Honor.
11 QUESTION: Mr. Klein, if a court's inherent
12 power is limited by the necessity to protect itself, and
13 if a court has available to it sanctions under Rule 11
14 that cover at least a portion of this conduct, why should
15 we not require the court to at least determine what of
16 this conduct is covered by Rule 11?
17 MR. KLEIN: Well, I guess I think that the
18 answer in part to that, Justice --
19 QUESTION: Because I'm not sure -- only then do
20 we know whether it's necessary to resort to inherent
21 power, isn't that right?
22 MR. KLEIN: Well, it seems to me -- it seems to
23 me that there are two parts to that. That is if Rule 11,
24 as I said, is coextensive with this power, then it's not
25 necessary. If it's not, then I suggest it is, because

1 there are abuses that will go unredressed. I don't think
2 it can be an either/or.
3 QUESTION: Well, we don't know. Apparently the
4 district court did not take up the Fifth Circuit on its
5 suggestion that it sort out what could be sanctioned under
6 Rule 11.
7 MR. KLEIN: Well, that's correct -- and the
8 Fifth Circuit --
9 QUESTION: It didn't do that. So we don't know,
10 really.
11 MR. KLEIN: But, I guess what I -- I realize
12 that.
13 QUESTION: And I didn't understand your answer
14 to be very clear in telling us whether every single dollar
15 imposed here could have been imposed under a Rule 11
16 sanction.
17 MR. KLEIN: The reason my answer is less than
18 clear about that, Your Honor, frankly, is because this
19 Court hasn't ruled on those kinds of issues and the
20 circuits are split. That's the reason why my answer is
21 somewhat unclear. But I would suggest to the Court, and
22 perhaps I haven't put this properly, but I would suggest
23 to the Court that it seems to me Rule 11 was designed for
24 a more narrow purpose, relating primarily to pleadings,
25 and that it was, as the Court said yesterday, concerned

1 with discrete events. There are, after all, sanctions
2 under Rule 56 --
3 QUESTION: Well, so your best reading of Rule 11
4 is to the effect that it did not cover all the conduct
5 here?
6 MR. KLEIN: That is my best reading of it at
7 this point.
8 QUESTION: Well, that wasn't the rationale of
9 the court of appeals, was it?
10 MR. KLEIN: It was not the rationale of the
11 court of appeals.
12 QUESTION: Are you defending the rationale of
13 the court of appeals?
14 MR. KLEIN: I am defending fully the rationale
15 of the --
16 QUESTION: Well, they said that Rule 11 just
17 doesn't replace the inherent power to any extent.
18 MR. KLEIN: That is their view. I happen to
19 agree with their view.
20 QUESTION: Well --
21 MR. KLEIN: But if -- what I'm saying, Justice
22 White, is --
23 QUESTION: Well, could I ask you, do you think
24 that presented here is the question of the relationship
25 between Rule 11 and inherent power?



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1 MR. KLEIN: I don't believe that's a fairly
2 presented question. The question here is whether he had
3 the power, the inherent power. I think the answer on
4 Roadway is yes, and if he exercised that properly --
5 QUESTION: You don't think the questions
6 presented here really succeed on the question of whether
7 Rule 11 or the statute limits inherent power?
8 MR. KLEIN: The question is very broadly
9 presented. I wouldn't say the Court was barred from
10 reaching the question, based on the question that is
11 presented, but I think it's clear Rule 11 doesn't. And
12 the reason I think it's clear is because the rule itself
13 expressly states it's expanding and building upon, and no
14 way contracting.
15 And it seems to me at worst the two powers are
16 coextensive. And if they are, the district court and the
17 court of appeals acted entirely properly in placing it on
18 the inherent power rather than Rule 11. If the two powers
19 are not coextensive, then it seems to me that the inherent
20 power, being broader, is necessary in the sense that this
21 Court found it necessary in Roadway.
22 Thank you, Mr. Chief Justice.
23 QUESTION: Thank you, Mr. Klein.
24 Mr. Barham, do you have rebuttal? You have 2
25 minutes remaining.

1 REBUTTAL ARGUMENT OF MACK E. BARHAM

2 ON BEHALF OF THE PETITIONER

3 MR. BARHAM: Quickly. In regard to the rules,
4 not only Rule 11, 11, 16(f), 26(g), 30(g)(1) and (2),
5 37(a), 37(b), 37(b)(1) and (2), 37(c), on and on are rules
6 that govern conduct. And in this case the rules were, by
7 the Fifth Circuit, said not to have anything to do with
8 inherent power. You don't have to use the rules. Sit
9 back. They don't have to mitigate. Let them sit back and
10 let them amass attorneys' fees and waste the court's time,
11 then hit him. Hit him with inherent power. And that's
12 just not the way the game should be played in this Court,
13 not the way the rules envision it, not the way this Court
14 envisions it.

15 Moreover, there is not one fact in the entire
16 record that Chambers designed a fraud upon the court.
17 It's a conclusion that he participated in everything and
18 in the design, but the only fact is his statement that I
19 didn't want to sell. I thought it was in the best
20 interest of the public and me not to go through with it.
21 I was willing to pay damages. I asked lawyers, can I pay
22 damages and not sell. The lawyers said yes, and they
23 devised the plan, and I questioned the plan. I thought it
24 might be a legal trick, but they persuaded me. And must
25 have persuaded him pretty good because he kept running his

1 business at the tune of an extra $2 million investment

2 over the time of the litigation.

3 The other thing is they wait 3 years to even

4 bring their motion for sanctions after the court of

5 appeals said do it.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Barham.

7 Your time has expired.

8 The case is submitted.

9 (Whereupon, at 12:01 p.m., the case in the

10 above-entitled matter was submitted.)

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