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Adding to the List: The Latest Development in the Anomalous Seventh Circuit Substantial Compliance Approach

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ADDING TO THE LIST: THE LATEST DEVELOPMENT IN THE ANOMALOUS SEVENTH CIRCUIT SUBSTANTIAL COMPLIANCE APPROACH

Abstract: In March 2017, in *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, the U.S. Court of Appeals for the Seventh Circuit reaffirmed its position to allow substantial compliance with Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"). In so doing, the Seventh Circuit remains the only circuit to allow for substantial compliance with Rule 11, rather than require a strict adherence approach. The Seventh Circuit's approach, however, runs counter to Rule 11's plain language and undermines the policy goals of the rule. This Comment argues that the Seventh Circuit should require parties to strictly adhere to Rule 11's requirements to alleviate concerns that arise from the substantial compliance approach.

INTRODUCTION

The Federal Rules of Civil Procedure ("FRCP") were first adopted in 1938.[1] Rule 11 of the FRCP ("Rule 11") governs court-imposed sanctions against attorneys, law firms, and parties involved in litigation.[2] Since Rule 11's implementation, it has been amended twice and remains one of the most controversial rules of the FRCP.[3] Rule 11 requires "every pleading, written mo-

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[1] *See* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1004, Westlaw (database updated Apr. 2018) (outlining the history of the Federal Rules of Civil Procedure ("FRCP")). The Rules Enabling Act of 1934, which is now codified at 28 U.S.C. § 2072, authorized the U.S. Supreme Court to create a set of procedural rules for federal courts. *See* 28 U.S.C. § 2072 (2012); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1024 n.3 (1982). In 1935, an Advisory Committee appointed by the U.S. Supreme Court consisting of law professors and practitioners drafted a unified set of procedural rules. *See* 4 WRIGHT ET AL., *supra*, § 1004. The FRCP were a result of a three-year-long endeavor involving multiple revisions based on feedback from various government agencies, committees of bar associations, and individuals. *See id.* In 1937, the FRCP were endorsed by the U.S. Supreme Court. *See id.* The following year, Congress also endorsed them and the FRCP were given legal effect on September 16, 1938. *See id.*

[2] FED. R. CIV. P. 11.

[3] *See* Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 171 (1994) (explaining that the Rule 11 amendments attempted to resolve problems that arose from the implementation of the rule). The 1938 version of Rule 11 stated, in relevant part, that "[i]f a pleading is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false . . . . For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action." 5A WRIGHT ET AL., *supra* note 1, § 1331 (quoting FED. R. CIV. P. 11 (1938)). Rule 11 was first amended in 1983 and again in 1993. *See* Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 VAL. U. L. REV. 67, 67 (1997). Disagreement over how to best implement sanctions without stifling advocacy stems from the history and effect of Rule 11. *See* Edward D. Cavanagh, *Mandating Rule 11 Sanctions? Here We Go*

tion, and other paper" be signed by an attorney.[4] Under Rule 11, a motion for sanctions must be submitted separately from other motions and must describe the alleged wrong conduct.[5] Finally, before a Rule 11 motion is filed with the court, the aggrieved party must serve the motion to the opposing party and allow the opposing party twenty-one days to alleviate the alleged offending matter.[6] If the party served with a Rule 11 motion resolves the matter within twenty-one days, the moving party cannot submit the motion to the court.[7] Because this provision allows an offending party to take corrective action before the matter goes to the court, it has been referred to as the "warning-shot/safe-harbor" provision.[8] Each U.S. Court of Appeals except for the Seventh Circuit requires that parties strictly adhere to the requirements under Rule 11.[9] In contrast, the Seventh Circuit has espoused a more liberal approach, requiring only that parties substantially comply with the Rule 11 requirements.[10]

In March 2017, in *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.* ("*NITEL III*"), the U.S. Court of Appeals for the Seventh Circuit held that the defendant's settlement demands fell short of substantial compliance with Rule 11 and thus did not satisfy the warning-shot/safe-harbor requirements of the rule.[11] The defendants believed that their settlement letters, which contained threats to seek Rule 11 sanctions, substantially complied with Rule 11 and

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Again!, 74 WASH. & LEE L. REV. ONLINE 31, 34 (2017), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1081&context=wlulr-online [https://perma.cc/NC29-LZK5] (arguing that a bill in the House of Representatives that would essentially restore Rule 11 to its 1983 version is a "bad idea"); Sandra Davidson, *FRCP 11: A Wounded Remedy for Unethical Behavior*, 62 J. MO. B. 16, 17 (2006) (questioning whether the current Rule 11 is too liberal).

[4] FED. R. CIV. P. 11(a). Requiring the attorney's signature ensures that the information presented in pleadings, motions, and other papers was gathered by a reasonable inquiry and in good faith. *See* FED. R. CIV. P. 11(b). The court may impose Rule 11 sanctions if the court determines that a party did not conduct a reasonable inquiry and act in good faith. *See* FED. R. CIV. P. 11(c)(1).

[5] FED. R. CIV. P. 11(c)(2).

[6] *See id.* (providing that Rule 11 motions must be served pursuant to FRCP Rule 5, and cannot be filed with the court within twenty-one days after service, which allows time for the offending matter to be resolved). Rule 5 of the FRCP provides in part that it is permissible to serve the opposing party by giving the papers to them in person, leaving the papers with someone at their office, or mailing the papers to them. *See* FED. R. CIV. P. 5(b)(2).

[7] *See* FED. R. CIV. P. 11(c)(2); N. Ill. Telecom, Inc. v. PNC Bank, N.A. (*NITEL III*), 850 F.3d 880, 882 (7th Cir. 2017) (describing the requisite twenty-one-day period as the warning-shot/safe-harbor requirement).

[8] *See NITEL III*, 850 F.3d at 882 ("[T]he party seeking sanctions must fire a warning shot that gives the opponent time to find a safe harbor.").

[9] *See NITEL III*, 850 F.3d at 887 (stating that only the Seventh Circuit allows for substantial compliance with the Rule 11 requirements to be sufficient); Penn, LLC v. Prosper Bus. Dev. Corp., 773 F.3d 764, 768 (6th Cir. 2014) (noting that the Seventh Circuit's approach has not been adopted by any other circuit).

[10] *See NITEL III*, 850 F.3d at 888 (reaffirming that Seventh Circuit precedent allows for substantial compliance with Rule 11).

[11] *See id.* at 882 (holding that the defendants did not substantially comply with Rule 11).

would effectively be substituted for Rule 11 sanction motions.[12] In *NITEL III*, the Seventh Circuit reaffirmed its position as the only circuit to allow substantial compliance with Rule 11 rather than require a strict adherence approach.[13] The substantial compliance approach, however, can lead to confusion for parties involved in litigation and runs counter to the clear-cut strict adherence approach adopted by the other circuits.[14]

This Comment argues that because the Seventh Circuit's analysis is contrary to both the plain language of Rule 11 and the policy goals the rule was meant to advance, the Seventh Circuit should instead require strict adherence with Rule 11.[15] Part I of this Comment examines the history and practical procedure of Rule 11 and provides the facts and procedural background of *NITEL III*.[16] Part II of this Comment addresses the Seventh Circuit's approach to Rule 11 and contrasts it with how other circuits interpret Rule 11.[17] Part III of this Comment argues that the Seventh Circuit should adopt a strict adherence approach to Rule 11 due to the rule's plain language and underlying policy.[18]

I. How We Got Here: The History of Rule 11 and *NITEL III*

Rule 11 sets forth guidelines for when and how courts can impose sanctions against attorneys.[19] The main purpose of Rule 11 is to act as a deterrent in preventing frivolous litigation.[20] This purpose, however, must be balanced with the reality that parties may bring fewer actions and convey less creative arguments out of fear of being sanctioned.[21] Over a sixty-four-year period, the Advisory Committee on the FRCP has amended Rule 11 twice in an attempt to reach its goal of successfully deterring frivolous litigation without also pre-

[12] *See id.* at 888 ("The Rule 11 threats did not transform PNC Bank's settlement offers into communications that substantially complied with Rule 11(c)(2) warning-shot/safe-harbor requirements").

[13] *See id.* at 887–88. Although the Seventh Circuit ultimately decided *NITEL III* without revisiting the substantial compliance approach, the court intimated en banc or U.S. Supreme Court review could be in the future. *See id.* at 888 n.5.

[14] *See id.* at 887–88 (stating that a substantial compliance approach to Rule 11 is difficult to reconcile with the requirements of the rule). Much of the court's opinion in *NITEL III* is spent criticizing the substantial compliance approach, despite the fact that the court ultimately declined to overrule its precedent. *See id.*

[15] *See infra* notes 19–154 and accompanying text.

[16] *See infra* notes 19–71 and accompanying text.

[17] *See infra* notes 72–120 and accompanying text.

[18] *See infra* notes 121–154 and accompanying text.

[19] *See* Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943, 946–47 (1992) (explaining that Rule 11 gives the court authority to apply sanctions).

[20] *See* Cavanagh, *supra* note 3, at 33 (clarifying that Rule 11 sanctions should be applied as a deterrent).

[21] *See* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 Val. U. L. Rev. 1, 2 (2002) (noting that the "Rule 11 sanctions chilled creative advocacy by deterring [parties] from filing meritorious claims in federal court").

venting parties from formulating innovative arguments.[22] Section A of this Part provides a brief historical outline of the evolution of Rule 11.[23] Section B of this Part provides an outline of how parties can bring a Rule 11 motion for sanctions.[24] Section C of this Part discusses the facts and procedural history of *NITEL III*, which concerns the Seventh Circuit's interpretation of Rule 11's requirements.[25]

A. A Historical Overview of Rule 11

Rule 11 was originally drafted by the Advisory Committee to deter frivolous litigation.[26] The original drafting of Rule 11 provided that sanctions were discretionary, and thus Rule 11 sanctions were rarely invoked.[27] The original 1938 version of Rule 11 permitted district courts to use a subjective standard to impose sanctions against a party who willfully violated the rule or if the pleading was a "sham."[28] The collective reluctance of courts to impose sanctions under this standard, however, rendered Rule 11 ineffective at deterring litigation abuse and eventually led to an amendment of Rule 11 in 1983.[29]

The 1983 modification adopted an objective reasonableness standard for determining violations and required the court to impose Rule 11 sanctions

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[22] *See* Hart, *supra* note 21, at 2–3 (arguing that the intended effects of Rule 11 have not been realized); Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 40–43 (1993) (outlining the goals that the 1993 amendment was intended to achieve).

[23] *See infra* notes 26–39 and accompanying text.

[24] *See infra* notes 40–54 and accompanying text.

[25] *See infra* notes 55–71 and accompanying text.

[26] *See* Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1562–63 (2001) (explaining that Rule 11's potential imposition of sanctions acts as a deterrence tool).

[27] *See id.* at 1565; D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34–35 (1976) (revealing that between 1938 and 1976, Rule 11 was only reportedly used twenty-three times). The rule was discretionary because it merely allowed, rather than required, courts to impose sanctions for willful violations. *See* 5A WRIGHT ET AL., *supra* note 1, § 1331 (quoting FED. R. CIV. P. 11 (1938)). Courts were hesitant to sanction lawyers because the rule focused on willful violations and whether the pleading had support to the best of the lawyer's knowledge, both of which were, and still are, difficult for courts to determine. *See* Marshall et al., *supra* note 19, at 947–48. Further, when Rule 11 was first adopted, there was also confusion over when the rule could be applied and the appropriate triggers. *See* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988).

[28] *See* Annette M. Wilson, *Rule 11 Sanctions Revisited:* Townsend v. Holman Consulting Corporation, 22 GOLDEN GATE U. L. REV. 45, 49–52 (1992) (providing an overview of the 1938 version of Rule 11).

[29] *See* Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1009 (1999) (opining that Rule 11 was not effective because of confusion regarding, among other things, the availability of the rule and the standard of conduct to which attorneys would be held). The Advisory Committee Notes specify that the primary reason for the amendment was to reduce the reluctance of courts to impose sanctions. *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

when a violation occurred.[30] The 1983 amendment caused an "explosion of satellite litigation," with parties using the threat of Rule 11 sanctions as a litigation tool.[31] Many commentators believed that the threat of Rule 11 sanctions deterred the formulation of innovative arguments by preventing attorneys from pursuing novel, yet worthy, claims due to fear of sanctions.[32] In 1990, in response to substantial criticism, the Advisory Committee requested public comment regarding how to amend Rule 11.[33] After several hearings and preliminary drafts, the U.S. Supreme Court submitted the second Rule 11 amendment to Congress in 1993.[34]

The 1993 amendment made numerous changes to Rule 11.[35] The amendment clarified that the only ways to bring a Rule 11 sanctions request were either by the court on its own initiative or by a motion by the aggrieved party.[36] A Rule 11 motion for sanctions must be filed separately from other motions and requests and must describe the specific conduct alleged to violate Rule 11.[37] The Rule 11 motion for sanctions cannot be filed with the court, however, if the challenged claim is either withdrawn or appropriately corrected within twenty-one days of serving the motion to the opposing party pursuant to the warning-shot/safe-harbor provision.[38] Further, Rule 11's current form does

[30] *See* Brown, *supra* note 26, at 1567. This change required judges to inquire into what the attorney *should have known*, not what the attorney *actually knew*. *See* Marshall et al., *supra* note 19, at 948–49; Herbert Kritzer et. al., *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269, 269 (1992).

[31] *See* Brown, *supra* note 26, at 1567 & n.39 (explaining that parties used Rule 11 sanction threats as a litigation tactic, even when the pleading was not frivolous, to scare the opposing party from continuing litigation). Satellite litigation consists of ancillary proceedings that are related to the original litigation, but stand on their own ground. *See* William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985). Over seven thousand published opinions discussed Rule 11 sanctions during the ten-year period between the 1983 and 1993 amendments. *See* Brown, *supra* note 26, at 1568. Further, evidence suggests that plaintiffs were far more likely than defendants to be recipients of Rule 11 motions. *See id.*; Hart, *supra* note 21, at 13.

[32] *See* Brown, *supra* note 26, at 1569 (arguing that the 1983 Rule 11 amendment was an overcorrection); Hart, *supra* note 21, at 11 (asserting that Rule 11 suppressed the development of the common law because it constrained creative lawyering due to fear of being sanctioned); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 484 (1991) (asserting that a statistical analysis shows that Rule 11 "'chills' vigorous advocacy").

[33] *See* Hirt, *supra* note 29, at 1011. The majority of the responses criticized the mandatory sanctions imposed by the 1983 amendment to Rule 11. *See* Carl Tobias, *supra* note 3, at 179.

[34] *See* Tobias, *supra* note 3, at 176, 177, 186.

[35] *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (stating that the purpose of the amendment was to "remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule"); Hart, *supra* note 21, at 27.

[36] *See* Hart, *supra* note 21, at 27.

[37] FED. R. CIV. P. 11(c)(2).

[38] *See id.* (providing a twenty-one day safe-harbor for parties prior to filing a Rule 11 motion for sanctions with the court).

away with mandatory sanctions, thereby reinstituting judges' discretion in applying sanctions.[39]

B. Filing a Rule 11 Motion

Rule 11 provides the necessary process to bring a successful motion for sanctions.[40] The rule requires attorneys to sign every pleading, written motion, or other paper presented to the court.[41] The signature certifies that, to the best of the attorney's knowledge, they conducted a reasonable inquiry to determine the validity of their asserted claims.[42] This certification ensures that the items being presented to the court are not being brought for an improper purpose.[43] Thus, a Rule 11 motion for sanctions can only be brought if a party believes that the opposing counsel did not conduct a reasonable inquiry when asserting a claim or that the claim was brought for an improper purpose.[44]

If a party believes that the opposing litigants violated one of the provisions of Rule 11(b), they can begin the process of requesting sanctions.[45] The allegedly aggrieved party must initiate a separate motion describing the wrongful conduct and must serve the motion to the allegedly offending party pursuant to Rule 5 of the FRCP.[46] The allegedly aggrieved party, however, cannot file the motion to the court for twenty-one days.[47] The purpose of this twenty-one day period is to allow the allegedly offending party to correct the claims

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[39] *See* FED. R. CIV. P. 11(c)(1) (providing the court "may impose" sanctions for Rule 11 violations). The removal of mandatory sanctions has received mixed reactions. *See* Cavanagh, *supra* note 3, at 34–35 (opining that mandatory sanctions are detrimental to litigation and that there is no factual basis for assuming mandatory sanctions deter frivolous lawsuits); Tobias, *supra* note 3, at 186 (describing the dissent to the 1993 amendment by U.S. Supreme Court Justices Scalia and Thomas that argued that without mandatory sanctions, Rule 11 would become "toothless").

[40] *See* FED. R. CIV. P. 11(c)(2) (explaining how a party can bring a Rule 11 motion for sanctions).

[41] *See* FED. R. CIV. P. 11(a) (explaining that any paper presented to the court must be certified). Individuals without representation must personally sign the paper. *See id.*

[42] *See* FED. R. CIV. P. 11(b) (stating that all papers submitted to the court must be done so only after a reasonable inquiry that certifies the claims are not frivolous).

[43] *See* Douglas J. Pepe, *Persuading Courts to Impose Sanction*s, AM. B. ASS'N (2010), https://apps.americanbar.org/litigation/litigationnews/trial_skills/080310-tips-federal-sanctions-law.html [https://perma.cc/TBZ9-YX4F] (stating that papers cannot be brought for an improper purpose).

[44] *See id.* (explaining that the act of presenting documents to the court certifies that a reasonable inquiry was made and the documents are not being brought for an improper purpose).

[45] *See* Sam Glover, *Dealing with Rule 11 Threats and Motions*, LAWYERIST.COM (Mar. 16, 2014), https://lawyerist.com/dealing-with-rule-11-threats-and-motions/ [https://perma.cc/N8CV-H56K] (explaining the difference between threatening to seek sanctions and actually serving a motion for sanctions).

[46] FED. R. CIV. P. 11(c)(2). A separate motion is required to stress the seriousness of the action. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

[47] FED. R. CIV. P. 11(c)(2).

prior to the imposition of sanctions.[48] The motion can only be submitted to the court once this twenty-one day safe-harbor period has passed and the offending matter has not been resolved.[49] If the court determines a Rule 11(b) violation occurred and sanctions are warranted, the court will hold the law firm and the attorney jointly and severally liable for the damages.[50]

The court also has the authority to impose sanctions on its own accord.[51] The court can order a party to show why a specific claim or action did not violate one of the substantive provisions of Rule 11.[52] Further, sanctions are not limited to strictly monetary punishments; the court has the discretion to determine the precise nature of the sanction.[53] Finally, Rule 11 sanctions should only be imposed as a deterrence and only to the extent necessary to prevent recurrence of the conduct.[54]

C. Facts and Procedural History of NITEL III

In 2007, a corporation known as Nexxtworks, Inc. ("Nexxtworks") was hired to upgrade the communications facilities of two banking institutions in the Chicago area.[55] Upon receiving the contract, Nexxtworks subcontracted Northern Illinois Telecom, Inc. ("NITEL") to perform the data and telephone installations.[56] NITEL performed the work, but alleged that it did not receive its full payment of $81,300 from Nexxtworks.[57] Soon after, Nexxtworks filed for bankruptcy and PNC Bank, N.A. ("PNC") bought the original banks where NITEL performed the work.[58] In 2012, after NITEL failed to recover the

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[48] *See* Marguerite L. Butler, *Rule 11—Sanctions and a Lawyer's Failure to Conduct Competent Legal Research*, 29 CAP. U. L. REV. 681, 701 n.111 (2002) (explaining that the twenty-one-day period provides a safe-harbor for parties to correct the offending matter without repercussions).

[49] *See NITEL III*, 850 F.3d at 882 ("To mix naval metaphors, the party seeking sanctions must fire a warning shot that gives the opponent time to find a safe harbor.").

[50] FED. R. CIV. P. 11(c)(1).

[51] FED. R. CIV. P. 11(c)(3).

[52] *Id.*

[53] *See* JEROLD S. SOLOVY ET AL., SANCTIONS UNDER RULE 11, at 136 (Jenner & Block Practice Series 2010) (explaining that the nature of the sanction is generally left up to the courts).

[54] *See* C. William Phillips, *The Law and Tactics of Sanctions*, *in* BUREAU OF NAT'L AFFAIRS, LEGAL ETHICS FOR IN-HOUSE CORPORATE COUNSEL, at A-87 (Corporate Practice Series 2007) (explaining that the focus of sanctions shifted from compensation to deterrence via the 1993 amendments).

[55] *See* N. Ill. Telecom, Inc. v. PNC Bank, NA (*NITEL I*), No. 12C2372, 2014 WL 4244069, at *1 (N.D. Ill. Aug. 27, 2014) (explaining that Nexxtworks, Inc. ("Nexxtworks") was subcontracted by Northern Illinois Telecom, Inc. ("NITEL") to install data and telephone cabling in a pair of Chicago banks).

[56] *See id.* By 2012, the two banks being upgraded were acquired by PNC Bank, N.A. ("PNC"). *See NITEL III*, 850 F.3d at 882.

[57] *See NITEL III*, 850 F.3d at 882. In 2009, before the dispute was resolved, Nexxtworks filed for bankruptcy. *See id.*

[58] *See id.* (explaining that NITEL's bankruptcy claim was disallowed because they did not timely file a proof of claim).

amount it was owed during Nexxtworks's bankruptcy proceedings, NITEL filed a breach of contract lawsuit against PNC.[59]

At the onset of litigation, PNC attempted to settle the case via a letter sent to NITEL in which PNC provided NITEL eight days to dismiss the suit and pay for PNC's fees and costs.[60] The letter asserted that there was no contract between PNC and NITEL, provided NITEL five days to respond, and warned that PNC would seek Rule 11 sanctions if NITEL failed to abide by the terms of the offer.[61] NITEL did not respond to PNC's letter and discovery subsequently began.[62] After discovery, PNC's lawyers sent a second settlement offer asserting NITEL's suit was frivolous.[63] The second letter asked for a written acceptance of the terms within six days and repeated that PNC would seek Rule 11 sanctions if NITEL did not agree because NITEL did not have a legitimate contract with PNC.[64] NITEL still refused to concede, prompting PNC to move for summary judgment.[65] In August 2014, in *Northern Illinois Telecom, Inc. v. PNC Bank, NA* ("*NITEL I*"), the U.S. District Court for the Northern District of Illinois granted PNC's motion for summary judgment on the grounds that NITEL failed to submit any evidence establishing a valid contract between the parties.[66]

Upon receiving summary judgment, PNC filed a motion in the Northern District of Illinois seeking sanctions against NITEL under Rule 11.[67] In April 2015, in *Northern Illinois Telecom, Inc. v. PNC Bank, NA* ("*NITEL II*"), the Northern District of Illinois upheld PNC's Rule 11 motion because PNC's two letters substantially complied with the warning-shot/safe-harbor requirements of Rule 11(c)(2).[68] The court further concluded that sanctions were justified

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[59] *See id.* (explaining that NITEL asked for $81,300, plus fees and costs).

[60] *See id.* at 888. The letter explained that there was no contract between PNC and NITEL. *See NITEL I*, 2014 WL 4244069, at *4. The letter asked for $9,195 for PNC's fees and costs. *See NITEL III*, 850 F.3d at 888.

[61] *See NITEL III*, 850 F.3d at 888 (explaining the terms of the settlement demand letter).

[62] *See* N. Ill. Telecom, Inc. v. PNC Bank, NA (*NITEL II*), No. 12 C 2372, 2015 WL 1943271, at *1 (N.D. Ill. Apr. 29, 2015), *rev'd* 850 F.3d 880 (7th Cir. 2017). During discovery, PNC continued to assert that there was no contract between PNC and NITEL and that, accordingly, the lawsuit was frivolous. *See id.* at *2.

[63] *See NITEL III*, 850 F.3d at 888. PNC demanded NITEL dismiss its lawsuit and pay $24,000 for PNC's costs. *See id.*

[64] *See id.* (describing PNC's second settlement demand letter).

[65] *See id.* at 882 (explaining that PNC removed the case to Federal jurisdiction prior to moving for summary judgement).

[66] *See NITEL I*, 2014 WL 4244069, at *5. The court agreed with PNC, finding that NITEL's contract was with Nexxtworks. *See id.* at *4.

[67] *See NITEL II*, 2015 WL 1943271, at *3 (holding that sanctions were justified because NITEL's claims had been "baseless").

[68] *See id.* at *4. In its analysis, the court noted that Seventh Circuit precedent allows for substantial compliance with Rule 11 because strict adherence may not be possible. *See id.* The court reasoned that both of PNC's letters were warning-shots, and because NITEL did not respond during litigation, NITEL could not be afforded another opportunity to correct the claims. *See id.*

under Rule 11 and awarded PNC attorney fees and costs incurred in defending against NITEL's claims.[69] The sanctions were imposed jointly and severally against NITEL and its attorney, Robert G. Riffner.[70] Consequently, NITEL and Riffner appealed the imposition of sanctions to the Seventh Circuit.[71]

II. Different Strokes for Different Folks: Approaches to Rule 11

Although the U.S. Court of Appeals for the Seventh Circuit has held that substantial compliance with Rule 11 satisfies the requirements of the rule, most other circuits require strict adherence.[72] Moreover, the plain language of Rule 11 and the Advisory Committee Notes suggest that strict adherence is required so that the underlying policy goals of Rule 11 are fulfilled.[73] Section A of this Part analyzes the Seventh Circuit's substantial compliance precedent.[74] Section B of this Part examines the Seventh Circuit's 2017 decision in *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.* ("*NITEL III*").[75] Section C of this Part compares the Seventh Circuit's substantial compliance approach with the strict adherence approach adopted by other circuits.[76]

A. The Seventh Circuit's Substantial Compliance Approach

In June 2003, in *Nisenbaum v. Milwaukee County*, the Seventh Circuit first adopted the substantial compliance approach to Rule 11.[77] In *Nisenbaum*, the defendants sent a letter, as opposed to a motion, outlining the defects in the plaintiffs' claims and provided the plaintiffs more than twenty-one days to alleviate the offending matter.[78] The Seventh Circuit held that the motion was

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[69] *See id.* at *4, *5; *see also NITEL III*, 850 F.3d at 882. The court agreed with PNC's assertions, holding that NITEL knew Nexxtworks, and not PNC, was contractually obligated to pay for NITEL's work. *See NITEL II*, 2015 WL 1943271, at *5, 7.

[70] *See NITEL II*, 2015 WL 1943271, at *9. The sanction amount was $84,325. *See NITEL III*, 850 F.3d at 883. Under Rule 11(c)(1), a court may impose sanctions jointly and severally on attorneys, law firms, and parties who violate the rule. FED. R. CIV. P. 11(c)(1).

[71] *See NITEL III*, 850 F.3d at 883. Because NITEL was eventually dismissed as an appellant, the Seventh Circuit heard only Riffner's appeal. *See id.*

[72] *See* N. Ill. Telecom, Inc. v. PNC Bank, N.A. (*NITEL III*), 850 F.3d 880, 887 (7th Cir. 2017) (asserting that the U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have all explicitly rejected the substantial compliance approach used in the Seventh Circuit). Only the Seventh Circuit allows for substantial compliance and not strict adherence with Rule 11's requirements. *See* Penn, LLC v. Prosper Bus. Dev. Corp., 773 F.3d 764, 768 (6th Cir. 2014).

[73] *See* FED. R. CIV. P. 11(c)(2); FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

[74] *See infra* notes 77–86 and accompanying text.

[75] *See infra* notes 87–108 and accompanying text.

[76] *See infra* notes 109–120 and accompanying text.

[77] *See* Nisenbaum v. Milwaukee Cty., 333 F.3d 804, 808 (7th Cir. 2003) (holding that substantially complying with Rule 11 qualified the parties to a decision on the merits of the motion).

[78] *See id.* The magistrate judge stated that the defendants failed to comply with the technical requirements of Rule 11 because they sent a "letter" or "demand" rather than "motion." *Id.* The Seventh

only a technical requirement and that the letter satisfied the purpose of Rule 11.[79] Thus, in effect, the letter served the same function as a motion.[80] Because the defendant's letter explained the grounds for sanctions and provided more than twenty-one days to remedy the problem, the court reasoned the letter satisfied the intent of Rule 11 and proceeded to decide whether sanctions were warranted on the merits of the case.[81]

The Seventh Circuit further clarified the substantial compliance requirement in 2011, in *Matrix IV, Inc. v. American National Bank and Trading Co. of Chicago* ("*Matrix IV*").[82] In *Matrix IV*, the defendants sent the plaintiffs a letter asserting they would seek sanctions if the plaintiffs did not dismiss their lawsuit.[83] The letter was sent two weeks after the initial complaint was filed and outlined the basis for sanctions.[84] Upon dismissal of the case two years later, the defendants filed for Rule 11 sanctions.[85] Following the precedent set forth in *Nisenbaum*, the Seventh Circuit held that the letter substantially complied with the warning-shot/safe-harbor requirement.[86]

B. The Seventh Circuit's Approach to NITEL III

In March 2017, in *Northern Illinois Telecom, Inc. v. PNC Bank, NA* ("*NITEL III*"), the Seventh Circuit reversed the district court's award of sanctions.[87]

Circuit disagreed, stating that the magistrate judge should have heard the defendant's request for Rule 11 sanctions and ultimately held that the defendants substantially complied with Rule 11 and thus deserved a decision on the merits. *See id.* at 811; *see also NITEL III*, 850 F.3d at 887.

[79] *See Nisenbaum*, 333 F.3d at 808 (explaining that because the "defendants alerted Nisenbaum to the problem and gave him more than [twenty-one] days to desist," the defendants substantially complied with Rule 11).

[80] *See NITEL III*, 850 F.3d at 887 (noting that the requirement of a formal motion is "unduly formalistic"); *Nisenbaum*, 333 F.3d at 808.

[81] *See NITEL III*, 850 F.3d at 887; *Nisenbaum*, 333 F.3d at 808 (holding that the defendants substantially complied with Rule 11).

[82] *See* Matrix IV, Inc. v. Am. Nat. Bank & Tr. Co. of Chi. (*Matrix IV*), 649 F.3d 539, 552–53 (7th Cir. 2011).

[83] *See id.* (explaining the details of the defendant's letter).

[84] *See id.* at 552 & n.5 (implying, in the letter, that a final judgment in a preceding bankruptcy matter precluded the plaintiffs' claim and warning that the defendants would seek Rule 11 sanctions if the opposing party did not voluntarily dismiss its claims).

[85] *See id.* The Seventh Circuit first addressed the timing of the request, holding that parties had ninety days after final judgment to seek Rule 11 sanctions. *See id.* at 552–53. In this case, the defendants filed twenty-three days after final judgment. *See id.* at 553.

[86] *See id.* at 552–53. The court held that, following *Nisenbaum*, a letter that outlines the basis for sanctions and notifies the opposing party of their intent to seek sanctions substantially complies with Rule 11. *See id.* The warning-shot/safe-harbor requirement gives the offending party a twenty-one-day period to withdraw or correct the offending matter. *See id.* at 553. Ultimately, however, the court found that although the defendant's letter satisfied the requirements of Rule 11, sanctions were unjustified on the merits. *See id.*

[87] *See NITEL III*, 850 F.3d at 882. The District Court for the Northern District of Illinois held that Seventh Circuit precedent allows for substantial compliance with Rule 11, and the two letters PNC sent NITEL constituted warning-shots that afforded NITEL more than twenty-one days to correct the

In *NITEL III*, the Seventh Circuit affirmed that substantial compliance with Rule 11 remains controlling law within the circuit, but stated that PNC's letters did not meet the liberal standard.[88] In explaining its decision, the Seventh Circuit held that merely sending a letter that threatens to seek Rule 11 sanctions does not substantially comply with Rule 11.[89]

The court specified that the letters PNC sent NITEL did not allow for a twenty-one day period to remedy the problems.[90] When PNC Bank sent NITEL's attorney, Robert G. Riffner, a settlement demand prior to discovery, they outlined the defects of the allegedly frivolous claim and threatened to seek sanctions if Riffner did not dismiss his suit within eight days.[91] Similarly, PNC's second settlement demand letter threatened to seek sanctions if Riffner did not acquiesce to the settlement demands within six days.[92] The court reasoned that both of the settlement demand letters did not provide Riffner the twenty-one day safe-harbor period required by Rule 11 because they demanded acceptance of the settlement offer within five and six days respectively.[93] The court held that this time period was inadequate and distinguished this situation from Seventh Circuit precedent in which the letters threatening to seek sanctions did provide a twenty-one day safe-harbor period.[94] Instead, the court determined that PNC was using the letters as leverage and that the letters were not sufficient to replace the warning-shot/safe-harbor requirements of Rule 11.[95] Without allowing the twenty-one day safe-harbor period, the settlement

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problems. *See* N. Ill. Telecom, Inc. v. PNC Bank, NA (*NITEL II*), No. 12 C 2372, 2015 WL 1943271, at *4 (N.D. Ill. Apr. 29, 2015), *rev'd* 850 F.3d 880 (7th Cir. 2017). Thus, according to the district court, PNC substantially complied with Rule 11 and deserved a decision on the merits. *See id.* at *8. The Seventh Circuit reversed the district court on a procedural basis, however, holding that the letters did not substantially comply with Rule 11. *See NITEL III*, 850 F.3d at 883.

[88] *See NITEL III*, 850 F.3d at 888 (declaring that due to the fact that PNC's letters did not substantially comply with Rule 11, the court did not need to revisit whether the theory can ever satisfy the warning-shot/safe-harbor requirements of Rule 11 at that moment).

[89] *See id.* at 888–89 ("PNC Bank was entitled, if it chose, to huff and puff about Rule 11 in its settlement demands . . . . [b]ut its posturing did not amount even to substantial compliance . . . .").

[90] *See id.* at 888 (stating that substantial compliance requires a twenty-one-day window to withdraw the offending matter, which PNC failed to provide). Although PNC didn't *actually* file for sanctions within twenty-one days of sending either of their two letters, PNC only provided NITEL five days and six days to respond to the letters. *See id.*

[91] *See id.* (explaining that the settlement demand requested a written reply accepting the terms within five days, and allowed eight days for Riffner to dismiss the lawsuit). The court assumed that the letter adequately explained the defects of the claim, and thus did not review if this complied with Rule 11's requirement that motions for sanctions must explain why the claims in question are frivolous. *See id.*

[92] *See id.* (explaining that PNC's second settlement demand letter demanded Riffner dismiss the lawsuit within five days, and if he did not comply, they would seek Rule 11 sanctions).

[93] *See id.* (holding that the settlement demand letters did not substantially comply with Rule 11).

[94] *See id.* ("[T]he letters simply did not offer NITEL or Riffner the [twenty-one] day safe harbor that was offered in *Nisenbaum* or *Matrix IV*.").

[95] *See id.* at 888–89 (explaining that the letters did not substantially comply with Rule 11 because they did not afford NITEL a twenty-one-day safe-harbor).

demand letters merely amounted to posturing that did not substantially comply with Rule 11's requirements.[96]

In *NITEL III*, the Seventh Circuit acknowledged problems with the substantial compliance theory, but ultimately determined that it did not need to revisit its approach.[97] Notably, the court stated that the substantial compliance approach was incompatible with the explicit requirements of Rule 11 and the approach ran counter to the Advisory Committee Notes.[98] Rule 11 requires that a motion for sanctions must be made separately from other motions.[99] The Advisory Committee Notes further clarify that a separate motion stresses the seriousness of the action and provides a concrete window for the twenty-one day safe-harbor period.[100] In effect, the Seventh Circuit dispensed with this requirement by allowing informal letters to be sufficient.[101]

The court also detailed other circuits' approaches to the warning-shot/safe-harbor requirements of Rule 11, but chose not to consider or apply those approaches to the issue in *NITEL III*.[102] The court did not reject the other circuits approach; indeed, a substantial portion of the court's decision was spent explaining that a strict adherence approach to Rule 11 is the only approach that was reconcilable with the plain language of the rule.[103] Instead, the court determined it did not need to revisit its substantial compliance approach in this case because PNC did not even meet the generous substantial compliance standard.[104]

The dissent, written by Judge Posner, did not attempt to reconcile the substantial compliance approach with Rule 11's requirements.[105] He acknowledged that circuit precedent allows for substantial compliance and thus limited his dissent to whether the facts of *NITEL III* sufficiently adhere to the circuit's

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[96] *See id.* at 888 (implying that without allowing for the twenty-one-day safe-harbor, PNC was simply threatening to seek Rule 11 sanctions).

[97] *See id.* at 887–88 (outlining the deficiencies of the substantial compliance approach).

[98] *See* FED. R. CIV. P. 11; *NITEL III*, 850 F.3d at 887; *see also* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

[99] *See* FED. R. CIV. P. 11(c)(2) ("A motion for sanctions must be made separately from any other motion . . . .").

[100] *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (explaining that Rule 11 motions for sanctions are serious threats). The Advisory Committee Notes explain that, generally, counsel should give an informal notice of their intent to seek sanctions prior to formally serving a Rule 11 motion. *See id.*

[101] *See NITEL III*, 850 F.3d at 887 ("Insisting on a formal motion seem[s] unduly formalistic.").

[102] *See id.* at 887–88 (explaining how other circuits approach Rule 11 motions).

[103] *See id.* (explaining that the substantial compliance approach to Rule 11 does not account for the explicit requirements of the rule).

[104] *See id.* at 888 (stating that Riffner did not meet the generous requirements of the Seventh Circuit's substantial compliance approach).

[105] *See id.* at 889 (remaining silent as to whether substantial compliance is appropriate for Rule 11 motions for sanctions).

allowable approach.[106] In light of circuit precedent, Judge Posner believed that the facts of *NITEL III* amounted to PNC substantially complying with Rule 11.[107] He concluded that PNC Bank's settlement demand letters were analogous to Rule 11 motions for sanctions because they provided Riffner the opportunity to correct his allegedly frivolous claims.[108]

C. Other Circuit Approaches to Rule 11

In its analysis, the Seventh Circuit recognized that its sister circuits have been critical of the substantial compliance approach to Rule 11.[109] For example, in 2014, in *Penn, LLC v. Prosper Business Development Corp.*, the Sixth Circuit reviewed the circuit split and adopted a strict adherence approach to Rule 11.[110] A strict adherence approach to Rule 11 requires parties to follow the plain language of Rule 11 and satisfy all the requirements of Rule 11.[111] In its analysis, the Sixth Circuit held that an informal warning was not a substitute for a motion because an informal warning undermined the seriousness of a motion for sanctions.[112] Further, the court noted that the Seventh Circuit's substantial compliance approach contravened Rule 11's plain language.[113]

In 2006, in *Roth v. Green*, the Tenth Circuit was even more critical of the Seventh Circuit's approach.[114] In *Roth*, the Tenth Circuit noted that Rule 11(c)(1)(A) required the aggrieved party to serve the offending party with a motion, not a letter.[115] The court recognized that the Advisory Committee Notes explicitly required a formal motion, stating that warning letters did not replace formal motions.[116] The Tenth Circuit went on to state that the Seventh

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[106] *See id.* (imposing no judgment on the substantial compliance approach).

[107] *Id.* (explaining that PNC provided Riffner with multiple opportunities to correct the allegedly frivolous claims).

[108] *See id.* ("Although PNC did not serve a formal Rule 11 motion on Riffner prior to filing the motion with the court, PNC's letters were the equivalent of Rule 11 motions . . . .").

[109] *See id.* at 887 (acknowledging that substantial compliance with Rule 11 is incompatible with the plain reading Rule 11); s*ee also Penn, LLC*, 773 F.3d at 768 (opining that the Seventh Circuit's decision violates the goals of Rule 11).

[110] *See Penn, LLC*, 773 F.3d at 768 (noting that only the Seventh Circuit has embraced substantial compliance with Rule 11 and that the Seventh Circuit's decision and rationale to do so has been criticized by the Second, Third, Fourth, Fifth, and Eighth Circuits).

[111] *See id.* (holding that the Sixth Circuit requires strict adherence with Rule 11).

[112] *See id.* at 767. The FRCP Advisory Committee Notes echo this sentiment, raising this issue as one of the underlying policy reasons for requiring a formal motion. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

[113] *See Penn, LLC*, 773 F.3d at 767. Rule 11 specifically states "[a] *motion* for sanctions must be made separately from any other motion." FED. R. CIV. P. 11(c)(2) (emphasis added).

[114] *See* Roth v. Green, 466 F.3d 1179, 1191–93 (10th Cir. 2006).

[115] *See id.* at 1191–92 (explaining that the text of Rule 11 is clear that only a separate motion is sufficient).

[116] *See id.*; FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (suggesting that informal notice is nothing more than a courtesy).

Circuit neglected to cite binding authority to advance its position in support of the substantial compliance approach.[117]

The Fifth Circuit, in 2008, in *In re Pratt*, echoed the Tenth Circuit's analysis.[118] In *In re Pratt*, the Fifth Circuit held that it was necessary for parties to fully comply with the requirements of Rule 11 because of the rule's plain language and Fifth Circuit precedent.[119] The Fifth Circuit disagreed with the Seventh Circuit's approach and held that the substantial compliance approach was contrary to Rule 11 and that there was no evidence that congressional intent allowed for mere substantial compliance.[120]

III. Different Is Not Always Better: Why the Seventh Circuit Should Adopt a Strict Adherence Approach to Rule 11

In *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.* ("*NITEL III*"), the U.S. Court of Appeals for the Seventh Circuit declined to reconsider whether the substantial compliance theory to Rule 11 was appropriate.[121] Courts within the circuit, however, have acknowledged that the unique approach to Rule 11 is likely untenable.[122] The Seventh Circuit's rationale underlying the substantial compliance approach is unpersuasive and is irreconcilable with the intent of the Advisory Committee.[123] By maintaining its approach, the Seventh Circuit ignored the plain language and history of Rule 11 and created unnecessary ambiguities for parties involved in Rule 11 litigation.[124] Adopting a strict adherence model would remedy these problems and create uniformity amongst the

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[117] *See Roth*, 466 F.3d at 1193. The *Roth* court stated that the reason a motion is necessary is because the purpose of the safe-harbor provisions was to "'protect[] litigants from sanctions whenever possible in order to mitigate Rule 11's chilling effects, formaliz[e] procedural due process considerations . . . . and encourag[e] the withdrawal of papers that violate the rule without involving the district court . . . .'" *See id.* at 1192 (alteration in original) (quoting 5A Charles Alan Wright et al., Federal Practice and Procedure § 1337.2, at 722 (3d ed. 2004)).

[118] *See In re* Pratt, 524 F.3d 580, 586–88 (5th Cir. 2008) (holding that parties must strictly adhere to the requirements of Rule 11).

[119] *See id.* (holding that informal notice is not sufficient).

[120] *See id.* at 587–88 (concluding that the Seventh Circuit's rationale is unpersuasive).

[121] *See* N. Ill. Telecom, Inc. v. PNC Bank, N.A. (*NITEL III*), 850 F.3d 880, 888 n.5 (7th Cir. 2017) (asserting that reliance on the substantial compliance approach will likely lead to an en banc or U.S. Supreme Court review).

[122] *See* Knapp v. Evgeros, Inc., No. 15 C 754, 2017 U.S. Dist. LEXIS 135510, at *5 (N. D. Ill. Aug. 24, 2017) (stating that the substantial compliance approach is on "life support" and that the Seventh Circuit came "within a cat's whisker of overruling it").

[123] *See NITEL III*, 850 F.3d at 887; Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment.

[124] *See NITEL III*, 850 F.3d at 887 (acknowledging that the substantial compliance approach is flawed).

circuits.[125] Section A of this Part examines the shortcomings of the Seventh Circuit's analysis.[126] Section B of this Part further explains why a strict adherence approach to Rule 11 better addresses the policy concerns that Rule 11 was intended to resolve.[127]

A. Problems with the Seventh Circuit's Analysis

In June 2003, in *Nisenbaum v. Milwaukee County*, the Seventh Circuit held that substantial compliance with Rule 11 is sufficient.[128] In so doing, the Seventh Circuit attempted to prevent formalities from interfering with the purpose of Rule 11.[129] The court provided no analysis, however, for why this approach should supersede a strict adherence approach.[130] Indeed, although the Seventh Circuit recognized that there were legal problems with its approach, the court never attempted to justify its rationale against the other circuits' approaches.[131]

The Seventh Circuit has previously held that the plain language of a statute should be followed unless it would lead to illogical results.[132] In this situation, the text of Rule 11 is unambiguously clear regarding the procedure necessary to sanction a party.[133] The Advisory Committee understood how serious motions for sanctions were and specifically amended Rule 11 to reflect this.[134] They created an unambiguously clear rule with a clear policy that the substan-

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[125] *See* Penn, LLC v. Prosper Bus. Dev. Corp., 773 F.3d 764, 768 (6th Cir. 2014) (noting that the Seventh Circuit is the only circuit to allow substantial compliance, which undermines the underlying policy of Rule 11 and the FRCP in general).

[126] *See infra* notes 128–142 and accompanying text.

[127] *See infra* notes 143–154 and accompanying text.

[128] *See* Nisenbaum v. Milwaukee Cty., 333 F.3d 804, 808 (7th Cir. 2003) (holding that the plaintiff substantially complied with Rule 11 because the plaintiff notified the defendant of the problem via a letter and gave him more than twenty-one days to resolve it).

[129] *See id.* (explaining that technical noncompliance should not bar parties from pursuing sanctions).

[130] *See In re* Pratt, 524 F.3d 580, 587–88 (5th Cir. 2008) (stating that the Seventh Circuit simply asserted that substantial compliance with Rule 11 is sufficient and did not provide any analysis or authority in support of its ruling).

[131] *See NITEL III*, 850 F.3d at 887 (conceding problems with the substantial compliance approach to Rule 11).

[132] *See* Busse v. Comm'r, 479 F.2d 1147, 1151, 1153 (7th Cir. 1973) (holding that a statute's plain language can be overlooked if the result would be irrational and if congressional intent suggests otherwise). This principle has been entrenched in U.S. Supreme Court case law since the nineteenth century. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457, 462 (1892) ("Where the intent is plain, nothing is left to construction.").

[133] *See* FED. R. CIV. P. 11(c)(2) (explicitly stating that a motion for sanctions must be made separately from other motions and must afford the opposing party a twenty-one-day safe-harbor).

[134] *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion.").

tial compliance approach undermines.[135] In light of the fact that sanctions were not used frequently enough under the original implementation of Rule 11, and the 1993 amendments were an overcorrection that caused too many motions for sanctions, the substantial compliance approach is simply inadequate.[136] By inconsistently applying when the plain language of the FRCP should be followed and when it can be disregarded, the Seventh Circuit is sending mixed signals to parties involved in both current and future litigation about how to interpret the FRCP.[137]

Although Judge Posner dissented from this opinion, he did not tackle whether the substantial compliance approach is the appropriate theory for Rule 11 motions.[138] He merely stated that circuit precedent allows for such an approach, and within the facts of *NITEL III*, Riffner substantially complied with the rule.[139] This is a fair assessment of the case, but also demonstrates the inadequacy of practically applying the substantial compliance approach.[140] Without clear guidance as to what constitutes substantial compliance, the rule is left vague and ineffective.[141] This too undermines the policy behind the rule because parties will not know if a letter threatening sanctions is merely a threat or an effective Rule 11 motion for sanctions.[142]

B. Accounting for More: A Strict Adherence Approach Addresses Policy Concerns that the Strict Compliance Approach Ignores

A substantial compliance approach ignores the plain language of the FRCP and the Advisory Committee Notes.[143] In pertinent part, Rule 11 states

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[135] *See* FED. R. CIV. P. 11(c)(2); FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (explaining the policy behind Rule 11).

[136] *See* Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 598 (1998) (explaining how the 1983 amendments led to an abundance of motions for sanctions and eventually led to the 1993 amendments).

[137] *Compare* United States v. Webber, 536 F.3d 584, 593 (7th Cir. 2008) (holding that the plain language of a statute takes precedent), *with* Nisenbaum, 333 F.3d at 808 (holding that a party must merely substantially comply with Rule 11 and does not need to follow its plain language).

[138] *See NITEL III*, 850 F.3d at 889 (Posner, J., dissenting) (stating that the Seventh Circuit allows for substantial compliance, but not defending the court's reasoning or delving into the court's analysis regarding if the approach is appropriate).

[139] *See id.* ("Our court has held that 'substantial compliance' with the rule is sufficient. And this case is a good example of substantial compliance . . . .") (citations omitted).

[140] *See id.* (demonstrating that in practice, it is difficult to determine what constitutes substantial compliance).

[141] *See id.* 888–89 (majority opinion) (showing that parties might assume they have substantially complied with Rule 11, but courts might hold otherwise).

[142] *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (explaining there is a difference between threatening sanctions and actually filing a motion to sanction a party).

[143] *See* FED. R. CIV. P. 11 (stating the requirements for Rule 11); *Penn, LLC*, 773 F.3d at 768 (explaining that the substantial compliance approach is inadequate); FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (providing insight into why Rule 11 was amended). The plain

that a motion for sanctions must be made separately from other motions and must describe the alleged wrongful conduct.[144] The motion must be served to the opposing party, and the moving party must afford the opposing party at least twenty-one days to withdraw or correct the challenged item.[145] The Advisory Committee Notes expand on this, stating that the rule for sanctions requires a separate motion to stress the seriousness of the sanctions.[146] The requirement of serving a motion removes the uncertainty of whether the party is serious about pursuing sanctions.[147] By dispensing with the formal requirements, the Seventh Circuit undermines the underlying policy rationales of Rule 11.[148]

On the other hand, a strict adherence approach to Rule 11 resolves problems that arise with the substantial compliance approach.[149] Although it is true that litigants would be subject to a more rigid set of rules under strict adherence, the litigants would also know with greater certainty whether they are abiding by the rules.[150] *NITEL III* illustrates this problem: due to the ambiguities of what constitutes substantial compliance with Rule 11, the Seventh Circuit has heard several cases questioning its approach, and the issue continues to cause confusion even amongst judges.[151] If there is confusion as to how to

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language of a statute is important because giving judges' discretion to formulate their own laws increases political discourse and encroaches on the responsibilities of the other branches of governments. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 4, 5 (2012). It is a judge's responsibility to apply the law, not create it. *See id.* at 5. Even when interpreting the plain language of a statute, however, the context behind the language is important. *See* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1615 (2014) ("Text, without context, can be radically indeterminate . . . ."). Within the boundaries of Rule 11, it seems that the context of the rule points to a plain language reading. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment (explaining that Rule 11 requires a separate, formal motion).

[144] FED. R. CIV. P. 11(c)(2).

[145] *Id.*

[146] *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment. The Advisory Committee comments that although it is polite for attorneys to give informal notices, they are not meant to replace a formal motion. *See id.*; *see also Penn, LLC*, 773 F.3d at 767; Roth v. Green, 466 F.3d 1179, 1192 (10th Cir. 2006) (declaring that the Advisory Committee did not intend for warning letters to replace motions).

[147] *See* Barber v. Miller, 146 F.3d 707, 710 (9th Cir. 1998) (holding that it runs counter to the language and purpose of Rule 11 to allow informal warnings as substitutes for motions). Even the Seventh Circuit acknowledged that a formal motion is the only way to sufficiently impress the seriousness of the sanctions request. *See NITEL III*, 850 F.3d at 888.

[148] *See* FED. R. CIV. P. 11; *Penn, LLC*, 773 F.3d at 767–68; FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

[149] *See Penn, LLC*, 773 F.3d at 767–68 (implying that a strict adherence approach satisfies the plain language of Rule 11 and sufficiently warns parties of the seriousness of the motion for sanctions).

[150] *See id.* ("[A] letter prompts the recipient to guess at his opponent's seriousness.").

[151] *Compare NITEL III*, 850 F.3d at 886 (concluding that because PNC did not comply with the warning-shot/safe-harbor provision, it did not substantially comply with Rule 11), *with id.* at 889 (Posner, J., dissenting) (concluding that PNC's letters substantially complied with Rule 11 under Seventh Circuit precedent).

comply with Rule 11, it might deter the formulation of innovative arguments, thus having the opposite intended effect of the rule.[152] Further, a strict adherence approach saves judicial resources because a court would not need to undertake an in-depth analysis to see if the facts of a particular case substantially comply with the rule.[153] The FRCP should be administered in a "just, speedy, and inexpensive manner," and this goal can be achieved more efficiently by requiring a strict set of rules. [154]

CONCLUSION

In 2017, in *Northern Illinois Telecom, Inc. v. PNC Bank, NA* ("*NITEL III*"), the U.S. Court of Appeals for the Seventh Circuit declined to revisit its substantial compliance approach to Rule 11. Due to the fact that the court never defined the methodology behind the substantial compliance approach, the court has had to hear numerous cases to carve out its boundaries. *NITEL III* shows how the uncertainty of what may constitute substantial compliance can create confusion to litigators. Further, the substantial compliance approach undermines the policy goals of Rule 11 and ignores the plain language of the rule. A strict adherence approach better serves the function of Rule 11 and is the only method that can be reconciled with the language of the rule. Therefore, the Seventh Circuit should forgo its substantial compliance theory and adopt a strict adherence approach to Rule 11.

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[152] *See* Hart, *supra* note 21, at 2 (stating that one of the reasons Rule 11 was amended was to prevent "chilling creative advocacy").

[153] *See* FED. R. CIV. P. 1.; *NITEL III*, 850 F.3d at 887 (exemplifying the latest case in a long series of cases from the Seventh Circuit concerning substantial compliance).

[154] *See* FED. R. CIV. P. 1.; *Penn, LLC*, 773 F.3d at 768 (suggesting that a strict adherence approach addresses the concerns that Rule 11 set out to resolve in a fairer way).