IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ELENA RUTH SASSOWER and DORIS L. SASSOWER,

Petitioners,

v.

KATHERINE M. FIELD, CURT HAEDKE, LILLY HOBBY, WILLIAM IOLONARDI, JOANNE IOLONARDI, ROBERT RIFKIN, individually, and as Members of the Board of Directors of 16 Lake Street Owners, Inc., HALE APARTMENTS, DeSISTO MANAGEMENT, INC., 16 LAKE STREET OWNERS, INC., ROGER ESPOSITO, individually, and as an officer of 16 Lake Street Owners, Inc.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether fee-shifting under inherent power against civil rights plaintiffs is barred by retroactivity and preemption, where an award under the Fair Housing Act, as amended after the action was commenced, could not be sustained under the Christiansburg standard?

2. Whether fee-shifting under inherent power may be used as a backup to uphold awards under Rule 11 and 28 U.S.C. §1927, which do not meet the standards of those provisions?

3. Whether fee-shifting under inherent power against civil rights litigants requires due process and the right to trial by jury, neither of which was afforded?

4. Whether fee-shifting under inherent power violates equitable rules of "unclean hands" and "unjust enrichment", where the fully-insured defendants did not controvert plaintiffs' 60(b)(3) motion[1] and never claimed to be acting on the insurer's behalf in making their post-trial fee applications?

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[1] Plaintiffs respectfully submit that the question of their entitlement to the granting of their Rule 60(b)(3) motion, as a matter of law, be subsumed within this question.

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ABBREVIATION GUIDE

CA-.....Certiorari Appendix

A-.....Plaintiffs' Circuit Court Appendix

AA-.....Defendants' Circuit Court Appendix

Br.....Plaintiffs' Circuit Court Brief

R. Br.....Plaintiffs' Circuit Court Reply Brief

LDF Br.....Amicus Curiae Brief of NAACP Legal Defense and Educational Fund

Note: Plaintiffs' Rule 60(b)(3) motion consisted of the following documents, citation to which has been abbreviated in their Petition for Certiorari:

5/16/91 Memorandum of Law

7/1/91 Supplemental Memorandum of Law

7/1/91 Notice of Motion

7/1/91.....Affirmation A: Part 1 (*factual rebuttal to counsel fee/sanction motion of Lawrence Glynn, Esq.)*

7/1/91.....Affirmation A: Part 2 *(factual presentation in support of Rule 60(b)(3) motion)*

7/1/91.....Affirmation B: *(factual rebuttal to counsel fee/sanction motion of Dennis Bernstein, Esq.*

7/1/91.....Affirmation C: *(factual rebuttal to counsel fee/sanction motion of Marshall, Conway & Wright*

7/1/91.....Affirmation D: *(factual rebuttal to counsel fee/sanction motion of Diamond, Rutman & Costello)*

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Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988)

Brocklesby Transport v. Eastern States Escort, 904 F.2d 131, 133 (2d Cir. 1990).

Browning Debenture Holders' Committee v. Dasa Corp., 560 F.2d 1078 (2nd Cir. 1977)

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991)

Chambers v. Nasco, ____ U.S. ____, 111 S.Ct. 2123 (1991), reh. denied, ____ U.S. ____, 112 S.Ct. 12 (1991)

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)

City of Burlington v. Dague, ____ U.S. ____, 112 S.Ct. 2638 (1992)

Curtis v. Loether, 415 U.S. 189 (1974)

Faraci v. Hickey-Freeman Co. Inc., 607 F.2d 1025 (2d Cir. 1979)

Fleischmann Distilling Corporation v. Maier Brewing Co., 386 U.S. 714 (1967)

Garner v. State of Louisiana, 368 U.S. 157 (1961)

Haines v. Kerner, 404 U.S. 451 (1972)

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)

G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc)

Holt v. Virginia, 381 U.S. 131 (1965)

Keystone Driller Co. v. General Excavator Co, 290 U.S. 240 (1933)

Link v. Wabash Railroad Co., 370 U.S. 626 (1962)

Lytle v. Household Manufacturing., Inc., 494 U.S. 545 (1991)

In Re Murchison, 349 U.S. 133 (1955)

New York Association for Retarded Children v. Carey, 711 F.2d 1136 (1983)

Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986)

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978)

Thompson v. City of Louisville, 362 U.S. 199 (1960)

Transmission Parts Corp. v. Ajac, 768 F.2d 1001 (9th Cir. 1985)

Tull v. United States, 481 U.S. 412 (1987)

United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949)

Willy v. Coastal Corp.,____ U.S. ____, 112 S.Ct. 1076 (1992)

Withrow v. Larkin, 421 U.S. 35 (1935)

OTHER AUTHORITIES

Legislative History of the Fair Housing Amendments Act of 1988, House Report No. 100-711, H.R. 1158

"Resolution on Bias in the Federal Judiciary", Report of the Proceedings of the Judicial Conference of the United States, September 22, 1992

Baylor Law Review, "The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions", [by Judge Sam D. Johnson, Fifth Circuit] Vol. 43 (1991) at 652-654, 669-670

Harvard Law Review, "Leading Cases: Courts' Inherent Power to Sanction in Diversity Cases", Vol. 105 (Nov. 1991), 349-360

Indiana Law Journal, "The Heileman Power: Well-Honed Tool or Blunt Instrument?", Vol. 66 (1991), 977-998

John Marshall Law Review, "G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.: The Seventh Circuit Approves the Exercise of Inherent Authority to Increase a District Judge's Pre-Trial Authority Under Rule 16", Vol. 23 (1990), 517-535

Nova Law Review, "Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception to Fee Shifting--Chambers v. Nasco, Inc.", Vol. 16 (1992), 1527-1566

Tulane Law Review, "Chambers v. Nasco, Inc.: Moving Beyond Rule 11 into the Unchartered Territory of Courts' Inherent Power to Sanction", Vol. 66 (1991) 591-603

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners ELENA RUTH SASSOWER and DORIS L. SASSOWER respectfully pray that a Writ of Certiorari issue to review the Opinion and Orders of the Court of Appeals for the Second Circuit entered in the above-entitled proceeding on August 13, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit is reported at 973 F.2d 75 (2nd Cir. 1992) and appears in the Appendix hereto at CA-6[1]. The District Court's Opinion, granting defendants' motions for a fee award and denying plaintiffs' motion for a new trial under Rule 60(b)(3) and for Rule 11 sanctions, is reported at 138 F.R.D. 369 (S.D.N.Y. 1991) and appears at CA-28.

JURISDICTION

The Order of the Court of Appeals affirming the Judgment of the District Court was entered on August 13, 1992 (CA-20). The Order denying plaintiffs' motion to vacate the Judgment on jurisdictional grounds was entered on the same date (CA-22). The Order denying plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 25, 1992 (CA-25). The Order denying plaintiffs' motion to expand the record was denied on October 1, 1992 (CA-26). Justice Clarence Thomas granted petitioners' motions to extend their time to seek certiorari up to and including February 22, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The constitutional, statutory, and rule provisions relied on by Petitioners are: The Fair Housing Act of 1968: 42 U.S.C. §3612(c); The Fair Housing Amendments Act of 1988, 42 U.S.C. §3613(c); Rule 60(b)(3); Rule 11; 28 U.S.C. §1927; Rule 17; Rule 19; 28 U.S.C. §2072; The Fifth and

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[1] "CA-" stands for the "Certiorari Appendix", which is annexed hereto. A guide to other abbreviations herein appears at the end of the Table of Contents.

Seventh Amendment to the U.S. Constitution. The text of these provisions is set forth in the Appendix (CA-1-5).

STATEMENT OF THE CASE

Overview

This Petition seeks review of what the Court of Appeals for the Second Circuit describes as "the extraordinary remedy of an award of nearly $100,000 assessed against pro se litigants, occasioned by extraordinary conduct" (CA-8).

The *"extraordinary remedy"* is the Second Circuit's invocation of inherent power to fee-shift a totality of litigation costs against civil rights plaintiffs after it rejected the District Court's post-trial fee-shifting award under the Fair Housing Act (CA-12-14), as well as its alternate fee-shifting awards under Rule 11 and 28 U.S.C. §1927, fixed in the identical aggregate amount (CA-14-16).

The *"extraordinary conduct"* deemed sanctionable under inherent power is not specified by the Second Circuit (CA-14, 16-17) and was not the subject of any specific findings of fact by the District Court. No hearing was held by the District Court to determine the facts as to any alleged sanctionable conduct, liability therefor, or the monetary amount of the sanction (CA-31). Each of these issues was sharply disputed by plaintiffs, who requested an evidentiary hearing if defendants' fee applications were not denied as a matter of law.

This Petition seeks review of the Second Circuit's Opinion (CA-6-19) and Order (CA-20) affirming the Judgment of the District Court (CA-23-24). The awards therein, in wholly arbitrary monetary amounts, represent a *"windfall"* to insured defendants, whose legal defense costs were fully paid by State Farm Insurance Company ("State Farm").

This Petition also seeks review of the denial of plaintiffs' uncontroverted Rule 60(b)(3) motion, which established that defendants' status as "prevailing" parties

under the Fair Housing Act was due to fraud and prejudicial discovery misconduct by them and their counsel, knowingly underwritten by their insurer.

Factual Background

In August 1988, plaintiffs, two single Jewish women, represented by counsel, brought this action under the Fair Housing Act of 1968 (CA-1) and the New York State Human Rights Law to redress prohibited housing discrimination on the basis of sex, religion, and marital status in connection with their purchase of a cooperative apartment. Joining them as co-plaintiff was their seller[2], who at the time of plaintiffs' purchase contract was president of the Co-Op's board of directors. The co-plaintiff was represented by counsel of his own.

As recognized in the District Court's Opinion denying summary judgment to the defendant Co-Op (CA-27), but unmentioned in its Opinion awarding counsel fee/sanctions to defendants (Br. 22-23; R. Br. 11), a document entitled "Guidelines for Admission" ("the Guidelines") was central to plaintiffs' case. The Guidelines--part of an admissions package disseminated to prospective purchasers, including plaintiffs (A-87)--were explicitly intended for "applications involving minorities or single women" and called upon the Co-Op "to articulate its valid reasons for rejection...contemporaneously with the making of the decision to reject..." (CA-27).

Exhibits to plaintiffs' complaint documented the fact that the Co-Op had failed and refused to provide plaintiffs with "contemporaneous reasons" for rejection of their purchase application (Ex. "D") and, thereafter, gave reasons which plaintiffs documented to be false and pretextual (Ex.

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[2] As used hereinafter, the word "plaintiffs" refers to the Sassower plaintiffs only. The seller was permitted to withdraw before completion of discovery, over plaintiffs' objections.

which plaintiffs documented to be false and pretextual (Ex. "F"). Plaintiffs' written request for reconsideration based on such proof was denied by the Co-Op, again without reasons (Ex. "G").

After service of plaintiffs' complaint, defendants denied the existence of the Guidelines (A-85-6), variously claiming that the Guidelines were not disseminated and, if disseminated (A-87), that such dissemination by the managing agent was without their knowledge and unauthorized (A-149-153) and, in any event, that the Guidelines had not been adopted (A-143) and, if adopted in the past (A-150), not adopted by the particular Co-Op board members who rejected plaintiffs' purchase application (A-142-3).

Defendants similarly disavowed other relevant Co-Op policies and procedures, which the co-plaintiff seller, as a member of the Co-Op board since its inception and its president for several years thereafter, had identified to exist (A-162). In face of such denials, pre-trial discovery was critical to proving the facts of plaintiffs' case, as well as to impugn defendants' credibility as to their pretextual defenses.

Plaintiffs' Rule 60(b)(3) motion detailed a pattern of concerted discovery misconduct by defendants and their four separate defense counsel. That motion, seeking relief as well under the court's inherent power, was fully documented by: (a) deposition transcripts showing defendants' admissions and refusals to answer critical questions; and (b) defendants' responses, signed by their counsel, to plaintiffs' document demands.

Through such documentation, plaintiffs established that defendants had deliberately destroyed and withheld material information and documents, including:

> (a) information relating to the adoption and dissemination of the Guidelines (Br. 17, 52-53; R. Br. 21-21-2, 26; A- 85-7; A-143, A-280)

(b) statistical data as to the number of Board-approved purchasers of apartments in the Co-Op who were Jews and/or single women (Br. 17, 24, 52, A-210-215);

(c) completed purchase applications of all apartment purchasers in the Co-Op (Br. 16-17, 52, fn. 47.; R. Br. 26).

Plaintiffs also showed that the Magistrate, sua sponte, had closed discovery immediately following their successful Rule 37 motion against one defendant and his counsel and that the District Court refused to adjudicate plaintiffs' timely-filed Objections thereto, documenting the similar discovery misconduct of the other defendants and their counsel. Such Objections, supported by deposition extracts, were *uncontroverted* (Aff. A-Part 2: pp. 4-13).

As a result, plaintiffs were deprived of documents and information essential to presenting their case to the jury, which brought in an adverse verdict--including a special finding that the Guidelines had not been adopted (R. Br. 26, AA-272).

The defense misconduct documented by plaintiffs' 60(b)(3) motion was additionally asserted as an "unclean hands defense" in opposition to the four separate pending post-trial fee applications of defense counsel--which plaintiffs challenged in all respects by a fully documented paragraph-by-paragraph rebuttal, set forth as part of their Rule 60(b)(3) motion. Plaintiffs' showed that such fee applications, unsupported by corroborating affidavits of the defendants or their insurer[3] or by contemporaneous time records, were factually false and perjurious, as well as legally frivolous.

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[3] Such lack of documentation included the failure of counsel for the defendant Co-Op to in any way substantiate his claim that the $100 per hour rate he had received from the insurer was only "partial" payment--leaving a "balance due of $150.00 per hour" (AA-17).

Based thereon, plaintiffs requested Rule 11 sanctions (7/1/91 Notice of Motion).

As a threshold issue in opposition to defense counsel's fee applications, plaintiffs objected that the insured defendants, whose defense costs had been fully paid by State Farm, were not the "real parties in interest" and that the insurer was a "necessary party". Plaintiffs pointed out that defense counsel made no claim to be acting on the insurer's behalf and that they and/or the defendants were seeking a *"windfall"* for themselves (Memos of Law: 5/16/91, 7/1/91).

Plaintiffs also sought sanctions against State Farm for knowingly financing a defense strategy of discovery misconduct (7/1/91 Notice of Motion; Aff. A-Part 2: p. 4; Aff. C: p. 2; Aff. D: p. 2). This included their payment of the cost of defending against plaintiffs' aforesaid successful Rule 37 motion, as well as the $8,000 sanction which the Magistrate awarded thereunder to plaintiffs (Aff. D: p. 21-3).

Defendants did *not* respond either in defense of their fee applications or in opposition to plaintiffs' motion for sanctions and 60(b)(3) relief and offered *no* documentation as counter-proof. Three of the defense law firms defaulted entirely, with the fourth, counsel for the Co-Op, submitting a five-page affirmation refusing to respond (Br. 32-3).

Although plaintiffs served copies of their Rule 60(b)(3) motion on the non-party State Farm, giving it notice of their "real party in interest" objection to the insured defendants' fee applications (A-82-3), State Farm expressly "decline[d] to become a party..., intervene or appear" (A-81). It likewise "declined[d]" to produce documentation as to its contractual arrangements for legal defense and payments for same (A-81). The District Court denied plaintiffs' request for a "so-ordered" subpoena of State Farm's records and an "evidentiary hearing" (A-80, 84).

The Opinion of the District Court

The District Court summarily denied plaintiffs' jurisdictional objections based on "real party in interest"

(Rule 17(a)) and "necessary party" (Rule 19).

Without addressing plaintiffs' *uncontroverted* factual rebuttal to defendants' fee applications or plaintiffs' "unclean hands" defense thereto, the District Court summarily granted an award of nearly $100,000 as counsel fee/sanctions "to be paid directly to the defendants" (CA-50). Plaintiffs' *uncontroverted* Rule 60(b)(3) motion was summarily denied.

The District Court granted the award to defendants under the Fair Housing Act (CA-32-33), as amended after the action was commenced--the amendment no longer limiting fee awards to "a prevailing plaintiff" (CA-1). The counsel fees awarded were "lump-sums", rather than "lodestar" calculations, without specification of: (a) the number of hours for which defense counsel was being compensated; (b) the rates therefor; (c) the reasonable or market value of the services rendered; or (d) the necessity of the alleged services (CA-50-52). Nor was any determination made by the Court as to the respective financial abilities of the parties.

Liability for the $92,000 fee award under the Fair Housing Act was not assessed against plaintiffs' seller, an original co-plaintiff to the action (CA-48).

The District Court devised alternate fee-shifting awards against plaintiffs "on the possibility that the awarding of attorneys' fees to the prevailing party pursuant to the Fair Housing Act is not upheld on appeal" (CA-52). Such alternate awards, also without any hearing prior thereto, consisted of $50,000 under Rule 11, uncorrelated to defense costs of any alleged Rule 11 violation[4], and $42,000 under 28

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[4] Notwithstanding that the District Court cited Business Guides v. Chromatic Communications, 498 U.S. 533 (1991), its Opinion made the following statement as to its Rule 11 award:

> These sanctions are not directly connected with the fees expended by the defense attorneys nor can they be prorated in that fashion. We find that the appropriate sanction against the plaintiffs for commencing and prosecuting this meritless litigation is the sum of

U.S.C. §1927, uncorrelated to "excess costs" for any alleged violation thereunder (CA-52-53). Taken together, the Rule 11 and 28 U.S.C §1927 sanction awards were in the identical $92,000 sum as the counsel fees awarded by the District Court's award under the Fair Housing Act[5].

Expressly absolved from liability for such alternate awards were all counsel who had represented plaintiffs during the litigation and who had signed the complaint (which plaintiffs had not) and other documents (CA-36-37, 43-45). In assessing the entire $92,000 fee sanction solely against plaintiffs, the District Court made no differentiation between them as to their separate liability based on individual culpability (CA-35-36, 42-43).

The District Court noted that to the extent plaintiffs' conduct was not sanctionable under Rule 11 and §1927, such conduct--which was not specified--could be sanctioned under inherent power, citing Chambers v. Nasco, ____ U.S. ____, 111 S.Ct. 2123 (1991) (CA-36, 41). It did not state, however, that it was invoking its inherent power, and defense counsel made no request for such relief in their motion papers (AA-1, AA-70, AA-95, AA-146).

The District Court's Opinion, sua sponte, incorporated false and defamatory dehors-the-record hearsay matter not presented before it either by counsel or the parties concerning, inter alia, plaintiff Doris Sassower (see, particularly, fn. 11, fn. 13 (CA-38-39, 42). This was done without notice to plaintiffs or opportunity to be heard with respect thereto[6].

$50,000. (CA-52)

[5] The award under the Fair Housing Act included an additional $1,350 for "expenses", which is not a component of the alternate Rule 11 and §1927 awards.

[6] Included in the Appendix hereto is the Martindale-Hubbell listing of Doris L. Sassower, which was part of the record before the District Court (CA-57-59).

The Judgment entered by the District Court (CA-23-24) was based solely on its award under the Fair Housing Act, its decretal paragraphs directing payment to the various defendants in accord with the allocations made thereunder (CA-50-52). No decretal directions were made for payment in accordance with the allocation provisions of the alternate Rule 11 and §1927 awards to the various defendants which were in markedly different amounts (CA-52-53)[7].

Appeal to the Circuit Court

Before perfecting their appeal, plaintiffs moved before the Court of Appeals to vacate the fee award based on their jurisdictional objections that the insured defendants were not the "real parties in interest" and that the insurer was a "necessary party" (11/27/91 motion, pp. 7-10) (Br. 42-3) (Reply Br. 2-8) (CA-22). Rather than adjudicating that motion, the Court of Appeals referred it "to the panel that will hear the appeal" (CA-22). This necessitated plaintiffs' prosecution of their appeal.

Plaintiffs' appellate brief contended and documented that:

> ...the district court's findings and conclusions are so unsubstantiated and actually disproven by the Record, and its legal positions so aberrant, illogical and unjust that they are explicable only as a reflection of its hostility and bias toward Plaintiffs. (Br. 2)

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[7] To the defendant Co-Op, the alternate award is $45,000 as compared to $50,850 awarded under the Fair Housing Act; to defendant Hale, the alternate award is $15,333 as compared to $12,500; to defendant Esposito, the alternate award is $15,833 as compared to $18,000; to defendant DeSisto Management, the alternate award is $15,833 as compared to $12,000.

Plaintiffs further argued that the District Court's sua sponte reliance on false and defamatory dehors-the-record material was itself so violative of due process as to mandate reversal as a matter of law (Br. 54 and errata sheet).

Plaintiffs' Reply Brief documented that defense counsel's inadequate and unsubstantiated appellate submission entitled plaintiffs to Rule 11 sanctions and costs (R. Br. 1-2, 19).

The NAACP Legal Defense and Educational Fund's amicus brief supporting plaintiffs' appeal argued that a fee award against plaintiffs was not sustainable under any theory of liability--regardless of whether the 1988 amendment to the Fair Housing Act was retroactive (LDF Br. 3). On the issue of discovery, the crucial importance of which was the gravamen of plaintiffs' Rule 60(b)(3) motion, the amicus stated:

> Virtually all intentional discrimination cases share certain characteristics in terms of the locus of evidence and actual knowledge of the motives of the charged party...virtually all relevant evidence, particularly documentary, is in the possession of the defendant. (LDF Br. 4)

The Opinion of the Circuit Court

The Court of Appeals summarily denied, without reasons or citation of law, plaintiffs' jurisdictional motion to vacate the fee award (CA-22).

Its Opinion did not cite a single reference to the factual record independent of the District Court's Opinion. Included by the Circuit Court was the same false and defamatory dehors-the-record material that had been incorporated by the District Court, with further false and defamatory dehors-the-record matter, added sua sponte by the

Circuit Court[8]. None of plaintiffs' arguments were identified or discussed. Instead, they were cumulatively dismissed in a single catch-all statement as "totally lacking in merit" (CA-18).

The Circuit Court affirmed the Judgment against both plaintiffs as to liability, albeit it could not sustain the fee award under the Fair Housing Act because:

> ...the plaintiffs' suit adequately alleged the elements of a prima facie case of discrimination and presented a factual dispute for the jury as to whether the plaintiffs had proven that the defendants' articulation of non-discriminatory reasons was pretextual...There is no finding that the plaintiffs did not believe that they had been the victims of discrimination. Moreover,...there is no finding that the plaintiffs' had given a false account of the basic facts alleged to support an inference of discriminatory motive. Nor is this a case where the trial judge expressed the view that no reasonable jury could have found in plaintiff's favor but reserved ruling on a motion for a directed verdict and submitted the case to the jury simply to have a verdict in the event that a court of appeals might have disagreed with his subsequent ruling to set aside a plaintiffs' verdict, had one been returned... (CA-13)

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[8] At the outset of its Opinion (CA-8), the Circuit Court refers to a New York Law Journal headline, "Attorney Sanctioned by Court of Appeals", the innuendo being that the attorney sanctioned was the plaintiff herein, Doris Sassower. In fact, the attorney referred to by that headline was not plaintiff, but someone totally unconnected with plaintiffs and this matter.

Also rejected was the alternate Rule 11 award because the District Court had failed to identify any offending documents, as Rule 11 requires (CA-14). Rejected as well was the District Court's §1927 sanctions award against the non-lawyer plaintiff, Elena Sassower (CA-15-16).

Nonetheless, the Circuit Court kept the entire $92,000 monetary award intact, stating:

> Judge Goettel *explicitly relied*...on his inherent authority in the portion of his Opinion awarding Rule 11 sanctions and...section 1927 sanctions... (CA-16) (emphasis added)

That statement was immediately followed by one showing that the Circuit Court was relying on inference as to what the District Court actually did:

> We may reasonably *infer* that [the district judge] intended to base the $50,000 portion of the award, alternatively, on his inherent authority, to whatever extent it was not supportable by Rule 11, and to base the $42,000 portion of the award, alternatively on his inherent authority, in the event section 1927 was deemed inapplicable to Elena Sassower. (CA-16-17) (emphasis added)

The Circuit Court did not identify what was being sanctioned under the $50,000 figure, the former Rule 11 sanction award (CA-14, 16-17). Nor did it cite any conduct by Elena Sassower warranting conversion of the §1927 liability against her to one under the court's inherent power (CA-14-17).

The Circuit Court affirmed the District Court's §1927 sanction against plaintiff Doris L. Sassower, holding her liable for an undefined portion of the $42,000 awarded thereunder, which was uncorrelated to any specific misconduct by her (CA-14-16). Like the District Court, the

Circuit Court made no distinction based on the fact that Doris Sassower, although a lawyer, was for the most part represented by counsel, upon whom such sanction was not imposed.

Disregarding the District Court's omission of any decretal provisions in the Judgment as to the different amounts payable to the defendants under the alternate awards, as compared to those under the Fair Housing Act award, the Circuit Court "affirmed" the Judgment as against plaintiff Doris Sassower, vacating it only as to amount with respect to plaintiff Elena Sassower, as to whom the Judgment was remanded for determination of her financial ability (CA-17-19).

Also affirmed was the Circuit Court's denial of plaintiffs' *uncontroverted* Rule 60(b)(3) motion, adopting the identical conclusory language as the District Court[9].

Petition for Rehearing and Suggestion for Rehearing En Banc

The Second Circuit denied plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc (CA-25).

While the Petition for Rehearing was pending, State Farm moved to intervene before the District Court. The basis for such belated application was State Farm's claim that defense counsel were refusing to turn over to the insurer the proceeds of the counsel fee sanctions award that the District Court had directed plaintiffs to pay "directly to the defendants" (CA-50). Plaintiffs, therefore, moved before the Circuit Court to expand the appellate record to include this further proof that defendants' fee applications were not made on behalf of the insurer as the "real party in interest". The Circuit Court summarily denied that motion (CA-26).

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[9] The Circuit Court repeated almost verbatim (CA-18) the misstatement of the District Court (CA-53), inter alia, that plaintiffs' Rule 60(b)(3) was supported by "a thousand pages of exhibits". In fact, the motion was supported by 69 discrete exhibits totalling fewer than 300 pages.

REASONS FOR GRANTING THE WRIT

Inherent power, as expanded by the Second Circuit, has not only injured the civil rights plaintiffs, who were thereby made the victims of a gross injustice, but directly impacts on all federal litigants and their lawyers. No longer can they rely on rules and statutes, whose standards provide protection from the undefined discretion and vagaries of individual judges.

What is here involved is so extreme a misapplication of existing rules and statutory provisions as to be a compelling catalyst for remedial action to define and limit inherent power.

This case is a microcosm of the very issues now under study by this Court in connection with the proposed amendments to the Federal Rules of Civil Procedure--Rule 11, discovery, and case management. Those proposed amendments are the product of hundreds of written comments from the bench, bar, and public over a three-year period and of public hearings. Yet, as this case illustrates, the enormous effort expended in the rule-making process is all for naught if inherent power is to be a "fall-back" for federal courts unwilling to adhere to the text-based requirements of those rules, amended or not.

This case is the *right* vehicle for this Court to define the interface of inherent power and rule and statutory provisions--the issues being clear, unobstructed and ripe for resolution.

The need for this Court's authoritative voice is highlighted by the Advisory Committee Notes to the proposed amendments, which refer to Chambers v. Nasco, supra, and G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. en banc 1989) (at 58, 71). Those two opinions are so sharply divided on the subject of inherent power that

they cannot serve as guide to the lower courts[10]. Together with the Advisory Committee Notes' citation to Willy v. Coastal Corp., ____ U.S. ____, 112 S.Ct. 1076 (1992), (at 55), those cases only add to litigation-producing confusion.

It is the unrestricted use of inherent power by the Second Circuit, purportedly relying on Chambers, that has generated the alarming precedent which plaintiffs here seek to have reviewed. It is one confirming Justice Kennedy's worst fears, as expressed in his Chambers dissent.

This case also offers a context for this Court to implement the spirit of the "Resolution on Bias in the Federal Judiciary", recently adopted by the Judicial Conference, which recognizes that "bias...presents a danger to the effective administration of justice in the federal courts" Report of the Proceedings of the Judicial Conference of the United States, September 22, 1992. The District Court's hostility to plaintiffs' efforts to obtain critical documents and information, essential to proving their discrimination cause of action, coupled with its failure to follow or even cite this Court's guidepost decision of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), setting forth the standards of fee awards to defendants in civil rights actions, confirms the need to "sensitize" the federal judiciary as to civil rights. A resounding decision from this Court on that subject can do more, far quicker, than educational programs which do not have the force of "the law of the land".

The civil rights issues in this case are of broad national concern, additionally affecting federal rights under all fee-shifting statutes. The retroactivity issue herein is "the

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[10] The need for greater clarity in the Chambers and Heileman decisions has been the subject of numerous law review articles. As to Chambers, see particularly, Harvard Law Review, Vol. 105 (Nov. 1991), 349-360; Nova Law Review, Vol. 16 (1992), 1527-1566; Tulane Law Review, Vol. 66 (1991), 591-603; also Baylor Law Review, Vol. 43 (1991) at 652-654, 669-670. As to Heileman, see particularly, Indiana Law Journal, Vol. 66 (1991), 977-998; John Marshall Law Review; Vol. 23 (1990), 518-535.

other side of the coin" to cases now on this Court's docket involving the 1991 amendments to the Civil Rights Act. Rivers v. Roadway Express, #92-938; Landgraf v. U.S.I. Film Industries, 92-757; Johnson v. Uncle Ben's, 92-737; Kuhn v. Island Creek Coal Co., 92-787, all pending decision on certiorari applications. This case also is relevant to an issue presented by a case already granted certiorari, Columbia Pictures v. Professional Real Estate Inv., #91-1043, involving attorney fees for alleged sham litigation.

POINT I

The Judicial Remedy Of Fee-Shifting Under Inherent Power Is Barred By Retroactivity And Preemption

The legislative background and the statutory language of civil rights laws, in general, and the Fair Housing Act of 1968, in particular, show that Congress' intent in adopting fee-shifting provisions was to encourage private enforcement in furtherance of our national commitment to a discrimination-free society.

The history of the Fair Housing Amendments Act of 1988 shows that its overriding purpose was to broaden the law and to strengthen its private enforcement[11]. The change in its attorney-fee provision made it uniform with other civil rights laws in effect, which by then had given the term "prevailing party" a settled judicial interpretation, not inconsistent with Congress' purpose. Legislative History of the Fair Housing Amendments Act of 1988, House Report No. 100-711.

That interpretation is found in the seminal case of Christiansburg Garment Co. v. EEOC., supra, which held that

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[11] The amendment not only extended coverage to the handicapped and families with children, but removed the $1,000 cap on punitive damages. 42 U.S.C. §3613(c) (CA-1).

fee-shifting against civil rights plaintiffs could only be sustained when the action was "frivolous, unreasonable, or without foundation", supra, at 421.

Neither the express language of the Fair Housing Amendments Act of 1988, nor its contextual background, supports any view that Congress intended to impose a greater fee liability upon civil rights plaintiffs than existed prior to its enactment. By reason of the settled judicial interpretation of Christiansburg, defining the fee-shifting liability of plaintiffs suing thereunder, the Fair Housing Amendments Act of 1988 should be deemed to have completely and preemptively expressed congressional intent to exclude any award to defendants under inherent power, even were the fee provision to be retroactively applied.

Research has failed to find a single case, before or after 1988, in which a federal court has resorted to inherent power to shift a totality of litigation fees against losing civil rights plaintiffs, where, as here (CA-13), the action was found not to be "meritless" under the standards of Christiansburg.

In Christiansburg, which involved a Title VII "prevailing party" fee provision, this Court intimated the validity of the preemption argument where the statutory fee provision limited the remedy to a "prevailing plaintiff":

> [h]ad Congress provided for attorney's fee awards only to successful plaintiffs, an argument could have been made that the congressional action preempted the common-law rule, and that, therefore, a successful defendant could not recover attorney's fees even against a plaintiff who had proceeded in bad faith. Id., fn. 13.

The case at bar thus presents this Court with the precise situation posited in Christiansburg.

Indications of this Court's view that preemption would preclude an inherent power fee award where a statute is involved may also be gleaned from Fleischmann Distilling

Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)[12]. A dispositive decision by this Court on the preemption "argument" would guide the lower courts on this still-open and recurring issue. Transmission Parts Corp. v. Ajac, 768 F.2d 1001 (9th Cir. 1985)[13].

Relying on Chambers, the Second Circuit has effectively held that the statutory remedy and the Christiansburg standards may be disregarded and circumvented by inherent power. It is for this Court "to make more certain" whether Chambers authorizes such use of inherent power.

Chambers did not involve a fee-shifting statute, such as the 1988 Fair Housing Act. Moreover, in Chambers, the District Court directly used its inherent power to fee-shift, rather than, as here, where the District Court made its primary award under the fee-shifting provisions of the 1988 Fair Housing Act, which it retroactively applied to favor defendants. Indeed, even in devising a fall-back scheme of alternative awards under Rule 11 and §1927, the District Court did not reach out to its inherent power.

The Second Circuit's use of inherent power to accomplish indirectly what the District Court did not do directly marks a dangerous expansion of such power at the expense of civil rights. Draconian penalties, such as visited upon litigants whose case the Circuit Court itself found meritorious (CA-13), will do more than *"chill"* civil rights advocacy, it will *"kill"* it.

The decision herein not only defeats the intent of Congress, as expressed in civil rights laws, and nullifies this

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[12] Fleischmann held that attorneys' fees under a federal statute not providing for a fee award could not be awarded under inherent power because the statutory remedy is intended to circumscribe "the boundaries" of monetary relief in cases arising thereunder.

[13] Transmission rose after the federal statute involved in Fleischmann had been superseded by an attorney fee provision. It reflected, but did not resolve, the preemption issue.

Court's intent in Christiansburg, but constitutes a sub silentio judicial repudiation of the "American Rule" against substantive fee-shifting.

POINT II

The Use Of Inherent Power To Uphold Deficient Fee-Shifting Awards Under Rule 11 and 28 U.S.C. §1927 Violates Standards of Those Provisions, The Rules Enabling Act, And The Constitutional Separation of Powers

The Second Circuit's transformation of the District Court's admittedly uncorrelated $50,000 Rule 11 award and $42,000 §1927 award (CA-52-53) into "free-standing" liabilities, sustainable under inherent power, represents so far a departure from law, logic, and justice as to mandate this Court's "power of supervision".

The intent to accomplish substantive fee-shifting by inherent power is reflected by the Judgment the Second Circuit affirmed (CA-23-24), which provided for awards to the various defendants according to the District Court's Fair Housing Act allocations, rather than the arithmetically diverging allocations under its Rule 11 and §1927 awards (see fn. 7 herein)[14].

The Rule 11 and §1927 awards, although denominated as "sanctions", are in reality the substantive fee-shifting proscribed by those provisions. The Second Circuit's use of inherent power to validate the District Court's circumvention of the plain language of those sanctioning provisions is a violation of the Rules Enabling Act, the constitutional

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[14] Plaintiffs submit that by reason of the discrepant monetary amounts payable to the various defendants under the alternate awards not embodied in the Judgment, the Judgment became void eo instante at the point where the Second Circuit rejected the District Court's award under the Fair Housing Act.

separation of powers, and an open defiance of this Court. Business Guides, supra.

In fashioning an inherent power expedient to salvage the District Court's defective awards under the Fair Housing Act, Rule 11, and §1927, the Second Circuit has nullified the standards and limitations of those provisions, disregarding the case law related thereto of the Second Circuit itself, Oliveri v. Thompson, 803 F.2d 1265 (2nd Cir. 1986) and Browning Debenture Holders' Committee v. Dasa Corp., 560 F.2d 1078 (2nd Cir. 1977). Those bedrock cases lay down stringent standards based on "a high degree of specificity" in factual findings so as to fix personable responsibility for culpable acts. As recognized by Business Guides, supra--decided less than a half year before the District Court's decision--such personal responsibility is "non-delegable"[15].

The District Court's Rule 11 award did not identify a single document--let alone one signed by either plaintiff--that was false or unfounded, factually or legally. It was, therefore, illogical for such an award to be sustained under inherent power which, unlike Rule 11, additionally requires a "bad-faith" predicate.

Similarly, the District Court's §1927 award did not identify any offending conduct by plaintiff Elena Sassower at all. Since the Second Circuit, likewise, did not identify any such conduct--the threshold finding that had to be made--her status as a non-lawyer was irrelevant.

As to Doris Sassower, her status as a lawyer was irrelevant to periods when she was represented by counsel. Yet that, too, was irrelevant, since the District Court had

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[15] The Advisory Committee Notes to the present Rule 11 (97 F.R.D. 199) indicate that the court has "discretion to take account of the special circumstances that often arise in pro se situations. See Haines v. Kerner, 404 U.S. 519 (1972)." The decisions of the District Court or the Circuit Court show that no discretion was exercised in plaintiffs favor by reason of the normal and customary solicitude afforded to pro se litigants. Plaintiffs, in fact, were held to a *higher* standard than their attorneys, who were the signators of the complaint and other documents.

failed to identify any conduct on her part, either when she was pro se or represented by counsel, which "multiplie[d] ... proceedings ... unreasonably and vexatiously". Since, in addition, there were no "costs, expenses, and attorneys' fees" identified by the District Court as relating to such unidentified "proceedings"--let alone any that were "excess" and "reasonably incurred", the award under §1927, which the Second Circuit approved against Doris Sassower, fell abysmally short of the clear standards of that statutory provision as well.

The Second Circuit dispensed even with the standards of fee-shifting under inherent power, predicated on findings of "necessity" and "bad-faith".

The fact that the Second Circuit's only citation for its use of inherent power is Chambers realizes the forebodings of Justice Kennedy's dissent that inherent power would be more than interstitial and would, in the absence of definitional limits, supplant perfectly adequate rule and statutory provisions.

The fundamental question as to the interface of inherent power with rules and statutes was not resolved in Chambers, which further did not address the issue squarely raised in this case as to whether inherent power can be used as a "fall-back" by a Circuit Court or District Court. That issue was explicitly left open in this Court's recent decision in Willy v. Coastal Corp., ____ U.S.____, 112 S.Ct. 1076, at fn. 5 (1992).

POINT III

Inherent Power, As Applied By The Second Circuit, Volates Fundamental Constitutional Rights, And Decisional Law Of This Court

A. The Fifth Amendment: Due Process

The Second Circuit, purporting to rely on Chambers, disregards its underlying due process premise: "A

Court...must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees" Id., at 2136.

The Chambers majority twice approved the lower court's specific finding that "the requirements of due process have been amply met...", Id., at 2130, 2139, citing Nasco, Inc. v. Calcasieu Television and Radio, 124 F.R.D. 120, at 141, fn. 11.

The elements of due process afforded to Chambers included: (a) notice that an award under inherent power was being sought by the adverse party; (b) a hearing; and (c) detailed factual findings.

In this case, *none* of those basic due process prerequisites exist. Nor was there any finding by either the District Court or the Second Circuit that they had been. This is particularly significant since plaintiffs repeatedly raised the issue that their due process rights had been violated, unlike the situation in Chambers, where the lower court expressly found that "due process has never been an issue" (Id., at fn. 11).

It is a principle long recognized that "A fair trial in a fair tribunal is a basic requirement of due process". In Re Murchison, 349 U.S. 133, 136 (1955), cited in Holt v. Virginia, 381 U.S. 131, 136 (1965), Withrow v. Larkin, 421 U.S. 35 (1935). By admission of the District Court, plaintiffs' "bias recusal motions" formed a basis for its fee award (CA-37). Yet, there was no finding by either the District Court or the Second Circuit that such motions were false, unfounded, or made in bad faith. As this Court made clear in Holt, supra, at 136, the right "to escape a biased tribunal" is itself a due process right, which may not be penalized under inherent power by a fine in reprisal for making a recusal motion grounded on judicial bias.

The result of this wholesale denial of due process is a judgment "so totally devoid of evidentiary support as to render [it] unconstitutional under the Due Process Clause...". Cf., Garner v. State of Louisiana, supra, 368 U.S. 157, 163 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960).

The factual record shows *no* sanctionable conduct by plaintiffs which could support an award of punitive sanctions against them. Nor was there any.

The due process requirements, seemingly clear in Chambers, are muddied by its reliance on Link v. Wabash Railroad Company, 370 U.S. 626 (1962), a case this Court also cited in Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). Chambers, supra, at 2133, like Roadway, supra, at 765, cited Link for the proposition that fee-shifting under a court's inherent power is permissible as a "*less* severe" sanction than dismissal of a complaint, authorized by the four judge majority in Link. However, a focal issue in Link was denial of due process, which the three Link dissenters found to have been violated. Thus, there is a serious inconsistency between Chambers and Roadway on one hand, which require due process for the "*less* severe" sanction of fee-shifting, and Link, which dispenses with the requirement of due process for the *more* severe sanction of dismissal of a complaint. Such irreconcilable decisions have fostered confusion in the Second Circuit as to the due process standards applicable to inherent sanctioning power--and necessitates clarification by this Court.

Plenary review by this Court is thus essential to clarify the due process concomitants of inherent sanctioning power as to which Link, Roadway Express, and Chambers are in direct, apparent, and intolerable conflict.

B. The Seventh Amendment: Trial By Jury

The precise question of whether a fee-shifting award may be made under the Fair Housing Act against unsuccessful civil rights plaintiffs without affording them the right to a jury trial on the issues of their liability and amount has not been decided by this Court.

The District Court denied such right when it awarded a substantial monetary amount under the Fair Housing Act, viewing this Court's decisions in Tull v. United States, 481 U.S. 412 (1987) and Lytle v. Household Manufacturing, Inc.,

494 U.S. 545 (1991) as contrary, if not irrelevant, to the right asserted by plaintiffs (CA-31).

Nearly twenty years ago, in Curtis v. Loether, 415 U.S. 189, 193 (1974), this Court recognized the Seventh Amendment right to jury trial in actions for damages under the Fair Housing Act, analogizing such statutorily-created causes of action to "suits at common law". See also, Legislative History of the Fair Housing Amendments Act, H.R. 1158; House Report No. 100-711.

In both Tull, which relied on Curtis, and in Lytle, this Court reaffirmed the right to jury trial in cases arising under other fee-shifting statutes. In creating a cause of action for attorneys' fees under fee-shifting statutes, such common-law legal remedy based on traditional criteria as to "reasonable value" of legal services, should likewise trigger Seventh Amendment legal rights. This is particularly true, where, as here, the issues of liability and amount of any fee award are vigorously contested, and where the outcome of the fee issues inevitably impact on future civil rights actions.

POINT IV

The Circuit Court's Use Of Equitable Inherent Power Is Unrestrained By Equitable Considerations Of "Unclean Hands" And "Unjust Enrichment"

It is a time-honored principle that "he who comes into equity must come with clean hands". Keystone Driller Co. v. General Excavator Co, 290 U.S. 240, 245 (1933).

> "The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity" Id., 247, citing Bein v. Heath, 6 How. 228.

Yet, the Court of Appeals disregarded the *adjudicated* discovery misconduct on the part of one of the defendants and his counsel (A-241-266), which was of a nature sufficient to have precluded *any* fee award to that insured defendant, and disregarded the *uncontroverted* proofs in plaintiffs' Rule 60(b)(3) motion showing the complicity of the other defendants and their counsel prima facie, if not conclusively, in such misconduct, as well as other discovery misconduct of their own (Br. 31-33).

Moreover, since the insured defendants paid no defense costs, it was their burden to show facts establishing that the fees sought would not be a *"windfall"*, precluded under controlling law. Nonetheless, the defendants not only failed to provide *any* documentation to meet their burden[16], they did *not* even claim an intention, let alone an obligation, to make the insurer the ultimate beneficiary of the fee award.

The identity of the ultimate recipients of the fee award--and their equitable entitlement thereto--should have been, but was not, a threshold issue for adjudication by the

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[16] That burden, inter alia, also required defense counsel for the Co-Op to document his claim that he was entitled to be paid an hourly rate of *150% more* than the hourly rate paid by the insurer (AA-17). The district court accepted his claim to an increased entitlement, relying on its citation to a "contingent retainer" case (CA-30-31, 50-51)--even though defense counsel never claimed to have had a "contingent retainer". Moreover, in affirming the Judgment (CA-23-24), the Circuit Court disregarded City of Burlington v. Dague, ____ U.S. ____, 112 S.Ct. 2638 (1992), rendered a month and a half earlier and reiterating that fee awards are governed by the "lodestar" approach to achieve a "reasonable" fee, not the contingent retainer model. No "lodestar" was employed by the District Court.

The Circuit Court also disregarded its own controlling case of New York Association for Retarded Children v. Carey, 711 F.2d 1136, 1147 (1983) (Newman, J.), holding that "contemporaneous time records are a prerequisite for attorney's fees in this Circuit". Notwithstanding that the District Court explicitly referred to plaintiffs' objection on this ground in its Opinion (CA-51), it failed to make a finding on that subject, as did the Circuit Court, whose Opinion in the case at bar was by the same "Newman, J", as authored Carey.

Second Circuit[17].

POINT V

The Second Circuit's Discriminatory Use of Inherent Power Raises Serious And Substantial Questions As To Denial Of Equal Protection Of Law

The Second Circuit's decision highlights the invidiousness of inherent power: invoked, sua sponte, against civil rights plaintiffs to sustain fee-shifting sanctions, *without* any finding or even claim of fraud on their part, but not invoked in their favor where plaintiffs specifically moved under inherent power, as well as under Rule 60(b)(3), against defendants, whose fraudulent statements and conduct were established by plaintiffs' *uncontroverted, unrebutted supporting documentary proof*.

Fraud upon a court has been the traditional basis for invocation of inherent power--a historic origin recalled in Chambers:

> ...'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 institutions set up to protect and

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[17] Likewise an issue for equitable adjudication was the financial ability of plaintiff Doris Sassower, upon whom the Circuit Court placed the entire liability. Particularly since the Circuit Court noted that Doris Sassower's "current status [as a member of the bar] is in some doubt" (CA-8), it had a basis upon which to question whether that fact might have some impact upon her financial ability to pay a $93,350 Judgment, plus, by reason of its affirmance thereof, the insured defendants' costs on plaintiffs' appeal. Rather than speculating as to Doris Sassower's financial resources, the Second Circuit should have applied its own cited case of Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1029 (2d Cir. 1979) (CA-17-18) equally to both plaintiffs

> safeguard the public'. [Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)], at 246...a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. [Universal Oil Products Co. v. Root Refining Co.], 382 U.S. [575 (1946)], at 580.... Chambers, at 2132

The District Court was presented with *unrefuted* documentary evidence supporting plaintiffs' two separate fraud claims involving "fraud, misrepresentation, [and]...misconduct" by defendants and their counsel: one in connection with the pre-trial discovery process; the other, the filing of false and unfounded fee applications by insured defendants, knowingly seeking a *"windfall"*.

Apart from their formal Rule 60(b)(3) motion, plaintiffs specifically invoked the District Court's inherent power to reach these two fraud issues. The lack of *any* counter-proof to plaintiffs' specific factual allegations and documentary evidence made the "power" to adjudicate such fraud issues a "duty", Hazel-Atlas, supra, at 249-50, which the lower courts were not free to shirk.

The insured defendants *never* disputed that they were not "the real parties in interest"--either before the District Court or the Circuit Court. Nor did they assert *any* contractual duty or intention to reimburse their insurer. The Second Circuit's summary denial of plaintiffs' motion to vacate the Judgment disregarded the clear commands of Rules 17(a) and 19, and was in direct conflict with this Court's decision in United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949), as well as its own decision in Brocklesby Transport v. Eastern States Escort, 904 F.2d 131, 133 (2d Cir. 1990).

Likewise, since defendants did *not* deny--either before the District Court or the Circuit Court--*their deliberate suppression and destruction of crucial discovery materials and the substantial interference and prejudice to plaintiffs'*

case caused thereby, the Second Circuit had no legal or factual basis for affirming the District Court's summary denial of plaintiffs' *uncontroverted* Rule 60(b)(3) motion, which should have been granted as a matter of law. Anderson v. Cryovac, Inc., 862 F.2d 910, at 926 (1st Cir. 1988), Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978).

By the Second Circuit's use of equitable inherent power to grant relief it should have denied and to deny relief it should have granted, this case brings into sharp focus the extent to which inherent power can be misdirected from its original purpose. That purpose was to protect the integrity of the judicial process, not to serve as a cloak for discriminatory adjudications.

EPILOGUE

"Extraordinary" departures from fundamental law are manifest from the face of the District Court and Circuit Court's Opinions. Decisions which fail to provide "valid reasons" for invoking inherent power, where standards of applicable statute and rule provisions have not been met, should be "presumptively suspect". When inherent power is used to deny equal protection of laws, rather than to enforce them, it is a time for the Supreme Court to intervene and, in no uncertain terms, exert its "power of supervision".

CONCLUSION

Plaintiffs respectfully pray that their Petition for Certiorari be granted; that the decision of the Second Circuit be summarily reversed and the Judgment thereon vacated; and that plaintiffs' Rule 60(b)(3) motion for a new trial and sanctions be granted, as a matter of law.

Respectfully submitted,

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