Attorney Sanctions - Procedural Aspects of Rule 11 of the Federal
Rules of Civil Procedure - Third Circuit Adopts Supervisory Rule
Requiring that Rule 11 Motions Be Filed Prior to Final Judgment in
the District Court

David A. Peckman

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Recommended Citation
Procedure - Third Circuit Adopts Supervisory Rule Requiring that Rule 11 Motions Be Filed Prior to Final
Available at: https://digitalcommons.law.villanova.edu/vlr/vol34/iss3/6
ATTORNEY SANCTIONS—PROCEDURAL ASPECTS OF RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE—THIRD CIRCUIT ADOPTS SUPERVISORY RULE REQUIRING THAT RULE 11 MOTIONS BE FILED PRIOR TO FINAL JUDGMENT IN THE DISTRICT COURT

Mary Ann Pensiero, Inc. v. Lingle (1988)

Rule 11 of the Federal Rules of Civil Procedure mandates sanctions against attorneys for filing frivolous or abusive claims.\(^1\) As a result of the significant 1983 amendments, Rule 11 has become the subject of an enormous amount of litigation.\(^2\) Despite the dramatic increase in Rule

1. Rule 11 states:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fees.


2. See FEDERAL PROCEDURE COMMITTEE OF THE LITIGATION SECTION OF THE A.B.A., SANCTIONS: RULE 11 AND OTHER POWERS 1 (2d ed. 1988) (study discovered 564 reported Rule 11 cases in addition to many unreported cases) (footnote omitted) [hereinafter A.B.A. SANCTIONS]; see also Schwarzer, Rule 11 Revisited, 101 HARV. L. REV. 1013 (1988) (presented more recent estimate of over 600 reported Rule 11 cases).

Much of the increased litigation can be attributed to both the “objective

(559)
11 litigation, few courts have examined the issue of a district court's jurisdiction over a post-judgment motion for Rule 11 sanctions. Those courts that have considered this issue have split. In Mary Ann Pensiero, Inc. v. Lingle, the United States Court of Appeals for the Third Circuit was confronted with a motion for Rule 11 sanctions filed after summary judgment was affirmed, but prior to issuance of the affirmance mandate. Although the Third Circuit held that the district court had juris-


Prior to the 1983 amendments, Rule 11 was largely ineffective and unused. Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 183 (1985). In fact, between 1938 and 1976, Rule 11 claims were brought only 23 times, and violations were found in only 9 cases. Note, An Attorney's Primer on Federal Rule of Civil Procedure 11, 23 TULSA L.J. 149, 149 n.3 (1987). Three factors contributed to Rule 11's failure to effectively police attorney conduct prior to 1983: (1) subjective bad faith was a prerequisite to an imposition of sanctions, (2) sanctions were not mandated, but only permitted upon finding a violation, and (3) the standards governing violations were confusing to attorneys and courts alike. Id. at 151-52 (footnotes omitted).

Rule 11 was subsequently amended in 1983 to achieve three principal goals: (1) cover the filing of motions and other papers, in addition to pleadings, (2) clarify and heighten standards for the imposition of sanctions, and (3) mandate sanctions for a violation of the rule. See Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, supra, at 184-85.

For a comparison of the language of amended Rule 11 and the pre-1983 version of the Rule 11, see Grosberg, supra, at 577 n.4.

3. An examination of the American Bar Association Rule 11 study reveals the paucity of litigation surrounding this issue. See A.B.A. SANCTIONS, supra note 2, at 29-181 (summary and analysis of all important Rule 11 decisions organized by circuit). The related issue of post-dismissal sanctions has also seen little consideration. See id.

In most of the reported Rule 11 cases, a motion was filed prior to the district court's entry of judgment on the merits of the underlying case. See id. In the rare case, however, the party seeking sanctions did not file its Rule 11 motion until after this entry of judgment. See id. Rule 11 does not distinguish between the two, and, in fact, contains no time limit for the filing of such motions. See Fed. R. Civ. P. 11. For a further discussion of this point, see infra note 71 and accompanying text.

For a discussion of other cases which have considered the jurisdictional issue, see infra note 72 and accompanying text.


5. 847 F.2d 90 (3d Cir. 1988). The case was argued before Circuit Judges Gibbons, Weis and Greenberg. Id. at 92. Circuit Judge Weis, who was subsequently elevated to Senior Judge status, wrote the opinion, with which Judges Gibbons and Greenberg joined. See id. at 92.

6. Id. For a further discussion of the facts of Pensiero, see infra notes 9-22 and accompanying text.
diction to consider the motion, it became the first court to adopt a supervisory rule requiring all Rule 11 motions be filed prior to the entry of a final judgment on the merits in the district court.

In Pensiero, Mary Ann Pensiero and her husband opened Bargain Beer and Soda, a retail beer market, in November 1985. However, Pennsylvania’s alcoholic beverage laws gave certain exclusive dealership rights to the Pensiers’ competitors, the Lingles, owners of Lingle Distributing. When the Pensiers sought to purchase the most popular brands of beer from the Lingles, the Lingles refused to deal with the Pensiers.

The Pensiers sought legal advice to resolve their dispute, and hired Thomas R. Betz of the Harrisburg, Pennsylvania, firm of Litman, Litman, Harris, Brown and Watzman. Before taking any legal action, Betz conducted an inquiry based upon information gained from the Pensiero...

7. Pensiero, 847 F.2d at 97-98. In doing so, the court agreed with the Fourth Circuit. Id. at 98 (citing Hicks v. Southern Md. Health Sys. Agency, 805 F.2d 1165 (4th Cir. 1986)). For a discussion of the Hicks holding, see infra notes 21 & 42 and accompanying text. For a complete discussion of the Third Circuit’s treatment of the jurisdictional issue, see infra notes 26-45 and accompanying text.

8. Pensiero, 847 F.2d at 92, 100. Although currently no other case has created such a requirement for Rule 11 motions, the Fourth Circuit in Hicks expressly declined to do so. Hicks, 805 F.2d at 1167. For a complete discussion of the Pensiero court’s supervisory rule and its examination of the appropriate timing of Rule 11 motions, see infra notes 46-67 and accompanying text.

9. Pensiero, 847 F.2d at 92. The Pensiers opened the establishment in November 1985 and were the principals of the plaintiff corporation, located in Lewistown, Pennsylvania. Id.

10. Id. The Lingles were the exclusive wholesalers of Anheuser-Busch and Genesee brand beers for the area. Id. This privilege stemmed from the licensing system in Pennsylvania. Id. The Lingles held an “ID” license, while the Pensiers held the more limited “D” license. Mary Ann Pensiero, Inc. v. Lingle, 115 F.R.D. 233, 234 (M.D. Pa. 1987).

Two privileges granted to holders of an “ID” license made the Pensiers dependent upon the Lingles, prompting the present dispute. First, the holder of an “ID” license has exclusive rights to make beer purchases from specified manufacturers located outside Pennsylvania. Id. Holders of “D” licenses, however, are not authorized to make wholesale purchases from these designated out-of-state manufacturers. Id. Second, while both types of licensees are permitted to sell on the retail level, “ID” license-holders are authorized also to resell to other distributors, such as the Pensiers. Id. Thus, the Pensiers could not obtain the desired beer except from the Lingles.

11. Pensiero, 847 F.2d at 92. The Pensiers intended to sell a variety of brands, but the labels in dispute were Genesee and Anheuser-Busch items. Id. Thus, as a result of the Lingles’ refusal to sell these brands, the Pensiers were effectively foreclosed from retailing those very labels which had the greatest market for resale. See id.

12. Id.
sieros, opinions' gathered from Pennsylvania State officials, and his own additional research. In January, 1986, the Pensieros filed suit in the United States District Court for the Middle District of Pennsylvania, alleging three violations of federal antitrust law. The district court granted summary judgment for the defendants upon defense counsel's motion, and the Third Circuit affirmed without opinion.

The defendants had considered filing for attorney's fees prior to the district court's grant of summary judgment. They did not, however, file a formal motion for Rule 11 sanctions until the Third Circuit had

13. Id. The information provided by the Pensieros can be categorized as follows: (1) statements made to the Pensieros by the defendants; (2) failed attempts by the Pensieros to elicit help from the out-of-state manufacturers; and (3) support for the defendants' conduct by an industry trade association. See id.

The Pensieros told their attorney that Lingle Distributing refused to deal with the Pensieros because the Lingles opposed "Bargain Beer's sales philosophy, which emphasized large volume and low prices." Id. The Pensieros also informed their attorney that the Lingles had repeatedly threatened to "drive Bargain Beer out of business." Id. The Pensieros disclosed that they had attempted to gain the support of the two out-of-state manufacturers, but the manufacturers rejected their plea to intervene. Id. Finally, the plaintiffs alleged that the Pennsylvania Importing Malt Distributors Association, a trade organization to which the defendants belonged, "commended the Pennsylvania Liquor Control Board for declining to penalize defendants for their conduct," a demonstration of support for the defendants. Id.

14. Prior to filing the federal antitrust suit, plaintiffs' counsel discussed the case with the Deputy Attorney General of the Antitrust Section of the Pennsylvania Attorney General's Office and with the Chief Counsel to the Pennsylvania Liquor Control Board. Id. at 93. The Deputy Attorney General "opined that the defendants' conduct gave rise to a valid antitrust claim, citing legal authority in support of this view." Id. The Chief Counsel also told the Pensieros' attorney that defendants' "refusal to sell to Bargain Beer was a 'citable offense' under the Pennsylvania Liquor Code." Id.

On the day after plaintiffs' counsel filed the federal antitrust suit, the Chief Counsel issued a written opinion concluding the defendants "violate[d] antitrust principles." Id. at 93 n.1 (quoting the written opinion). The Third Circuit pointed to this as evidence "that at least one state official believed that the circumstances evidenced antitrust activity." Id. However, the court held the written opinion did not constitute part of counsel's pre-filing inquiry, because it was issued after the filing of the complaint. Id.

15. Id. at 93. Betz submitted an uncontested affidavit declaring he conducted additional research of the relevant facts and law needed to support a valid claim. Id.

16. Id. Plaintiffs alleged the defendants' conduct constituted "a conspiracy to restrain trade in violation of section 1 of the Sherman Act; an attempt to monopolize interstate commerce in violation of section 2 of the Sherman Act; and price discrimination in violation of section 1 of the Robinson-Patman Act." Id.

17. Id. The district court granted summary judgment only with respect to the second claim. Id. This is because the plaintiffs had already voluntarily dismissed the other two claims in response to defendants' motion for summary judgment. Id.


19. Pensiero, 847 F.2d at 93. Defendants had submitted a legal memorandum the month following their motion for summary judgment stating that they
affirmed the district court’s summary judgment ruling prior to its issuance of a mandate.\textsuperscript{20} The district court determined that it had jurisdiction over the post-judgment motion and, after finding a Rule 11 violation, imposed sanctions upon the plaintiffs’ law firm for violating the Rule 11 requirement of a reasonable investigation of the facts and law.\textsuperscript{21} The plaintiffs’ law firm appealed the sanction order, conceding the district court had jurisdiction to consider the motion, but denying that Rule 11 was violated.\textsuperscript{22}

On appeal of the sanction order, the Third Circuit examined two issues in connection with its analysis of the district court’s jurisdiction to consider the post-judgment Rule 11 motion: (1) whether the district deserved fees and costs and noting their intention to file a separate Rule 11 motion for such relief. \textit{Id.}

\textsuperscript{20} \textit{Id.} A brief chronology is helpful in clarifying the events that took place. The plaintiffs filed their complaint on January 30, 1986. The defendants moved for summary judgment on April 10, 1986. In May, the defendants noted their intent to file a Rule 11 motion. The district court granted the defendants’ motion for summary judgment on June 5, 1986. The plaintiffs appealed, and the Third Circuit affirmed the order of summary judgment without opinion on January 28, 1987. On February 17, 1987, the defendants filed a Rule 11 motion for attorney’s fees. Two days later, on February 19, 1987, the Third Circuit filed its judgment order. Mary Ann Pensiero, Inc. v. Lingle, 115 F.R.D. 233, 234 (M.D. Pa. 1987).

The defendants had received a copy of the affirmation order prior to its formal issuance. \textit{Pensiero}, 847 F.2d at 93. After receipt of this copy, the defendants filed their motion. \textit{Id.}


The district court regarded \textit{Overnite} and \textit{Hicks} as a choice between two long-standing judicial goals: “avoidance of piecemeal litigation and judicial economy.” \textit{Id.} at 236. Where these goals are in conflict, the district court concluded judicial economy should prevail. \textit{Id.} The district court made this determination by analogizing the present situation to two other types of fee-petition cases in which the Third Circuit had favored judicial economy where it conflicted with piecemeal review. \textit{Id.} at 236-37.

On the merits of the motion for sanctions, the district court held that although the plaintiffs’ attorney had not acted in bad faith, he had violated the objective reasonableness requirement of Rule 11 and, thus, the court imposed sanctions against plaintiffs’ counsel. \textit{Pensiero}, 847 F.2d at 93-94. Furthermore, the sanctions were imposed on the plaintiffs’ counsel but not on the plaintiffs, because the “plaintiff[s] had no part in the decision to pursue the case, other than to abide by the advice of counsel.” \textit{Id.} For the district court’s discussion of the merits of the sanctions motion, see \textit{Pensiero}, 115 F.R.D. at 237-39.

\textsuperscript{22} \textit{Pensiero}, 847 F.2d at 94.
court had jurisdiction to order Rule 11 sanctions, and assuming jurisdiction existed, (2) whether the policies underlying Rule 11 and the goals of judicial efficiency mandated a more restrictive approach to the timeliness of filing Rule 11 claims. The Third Circuit concluded that jurisdiction existed but that the present motion was untimely; notwithstanding this latter conclusion, the court went on to examine the merits of the Rule 11 claim and reversed the lower court’s imposition of sanctions.

The Third Circuit’s analysis of the appeal began with its independent review of the district court’s jurisdiction over the post-judgment Rule 11 claim. The court found two separate grounds for holding that the district court did have jurisdiction. The court began its examination of the first basis of jurisdiction with the observation that, as a general rule, the district court is divested of jurisdiction over a case upon the filing of an appeal. The Pensiero court noted that the general rule was a judicial creation founded on prudential considerations rather than

23. See id. at 97-98. For a complete discussion of the court’s treatment of the jurisdictional issue, see infra notes 26-45 and accompanying text. For an independent analysis of the court’s resolution of this issue, see infra notes 68-75 and accompanying text.

24. See Pensiero, 847 F.2d at 98-100. For a full discussion of the court’s examination of the timeliness of Rule 11 motions, see infra notes 46-67 and accompanying text. For an independent analysis of the court’s approach and its newly-promulgated supervisory rule, see infra notes 76-113 and accompanying text.

25. See Pensiero, 847 F.2d at 94-97. The court considered the merits of the Rule 11 claim in furtherance of the general policy of giving notice of new rules of law prior to their application, despite the effect of its new supervisory rule to make such post-judgment motions untimely. See id.

On the merits, the Third Circuit held that the plaintiffs’ attorney had met the pre-filing requirements of Rule 11, making sanctions inappropriate. Id. at 92. Detailed consideration of the merits of the Rule 11 motion is beyond the scope of the present discussion. For a complete discussion of the Third Circuit’s treatment of this issue, see id. at 94-97.

26. See id. at 97-98. Although the parties did not contest the validity of the district court’s jurisdiction, the Third Circuit noted the need to consider the jurisdictional issue by stating that “jurisdiction may not be conferred by consent of the parties.” Id. at 97 (citing Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (Article III of United States Constitution imposes duty upon federal appellate courts to make independent inquiry into lower court’s jurisdiction)). According to the Supreme Court, an appellate court has “a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,’ even though the parties are prepared to concede it.” Bender, 475 U.S. at 541 (quoting Mitchell v. Maurer, 293 U.S. 237, 244 (1934)).

27. For a discussion of the two grounds for jurisdiction, see infra notes 28-45 and accompanying text.

28. Pensiero, 847 F.2d at 97 (citing Griggs v. Provident Consumer Discount Co., 450 U.S. 56, 58 (1982) (per curiam) (“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”)) (emphasis added)).
a statutory limitation. Therefore, exceptions to the rule are justified when its application would serve to defeat the underlying purpose of advancing judicial economy.

One such exception to the general rule, as the Third Circuit previously held in West v. Kev.

The West court held that the district court retains jurisdiction to consider a post-judgment fee petition while the appeal on the merits is still pending. The Pensiero court found that a Rule 11 motion for sanctions is sufficiently analogous to a post-judgment petition for statutory fees, warranting treatment as a similar exception. Therefore, because the present appeal was still pending when the Rule 11 motion was filed, the court held the district court had jurisdiction to consider the sanctions claim.

As a second ground for jurisdiction, the Pensiero court reasoned that the district court had jurisdiction to consider the Rule 11 motion regardless of whether the appeal was still pending or finalized, because the Rule 11 motion was collateral to the appeal on the merits. The court reached this conclusion by adopting the collateralness test established by the Supreme Court’s decision in White v. New Hampshire Department of Employment Security.

29. Id.
30. Id. (citing Venen v. Sweet, 758 F.2d 117, 121 (3d Cir. 1985); 9 J. Moore, B. Ward & J. Lucas, Moore’s Federal Practice ¶ 203.11 n.1 (2d ed. 1948 & Supp. 1989) (“The rule is a judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes nor to induce needless paper shuffling.”)). Such exceptions are “designed to prevent the confusion and inefficiency that would result if both the district court and the court of appeals were adjudicating the same issues simultaneously.” Id.
31. 721 F.2d 91 (3d Cir. 1983).
32. Pensiero, 847 F.2d at 97.
33. Id. at 97-98. However, the West court left to the district court’s discretion whether the district court actually would choose to consider the petition. Id. at 95 n.5; accord Venen v. Sweet, 758 F.2d 117, 120 n.2 (3d Cir. 1985) (post-judgment petition for attorney’s fees allowed while appeal still pending).
34. Pensiero, 847 F.2d at 97. The Third Circuit, however, did not explain the precise reasons for considering the statutory fee petition analogous to the motion for Rule 11 sanctions. See id.
35. Id. at 98. The court held that the present appeal was still pending prior to February 19, 1987, when the certification of the affirmance order was issued. See id. at 97-98 (citing Finberg v. Sullivan, 658 F.2d 93, 99 (3d Cir. 1980) (en banc) (principle well-established that decision of appeals court not final until issuance of mandate)). Therefore, because the motion for Rule 11 sanctions was filed prior to the end of litigation, the Third Circuit held that the district court retained jurisdiction to consider the petition for attorney’s fees under the analogy to other fee-petition situations. Id. at 98.
36. Id.
37. See id. (citing White v. New Hampshire Dep’t of Employ. Sec., 455 U.S. 445 (1982)). In White, the plaintiff brought a civil rights action against a state agency claiming that an Act of Congress had been violated. 455 U.S. at 447. The plaintiff prevailed on the merits. Id. Four and one-half months following
In *White*, the Supreme Court of the United States allowed the district court to consider and award attorney's fees under a 42 U.S.C. § 1988 petition which was filed after entrance of the final judgment on the merits. The court held that Rule 59(e) of the Federal Rules of Civil Procedure bars only those issues "properly encompassed in a decision on the merits." The court concluded that the fee petition was not encompassed, because it was collateral to the cause of action. The Court found this petition collateral because: (1) the award was "not compensation for the injury giving rise to the litigation," and (2) "the fee petition required an inquiry distinct from the decision on the merits, it was 'uniquely separable' from the matters to be proved at trial."

In applying the *White* test to a Rule 11 motion, the Third Circuit agreed with the Fourth Circuit's decision in *Hicks v. Southern Maryland Health Systems Agency* that the section 1988 fee petition involved in judgment, the plaintiff formally moved for attorney's fees pursuant to 42 U.S.C. § 1988 (1982). *White*, 455 U.S. at 448. Over defendant's objections, the district court awarded fees to the plaintiff. *Id.* The defendant appealed to the Court of Appeals for the First Circuit following an unsuccessful attempt to persuade the district court to vacate its order. *Id.* The First Circuit reversed the lower court, holding that Rule 59(e) of the Federal Rules of Civil Procedure provides a 10-day limit for moving to alter or amend a judgment, and also that the current petition for fees constituted such a motion. *Id.* On the plaintiff's appeal, the Supreme Court reversed the circuit court, holding that Rule 59(e) did not apply to a petition for statutory fees. *Id.* at 455.

40. Id.
41. Id. at 451-52.
42. 805 F.2d 1165 (4th Cir. 1986). In *Hicks*, the Fourth Circuit held that post-judgment Rule 11 motions were timely even if filed several months following the close of the entire litigation of the case. *Id.* at 1166-67.

In *Hicks*, several plaintiffs who were discharged by their employer joined in a complaint against state and federal defendants. *Id.* at 1166. The defendants sought and received a grant of summary judgment which was affirmed by the Fourth Circuit in *Hicks v. Southern Maryland Health Systems Agency*, 737 F.2d 399 (4th Cir. 1984). Following the conclusion of the litigation on the merits, the defendants filed a motion, *inter alia*, for sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Hicks*, 805 F.2d at 1166. After the district court granted the defendants' motion, the plaintiffs and their counsel appealed, asserting for the first time on appeal that the district court lacked jurisdiction to consider the Rule 11 motion. *Id.*

The Fourth Circuit, per Senior Circuit Judge Haynsworth, held that the court was without authority to consider whether the issue would have been more appropriately filed at an earlier time. *Id.* at 1167. The court stated that jurisdiction existed even after the appellate proceedings had concluded, provided there was no applicable local rule of the district court to the contrary. *Id.* For a further discussion of the court's holding, see *supra* note 21 and *infra* notes 80-81 and accompanying text.

The opposite view, however, was endorsed in Duane Smelser Roofing Co. v. ARMM Consultants, Inc., 609 F. Supp. 823, 824 (E.D. Mich. 1985), where the court applied the general rule that filing a notice of appeal divests the district court of jurisdiction in matters involving the merits of appeal. In *Duane*, the plaintiff brought a breach of contract action in federal district court in May 1983.
White was sufficiently analogous to a Rule 11 motion to warrant a finding of jurisdiction. In adopting the Fourth Circuit's conclusion, the Pensiero court held that "a Rule 11 motion is also . . . collateral from the decision on the merits." The court applied the White factors and found: (1) a Rule 11 motion seeks compensation only for the "Rule violation itself," not the underlying claim, and (2) the inquiry is "uniquely separable."45

Although the Third Circuit found that jurisdiction existed in the district court to consider post-judgment Rule 11 motions, the court nevertheless adopted "as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed" before the district court enters final judgment. The Pensiero court's supervisory rule rested on two grounds: (1) the White court's invitation to create such a rule, and (2) differences between statutory fee petitions and Rule 11 motions.47

---

43. Pensiero, 847 F.2d at 98. The Fourth Circuit, in Hicks, held that the district court had jurisdiction to award Rule 11 sanctions and other fee petitions even after final judgment on a merit appeal, and adopted the reasoning of White. Hicks, 805 F.2d at 1166-67.

44. Pensiero, 847 F.2d at 98.

45. Id. at 98-99.

46. Id. at 92, 100. In dictum, the court advised counsel to file such motions "where appropriate, ... at an earlier time—as soon as practicable after discovery of the Rule 11 violations." Id. at 100.

47. In addition to relying upon the Supreme Court's invitation and expression of antipathy for piecemeal litigation, the Third Circuit also pointed to the advisory committee notes to Rule 11 as an additional source of implicit authority for the court's imposition of timeliness restrictions beyond jurisdictional limits. See id. at 99.

Rule 11 of the Federal Rules of Civil Procedure specifies two mechanisms for initiating sanction proceedings: "upon motion or upon [the court's] own initiative." Fed. R. Civ. P. 11. The text of Rule 11 is silent concerning judicial power to limit the timing of a motion for sanctions under the rule. See id.
For authority, the *Pensiero* court relied upon the Supreme Court’s decision in *White v. New Hampshire Department of Employment Security*.\(^4\) In *White*, the Court granted the district courts authority to “adopt local rules establishing timeliness standards for the filing of claims for attorney’s fees.”\(^4\) The policy underlying this aspect of the *White* decision was the avoidance of piecemeal litigation.\(^5\) The danger of piecemeal litigation is the resolution of a case in fragmented pieces, with the result being a decrease in judicial efficiency.\(^5\)

In justifying its acceptance of the *White* invitation, the Third Circuit pointed to several important differences between a request for statutory fees and Rule 11 sanctions.\(^5\) As a result of these differences and the time for filing a Rule 11 motion, but several comments deserve mention. See Fed. R. Civ. P. 11 advisory committee’s notes. The drafters were interested in early filing of Rule 11 motions, noting that “[a] party seeking sanctions should give notice to the court promptly upon discovering a basis for doing so.” Id. (emphasis added). While this indicates a preference, neither the text of the rule nor the committee notes make early filing a requirement.

Subsequent advisory committee notes indicate somewhat conflicting goals. On the one hand, in the case of pleadings, the drafters contemplated that adjudication of “the sanctions issue under Rule 11 normally will be determined at the end of the litigation.” Id. This suggests no time limit. On the other hand, in discussing the appropriate scope of sanction proceedings, the drafters expressed the concern that “efficiencies” are not “offset by the cost of satellite litigation.” *Id.* Although this policy is applicable to the timing of Rule 11 requests, the drafters sought to ensure efficiency by regulating the scope of judicial review of a sanction request. See *id.*


49. *White*, 455 U.S. at 454. The Court thereby addressed the potentially dissimilar and local needs of jurisdictions which may result from the establishment of different procedures for filing petitions or motions for fees. See *id.* at 454 n.16.

50. See *id.* at 454 (“[D]istrict courts generally can avoid piecemeal appeals by promptly hearing and deciding claims to attorney’s fees.”). In *White*, the Court concluded that application of Rule 59(e) of the Federal Rules of Civil Procedure in limiting the timeliness of a § 1988 post-judgment fee request would frustrate the policy of avoidance of piecemeal claims and “could generate increased litigation of fee questions.” *Id.* at 453; see *Fed. R. Civ. P.* 59(e). While the Court found Rule 59(e) inapplicable, it distinguished the other devices given to the district courts to avoid judicial inefficiency. *White*, 455 U.S. at 452 n.14 (referring to power to establish local rules).

51. See *White*, 455 U.S. at 452.

52. The Third Circuit found three relevant differences: (1) disparity in what the fee covers, (2) difficulty in calculation, and (3) desirability of consolidation of fee issues with merits on appeal. *Pensiero*, 847 F.2d at 98-99.

A statutory fee petition pursuant to § 1988 “routinely requests payment for relevant services performed during the whole course of the litigation.” *Id.* at 98 (emphasis added). However, “when awarded as Rule 11 sanctions, attorney’s fees ordinarily will not include compensation for the entire case, but only for expenses generated by the Rule violation itself.” *Id.* at 99 (emphasis added). Because § 1988 fees frequently compensate for the entire costs of litigation, the court felt this was “good reason to wait until the lawsuit has been concluded before calculating the proper fee amount.” *Id.* at 98. By implication, the court’s
Third Circuit’s reliance on White,\textsuperscript{53} the Pensiero court adopted its supervisory rule.\textsuperscript{54} The essential nature of the Third Circuit’s analysis of timeliness of Rule 11 sanctions is a balancing test.\textsuperscript{55} The court weighed reasoning suggests no similar need to wait in the Rule 11 context. See id. at 98-99.

The disparity in what the fee covers creates, in turn, the difference in the difficulty of calculating the fee amount. See id. at 99. According to the Third Circuit, "[t]he computation of attorney’s fees in [the § 1988 context is frequently a detailed and prolonged undertaking, requiring thorough review by the trial judge and a sometimes lengthy hearing.]" Id. at 98-99. Computing Rule 11 sanctions, however, may be less demanding, often not requiring a hearing. Id. at 99.

In addition, the court felt "swift disposition of a Rule 11 motion is essential so that any ensuing challenge to it might be included with the appeal on the merits." Id. (emphasis added). The court was convinced that consolidation would not constitute "misusing scarce resources." Id. On the contrary, it found:

"[T]imely filing and disposition of Rule 11 motions should conserve judicial energies. In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of the current familiarity with the matter. Similarly, concurrent consideration of challenges to the merits and the imposition of sanctions avoids the invariable demand on two separate appellate panels to acquaint themselves with the underlying facts and the parties’ respective legal positions."

Id. (citing with approval Terket v. Lund, 623 F.2d 29, 34 (7th Cir. 1980) (in unsuccessful civil rights action where defendant sought and received post-judgment § 1988 fee award, court held, \textit{inter alia}, that district court was not divested of jurisdiction to consider motion for attorney’s fees)). \textit{Terket} allowed a post-judgment motion for § 1988 attorney’s fees prior to the appeal on the merits, suggesting consolidation of the merit and fee issues on appeal. \textit{Terket}, 623 F.2d at 34.

Despite the Pensiero court’s favorable reference to Terket, the Third Circuit also suggested that, at least in the § 1988 context, it was desirable to leave the fee issue until after the final merit appeal to eliminate "unnecessary trial court effort in awarding prevailing party fees ultimately mooted by reversal on the merits." Pensiero, 847 F.2d at 98 (citing West v. Keve, 721 F.2d 91, 94-95 (3d Cir. 1983)).

In sum, the Third Circuit seems to suggest that consolidation of the fees and merit issues is appropriate and efficient in the Rule 11 context, while such a merger would be impractical in the § 1988 context. See id. at 98-99. The underlying rationale is that Rule 11 sanction awards do not depend upon the disposition of the merits issue, while § 1988 fee awards are only appropriate for the "prevailing party."

\textsuperscript{53} For a discussion of the Supreme Court’s invitation, see supra notes 48-51 and accompanying text.

\textsuperscript{54} Pensiero, 847 F.2d at 98. "Although a Rule 11 motion is sufficiently analogous to a request for statutory fees to resolve the jurisdictional issues ..., certain distinguishing features bear on the desirability of a more restrictive approach to timeliness in resolving sanction disputes." Id. (emphasis added).

\textsuperscript{55} See id. at 99 ("[T]he balancing analysis ... prompts a different conclusion."). In \textit{West}, the Third Circuit had resolved the balance, in the context of statutory fees, in favor of allowing independent fee-petition hearings:

"[W]e acknowledged the diminution [sic] of judicial efficiency in allowing appeals from fee petitions separate from judgments on the merits. We noted that the hearings on statutory fee requests which must be
the policy of avoiding piecemeal litigation against the judicial efficiency of allowing determinations of Rule 11 claims to be postponed until after the conclusion of an appeal on the merits. Because of the differences between Rule 11 motions and statutory fee petitions, the Third Circuit decided judicial economy would be served best by consideration of Rule 11 motions prior to an appeal on the merits.

The Third Circuit in *Pensiero*, though primarily basing its decision upon the judicial efficiency argument, also justified the newly-promulgated supervisory rule by relating it to two policies of Rule 11. First, the Third Circuit asserted that the policy of deterrence would be served by early attention to Rule 11 issues. Allowing baseless claims to conduct in the district court are time-consuming. Accordingly, we concluded that any loss in appellate efficiency would be outweighed by the elimination of unnecessary trial court effort in awarding prevailing party fees ultimately mooted by reversal on the merits. *Id.* at 98 (citing *West*, 721 F.2d at 94-95). In *West*, the court was convinced that piecemeal appeals of statutory fee petitions are less taxing to judicial resources than consolidation of the merits with fee requests, both on the trial level and on appeal. *See id.* The risk to be avoided in that context was "significant waste of district court efforts." *Id.* at 99.

56. *See id.* at 92, 100 ("[T]o eliminate piecemeal appeals we adopt a supervisory rule.").

57. *See id.* at 98-99.

58. For a discussion of these differences, see *supra* note 52.

59. *Pensiero*, 847 F.2d at 99. The court's argument is based on two premises.

First, there is the burden caused by piecemeal appeals: "The fragmented appeals arising in the case at hand ... graphically illustrate the inefficiency resulting from delay in filing a sanction motion until after resolution of the merits appeal. In [this case], the Rule 11 issue could and should have been presented to this court as part of the appeal on the merits." *Id.*

Second, there is the relatively insignificant use of district court resources in considering the appropriate fee amount prior to an appeal:

In the case at hand, for example, the district judge arrived at a suitable sanction through the exercise of his informed discretion without conducting an extended appraisal of individual items. The need for protracted scrutiny was obviated by the trial judge's familiarity with the case and the circumstances surrounding the challenged filing.

*Id.*

Thus, the court's argument is that any diminution of judicial efficiency is not outweighed by the elimination of unnecessary trial court effort in awarding fees prior to an appeal on the merits. *See id.* at 98. *But see West*, 721 F.2d at 94-95. For a discussion of *West*, see *supra* note 33.

60. *Pensiero*, 847 F.2d at 99. These two policies are: (1) the deterrence of Rule 11 violations, and (2) the reservation of Rule 11 sanctions for exceptional circumstances. *Id.*

The court did not explicitly adopt either rationale as its primary support for the new rule; however, the Third Circuit relied more heavily on the former rationale. This is shown not only by the court's extended discussion of judicial economy, but also by the court's statement of its holding, where attention is given only to the avoidance of piecemeal appeals. *See id.* at 92, 100.

61. *Id.* at 99 (citing Schwarzer, *Sanctions Under the New Federal Rule 11: A Closer Look*, *supra* note 2, at 198 ("prompt action helps enhance the credibility of
sume valuable litigation resources is not only inefficient but also fails to deter the offending party from interposing additional claims or defenses stemming from the violation. Thus, the Third Circuit concluded that “[p]romptness in filing valid motions . . . in many instances . . . will deter further violations of Rule 11 which might otherwise occur during the remainder of the litigation.”

Finding a second Rule 11 policy, the court observed that Rule 11 sanctions were “reserved for only exceptional circumstances.” The court stated that sanctions are not likely to be justified where doubt exists as to how the merits of the contested pleading or motion will be resolved. The court noted that “mere failure to prevail [on the merits] does not trigger a Rule 11 sanction order.” In sum, the court found that these two policies necessitated early filing of Rule 11 motions and, hence, the court’s supervisory rule which mandates early filing.

An analysis of the Third Circuit’s decision in Pensiero requires two separate examinations: (1) the court’s treatment of the jurisdictional issue, and (2) its promulgation of the supervisory rule. In surveying the question of jurisdiction to consider the post-judgment Rule 11 motion, it is submitted that the Third Circuit’s resolution of the jurisdictional issue represents a correct evaluation of precedent and analogy. By

the rule and, by deterring further abuse, achieve its therapeutic purpose”). Schwarzer concluded that many sanctionable claims or defenses are “so meritless” that they should not require a trial. Schwarzer, Sanctions Under the New Federal Rule 11: A Closer Look, supra note 2, at 198.


63. Pensiero, 847 F.2d at 99.

64. Id. The court warned against “routine and indiscriminate invocations” of Rule 11. Id. (citing Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir.) (“[L]itigants misuse the Rule when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment. . . . Substantially more is required.”), cert. denied, 109 S. Ct. 128 (1988); Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987) (“[W]hen issues are close, the invocation of Rule 11 borders on the abusive.”); Morristown Daily Record, Inc. v. Graphic Communications Union, Local 8N, 892 F.2d 31, 32 n.1 (3d Cir. 1987) (“We caution litigants that Rule 11 is not to be used routinely when the parties disagree about the correct resolution of a matter in litigation.”)).

65. Id. Unlike this situation, the court noted that “abusive” violations should be immediately apparent to an aggrieved party. Id.

66. Id.

67. See id. In addition, the Third Circuit found this policy enabled early adjudication of Rule 11 issues, stating: “Seldom should it be necessary to wait for the district court or the court of appeals to rule on the merits of an underlying question of law.” Id.

68. See id. at 97-98. The court held that the district court had jurisdiction to consider the Rule 11 motion even though the motion was not filed until immediately prior to the appellate court’s issuance of the mandate on the merits. See id. For a further discussion of the court’s treatment of the jurisdictional issue, see supra notes 26-45 and accompanying text.
adopting the test formulated by the Supreme Court in White, the Third Circuit separated the jurisdictional question from the technical and limited issue of whether the litigation is in progress. The inquiry looks, instead, at whether the motion is "collateral" to the cause of action. Because a Rule 11 motion is collateral to and independent of any inquiry into the merits, the district court is not divested of jurisdiction even

69. See Pensiero, 847 F.2d at 98. The court also resolved the jurisdictional question on the more technical ground by finding that: (1) a Rule 11 motion is analogous to a petition for statutory fees; (2) a district court is not divested of jurisdiction to consider a petition for statutory fees while an appeal is still pending; (3) an appeal is still pending until the mandate issues; and (4) when the Rule 11 motion was filed in the present case, the mandate had not yet issued. Id. at 97-98. For a further discussion of the court's technical ground for finding jurisdiction, see supra notes 28-35 and accompanying text.

By adopting the White test and deciding the jurisdictional issue on a non-technical, alternative basis, the court extended the reach of the district court beyond the finality of the litigation on the merits. See Pensiero, 847 F.2d at 98.

70. Pensiero, 847 F.2d at 98 (citation omitted). The idea that a post-judgment motion for attorney's fees is "collateral and independent" from a decision on the merits originated in the Court of Appeals for the Eighth Circuit's decision of Obin v. District No. 9, International Association of Machinists & Aerospace Workers, 651 F.2d 574, 582 (8th Cir. 1981), noted in White v. New Hampshire Department of Employment Security, 455 U.S. 445, 450 n.9 (1982).

71. Pensiero, 847 F.2d at 98. It is submitted that this conclusion is as compelling, if not more so, in the Rule 11 context than in the § 1988 context which was the basis of the dispute in White. See White, 455 U.S. at 445.

In the § 1988 context, the Supreme Court pointed to several reasons why the statutory fee petition was "collateral" and "separable." See id. at 451-52. These reasons include: (1) § 1988 fees are not "compensation for the injury giving rise to an action" and thus their award is "uniquely separable from the cause of action to be proved at trial"; (2) the petition's determination is unlike a motion to alter or amend a judgment in that it doesn't seek a change in the judgment; and (3) the determination cannot take place until one party "prevails" on the merits, so it necessarily requires a separate inquiry from the determination on the merits. Id.

Like § 1988 fees, Rule 11 sanctions are not compensation for the underlying injury. Whereas the § 1988 attorney's fee award is a mechanism for shifting fees, Rule 11 is a sanctioning device for litigation-related conduct. See Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, supra note 2, at 185 ("[Rule 11] is aimed at deterring and, if necessary punishing improper conduct rather than merely compensating the prevailing party. The key to invoking Rule 11, therefore, is the nature of the conduct of counsel and the parties, not the outcome."). The Third Circuit has expressed this latter point by stating, "Rule 11 sanctions should not be viewed as a general fee shifting device." Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987) (making comparison to 42 U.S.C. § 1988 as form of statutory fee shifting).

The sanctions determination in the Rule 11 context, like the § 1988 petition for fees, is independent of a judgment on the merits; in fact, the question of sanctions can be addressed before a judgment on the merits is ever issued. See Fed. R. Civ. P. 11 advisory committee's notes. The drafters made this intention clear:

The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the liti-
after it has rendered a final judgment on the merits.\textsuperscript{72}

\textit{Id.} (emphasis added).

In sum, because Rule 11 sanctions are less connected to the judgment on the merits than \S\ 1988 fees, both in terms of the timing of the Rule 11 adjudication and with regard to the nature of the compensation, Rule 11 sanctions should be seen as more collateral and independent than \S\ 1988 fees.

72. \textit{Pensiero}, 847 F.2d at 98. The Third Circuit, in reaching this conclusion drew support from the case of Hicks v. Southern Maryland Health Systems Agency, 805 F.2d 1165 (4th Cir. 1986). In \textit{Hicks}, the Fourth Circuit found that the reasoning of \textit{White} applied not only to \S\ 1988 situations, but also to Rule 11 sanctions. \textit{Id.} at 1166 (discussing \textit{White}). For a further discussion of \textit{Hicks}, see \textit{supra} note 42 and \textit{infra} notes 80-81 and accompanying text.

A view contrary to \textit{Hicks} was advanced in \textit{Overnite Transportation Co. v. Chicago Industrial Tire Co.}, 697 F.2d 789 (7th Cir. 1983). The \textit{Overnite} decision disagreed with the \textit{Hicks} court, not over whether it may fashion limits separate from jurisdictional time-bars, but rather on the question of whether jurisdiction exists at all to consider a post-appeal motion for fees. Interestingly, the \textit{Overnite} decision, which was both argued and decided after the publication of \textit{White}, did not mention this Supreme Court decision. See \textit{Pensiero}, 847 F.2d at 98.

In \textit{Overnite}, the plaintiff brought a federal suit seeking jurisdiction under the Interstate Commerce Act. \textit{Overnite}, 697 F.2d at 791. Defendant, asserting lack of jurisdiction, filed a motion to dismiss which was granted. \textit{Id.} Plaintiff appealed the dismissal, and the motion was affirmed. \textit{Id.} After the affirmation mandate had been docketed, defendant filed a motion in district court seeking the costs of defending the federal suit pursuant to 28 U.S.C. \S\ 1927 (1982). \textit{Id.} The provision reads:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.

\textit{Id.} The district court awarded costs, finding the “vexatious character of plaintiff’s attorney’s conduct . . . manifest from the record.” \textit{Overnite}, 697 F.2d at 791-92. The plaintiff’s counsel appealed. \textit{Id.} at 792.

The Seventh Circuit confronted the jurisdictional issue from the perspective of whether this motion fell under an exception to the general rule that an appeal divests the district court of jurisdiction. \textit{Id.} This rule was explained in \textit{Griggs v. Provident Consumer Discount Co.}, 459 U.S. 56, 58 (1982) (per curiam). For a discussion of the \textit{Griggs} rule, see \textit{supra} note 28.

The Seventh Circuit, however, was not forced to decide whether a 28 U.S.C. \S\ 1927 motion falls within one of the exceptions, because those “exceptions only apply to those motions filed with the district court while the appeal on the merits is pending.” \textit{Overnite}, 697 F.2d at 792 (emphasis added). Finding that the docketing of the mandate of the affirmation on the merits constituted the conclusion of the litigation, the Seventh Circuit held that no case or controversy remained. \textit{Id.} Because no motion had been filed seeking costs before this point, the lower court was held not to have jurisdiction over the matter. \textit{Id.}

In \textit{dictum}, the Seventh Circuit distinguished its earlier decision in \textit{Terket v. Lund}, 623 F.2d 29 (7th Cir. 1980). See \textit{Overnite}, 697 F.2d at 793. In \textit{Terket}, the court had allowed the district court to consider a 42 U.S.C. \S\ 1988 motion that had been filed after the district court had rendered a judgment on the merits but while the appeal was still pending. \textit{Terket}, 623 F.2d at 34. As the Seventh Circuit explained in \textit{Overnite}:

In an effort to avoid delay and wasted effort, the \textit{Terket} court adopted a general rule that “district courts in this circuit should proceed with at-
If a final judgment deprived the district court of jurisdiction to consider a Rule 11 motion, this would encourage litigants to file their Rule 11 motions whenever the court issued a ruling, out of fear that such ruling could be a "final judgment."\(^{73}\) Allowing the district court to retain jurisdiction over post-judgment Rule 11 motions, by contrast, serves the policy of avoiding reflexive motion filing that breeds excess "satellite litigation."\(^{74}\) As a result of these concerns, a majority of courts which have considered the issue of post-judgment motions, have agreed with Pensiero in holding that jurisdiction remains in the district courts to consider post-judgment Rule 11 motions.\(^{75}\)

Through the application of White's collateralness inquiry, the Third

- tornery's fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits."

Overbite, 697 F.2d at 793 (quoting Terket, 623 F.2d at 34) (footnote omitted).

73. See White, 455 U.S. at 453. The Supreme Court, in determining whether Rule 59(e) of the Federal Rules of Civil Procedure should apply to fee motions pursuant to § 1988, was concerned about the possible "harsh and unintended consequences" attendant to the Rule's application: If Rule 59(e) were applicable, counsel would forfeit their right to fees if they did not file a request in conjunction with each "final" order. Caution to protect their own interests, lawyers predictably would respond by entering fee motions in conjunction with every interim ruling. Yet encouragement of this practice would serve no useful purpose. . . .

. . . [T]he application of Rule 59(e) actually could generate increased litigation of fee questions—a result ironically at odds with the claim that it would promote judicial economy.

Id. at 452-53 (footnote omitted) (emphasis added). As other courts have noted, this logic applies with equal force to Rule 11 sanction awards. Hicks, 805 F.2d at 1166; accord Gordon v. Heimann, 715 F.2d 531, 537 (11th Cir. 1983) (finding Supreme Court's logic equally compelling in Rule 11 context).


75. Three circuits have expressly applied White to a post-judgment motion for Rule 11 sanctions. See Lupo v. R. Rowland & Co., 857 F.2d 482, 485 (8th Cir. 1988) (adopting White and holding Rule 59(e) inapplicable to post-judgment Rule 11 motion so jurisdiction exists); Laugham-Hill Petroleum, 813 F.2d at 1329, 1330-31 (adopting White and finding jurisdiction to consider motion for Rule 11 claim filed day after notice of appeal); Gordon, 715 F.2d at 537 (adopting White and finding jurisdiction over post-judgment motion for Rule 11 sanctions).

One circuit has adopted White in the context of a post-dismissal motion for sanctions. See Szabo Food Serv., Inc. v. Canteen Corp., 825 F.2d 1073, 1079-80 (7th Cir. 1987) (adopting White and finding jurisdiction to consider Rule 11 motion filed after voluntary dismissal by plaintiff), cert. dismissed, 108 S. Ct. 1101 (1988). But see Wojan v. General Motors Corp., 851 F.2d 969, 972-73 (7th Cir. 1988) (assuming arguendo that 59(e) applied and finding motion timely within 10-day period). Several other courts have found jurisdiction to consider post-judgment or post-dismissal motions for sanctions without considering White. See Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988); McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986), noted in 2A MOORE'S FEDERAL PRACTICE, supra note 1, ¶ 11.02[4] n.1. Contra Davis v. United States,
Circuit correctly recognized a district court's jurisdiction to hear post-judgment Rule 11 motions. However, the Third Circuit analysis went beyond *White* and imposed a new supervisory rule which effectively removed the district court's authority to make Rule 11 determinations even though jurisdiction otherwise exists.\(^7\) It is submitted that while the Third Circuit was empowered by *White* to create such a supervisory limit, the precise limit adopted by the court may cause unfair hardships while eliminating only de minimis costs, with the result that the court's rule should be modified.

Initially, it is contended that the Third Circuit acted within its authority in promulgating its new supervisory rule. The *Pensiero* court agreed with the Fourth Circuit, in *Hicks*, which concluded that jurisdiction was established by the Supreme Court's decision in *White*.\(^8\) Also like *Pensiero*, the Fourth Circuit noted with approval the Supreme Court's invitation to district courts to adopt local rules limiting the time for filing motions for attorney's fees.\(^9\) However, the Fourth Circuit's opinion differs on the crucial point of whether this invitation extends to the courts of appeals.\(^9\)

In *Hicks*, the Fourth Circuit held that courts of appeals are powerless to fashion their own limitations such as the supervisory rule invented by *Pensiero*.\(^\) Although the Fourth Circuit shared the Third Circuit's concern about "piecemeal appeals," the *Hicks* court felt con-

---

104 F.R.D. 509, 511 (N.D. Ill. 1985) (rejecting *White* and finding Rule 11 motion governed by Rule 59(e), limiting timeliness to within 10 days of final judgment).


76. *Pensiero*, 847 F.2d at 100. For a full discussion of the court's supervisory rule, see supra notes 46-67 and accompanying text.

77. *Hicks*, 805 F.2d at 1167 ("The Supreme Court seems to have held in *White* that the district court has jurisdiction" to entertain post-judgment Rule 11 motions.).

78. *Id.* at 1166 ("The Supreme Court also observed that district courts could adopt local rules providing time limitations for the filing of such motions.").

79. For a discussion of the Fourth Circuit's view that the invitation extends only to district courts, see *infra* note 80 and accompanying text. For a discussion of the Third Circuit's implied disagreement with the Fourth Circuit on this point, see *infra* note 81 and accompanying text.

80. *Hicks*, 805 F.2d at 1167. The Fourth Circuit explained this point: It is not for us, however, to speculate whether [the motion] was better pressed earlier rather than later. The Supreme Court seems to have held in *White* that the district court has jurisdiction to consider and grant a motion for the allowance of fees, though made several months after the conclusion of all appellate proceedings. In the absence of an applicable local rule *in the district court*, the only time limitation arises out of those equitable considerations that a district judge may weigh in his discretion.

*Id.* (emphasis added).
strained to abide by the fact that White only invited district courts to adopt local rules concerning the timing of fee petitions. While the language of the Supreme Court's invitation does not extend to the circuit courts, there is a good policy reason for giving the invitation a broader interpretation. By adopting a timeliness rule at the circuit court level, there would be uniformity throughout the circuit rather than different rules for different districts. Thus, it is contended that the Pensiero court had proper authority to impose a timeliness standard despite the reasoning of Hicks.

Having determined that the Third Circuit was acting within its proper authority, it is necessary to examine the wisdom of the supervisory rule adopted by the court. The court relied upon three policy considerations in conducting its balancing approach in order to arrive at a different result from that reached in West v. Keve. While these policy considerations do indeed justify arriving at a more restrictive notion of timeliness than the jurisdictional limit, certain countervailing factors merit an ultimate result that differs from the Third Circuit's rule.

The court's first policy reason for creating a more rigorous supervisory rule related to the differences between a Rule 11 motion and the statutory fee petition that was addressed in West. Specifically, the Third Circuit justified the more rigorous limit adopted in Pensiero by pointing out three dissimilarities between the two types of attorney's fees: (1) what the fee seeks payment for, (2) the amount of district court resources needed to determine the proper fee amount, and (3) the dependence of the award's validity upon the ultimate decision on the merits. These differences, in the Third Circuit's view, shift the balance in favor of adopting policies to curtail the costs of piecemeal litigation. The court noted that "swift disposition of a Rule 11 motion is essential so that any ensuing challenge to it might be included with the appeal on

81. See id.

82. Pensiero, 847 F.2d at 98-99. In contrasting the situations presented in West and Pensiero, the court held:

A petition for statutory counsel fees routinely requests payment for relevant services performed during the whole course of the litigation. There is, thus, good reason to wait until the lawsuit has been concluded before calculating the proper fee amount. The computation of attorney's fees in this context is frequently a detailed and prolonged undertaking, requiring thorough review by the trial judge and a sometimes lengthy hearing.

By contrast, when awarded as Rule 11 sanctions, attorney's fees ordinarily will not include compensation for the entire case, but only for expenses generated by the Rule violation itself.

Id. In addition to the greater expense of judicial resources on the district court level in the statutory fee context, the Third Circuit noted that in such a fee situation, "any loss in appellate efficiency would be outweighed by the elimination of unnecessary trial court effort in awarding prevailing party fees ultimately mooted by reversal on the merits." Id. at 98 (citing West, 721 F.2d at 94-95) (emphasis added).

83. For a discussion of this point, see supra notes 52-55.
The court’s second policy reason for restricting the timeliness of Rule 11 motions stemmed from its reading of the advisory committee notes to Rule 11. The advisory committee notes suggest prompt notification by aggrieved parties, and express concern about the possible costs of “satellite litigation over the imposition of sanctions.” The court pointed to the fragmented litigation process in the present case as an example of how delays in filing Rule 11 motions until after the conclusion of the merits on appeal can burden judicial resources. Accordingly, the court thus found that the advisory committee notes express a preference for combining the Rule 11 appeal with the merits appeal.

The court’s third justification arose from another Rule 11 policy. The court stressed that early consideration of Rule 11 motions will deter further violations. Connected to this argument was the court’s view that Rule 11 claims are often immediately evident to the aggrieved party, meaning that parties often can and should file early.

Although the considerations noted by the Pensiero court are important, several contrary factors warrant against the ultimate judgment in Pensiero. Turning first to the differences between Rule 11 sanctions and statutory fees, it is true that the appropriateness of sanctions, unlike statutory fees, does not depend upon the ultimate outcome of the merits of the litigation. However, a party’s characterization of an opponent’s

84. Pensiero, 847 F.2d at 99.
85. Id. “The drafters of Rule 11 . . . suggest early action by litigants who believe they have a valid ground for requesting sanctions under the Rule.” Id.
86. The notes suggest “a party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so.” Fed. R. Civ. P. 11 advisory committee’s notes. The drafters also hoped “the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions.” Id.
87. See Pensiero, 847 F.2d at 99.
88. See id.
89. For a further discussion of this rationale for accepting the White Court’s invitation to limit the timeliness of Rule 11 motions, see supra notes 61-63 and accompanying text.
90. See Pensiero, 847 F.2d at 99.
91. Four arguments justify amending the timeliness requirement promulgated by the Third Circuit in Pensiero: (1) extending the timing requirement beyond a final judgment (either in the district court or on appeal) will help clarify the existence of a valid Rule 11 claim; (2) a rule which fixes the limit of timeliness at final judgment in the district court will, in some circumstances, shield violations, and the rule may even increase litigation about finality of judgments; (3) the costs of piecemeal litigation are not necessarily great, and the burden on the judicial system can be addressed in other ways; and (4) the present rule adopted by the Third Circuit could be relaxed while still alleviating most of the burden on judicial resources caused by post-judgment Rule 11 motions.
92. For a discussion of this difference, see supra notes 52 & 71 and accompanying text.
claim as baseless or abusive may be strengthened or weakened by a judgment on the merits appeal.93 Thus, the Fourth Circuit's view that a subsequent appeal on the merits will clarify the existence of a Rule 11 violation supports allowance of post-judgment Rule 11 motions.94 While it may be too inefficient to allow postponement of consideration of the Rule 11 motion until after the appeal on the merits, as allowed by the Hicks court, resolution of the merits in the district court could clarify the validity of a Rule 11 claim without any measurable loss of judicial efficiency.95

Another reason for relaxing the Pensiero timeliness requirement stems from the Supreme Court's concern over the confusion produced by a requirement of filing in conjunction with a final judgment.96 Such confusion can have two deleterious effects on both of the parties and on the litigation process. First, the Third Circuit's supervisory rule has the potential for barring a substantial number of otherwise valid Rule 11

93. The Hicks court was strongly influenced by this consideration: Even where, as here, the defendants characterize the plaintiffs' claims as entirely baseless, the appropriateness of the characterization is unsettled as long as there is a pending appeal in which the plaintiffs, with apparent earnestness, assert that there are real issues of disputed fact foreclosing the entry of summary judgment against them. There is some reason to think that such uncertainty should be clarified before counsel and the district judge should be called upon to consider the appropriateness of a fee award and assess the amount.

Hicks, 805 F.2d at 1167 (emphasis added).

The Third Circuit took a different view, at least with respect to potential "abusive" violations:

If a party's action is "abusive" as contemplated by Rule 11, the adversary should be able to realize immediately that an offense has occurred. Seldom should it be necessary to wait for the district court or the court of appeals to rule on the merits of an underlying question of law. If there is doubt how the district court will rule on the challenged pleading or motion, the filing of the paper is unlikely to have violated Rule 11.

Pensiero, 847 F.2d at 99. But see Gordon v. Heimann, 715 F.2d 531, 537 (11th Cir. 1983) ("In the present case, the defendants were reassured that appellant's actions were frivolous only when those actions were dismissed by the district court.") (emphasis added).

94. See Hicks, 805 F.2d at 1167. For a discussion of the loss of current district judge familiarity with the case associated with waiting until the appeal on the merits, see infra notes 103-06 and accompanying text.

95. For a further discussion of the argument that some post-judgment motions for Rule 11 sanctions can be allowed without significant costs, see infra notes 98-109 and accompanying text.

motions on account of counsel being surprised by an entry of final judgment.\textsuperscript{97} This plausible scenario would unfortunately have the effect of allowing a technicality to shield violations, and would undermine the deterrent nature of Rule 11. Second, the court's rule, which was designed to streamline the litigation process, might ironically have the effect of increasing litigation over finality of judgment issues. This may occur where a party fails to file its Rule 11 motion in conjunction with an order and where the parties then litigate the finality of the order. Both problems illustrate the need to separate the Rule 11 filing deadline from the occurrence of a final judgment.

In addition, the costs of piecemeal appeals are not necessarily great. As the Fourth Circuit noted, "'[h]owever an independent and collateral issue, such as a fee award, is handled, there is some risk of squandered judicial effort.'\textsuperscript{98} The Third Circuit itself indicated that the costs of conducting a Rule 11 adjudication in the district court are not significant.\textsuperscript{99} Furthermore, any burdens caused by unreasonable delays in filing Rule 11 motions can be addressed by the district judge's discretion to fashion an "appropriate sanction."\textsuperscript{100} The facts of \textit{Pensiero} illustrate a situation which, although "fragmented," may not have imposed significant costs to the judicial system.\textsuperscript{101}

In \textit{Pensiero}, there was a grant of summary judgment in the district

\footnotesize

\textsuperscript{97} Many attorneys might mistake an order's character as being an interim order when, in reality, it is a final judgment. If so, the Third Circuit's supervisory rule would operate to bar any possible Rule 11 motions that were not yet filed because of a technical mistake. \textit{See White}, 455 U.S. at 459.

\textsuperscript{98} \textit{Hicks}, 805 F.2d at 1167.

\textsuperscript{99} \textit{See Pensiero}, 847 F.2d at 99 (finding Rule 11 adjudication less taxing on district court than consideration of other fee petitions).

\textsuperscript{100} \textit{Fed. R. Civ. P. 11}. The district court could, for example, impose a duty of mitigation upon the party asserting the Rule 11 motion. In this way, if a party is unreasonably untimely in filing a Rule 11 motion for sanctions, the court could limit any sanction to those expenses and fees which would have been necessary to defend against the offensive paper, \textit{had the Rule 11 motion been filed in a timely fashion}. \textit{See Schwarzer, Sanctions Under the New Federal Rule 11—A Close Look, supra note 2, at 198. See also Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987), in which the Third Circuit held that under Rule 11, the "duty of mitigation" should "diminish the tactical value of orchestrating motions to increase the cost of litigation for the other side." Gaiardo suggests the duty of mitigation will operate as an independent deterrent, reminding counsel of the necessity of prompt filing}. \textit{Id.}

In addition, the Supreme Court in \textit{White} held that the discretion of the trial judge supports a rejection of fees where the "postjudgment [sic] motion unfairly surprises or prejudices the affected party." \textit{White}, 455 U.S. at 454 (emphasis added); \textit{see also Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 881 (5th Cir. 1988) (accepting occasional declination of award of fees where violation exists but where delay in filing considered unreasonable); Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327, 1331 (4th Cir.) (agreeing with \textit{White})}. \textit{cert. denied, 108 S. Ct. 99 (1987)}.

\textsuperscript{101} \textit{See Pensiero}, 847 F.2d at 99.
court followed by an affirmance without opinion.\textsuperscript{102} Had the motion been filed prior to the grant of summary judgment in the district court, the trial court would still have been required to conduct a collateral and separate inquiry into the merits of the Rule 11 claim.\textsuperscript{103} Thus, it is submitted that the costs attending the post-judgment motion were not significant in the district court.\textsuperscript{104} If the motion had been filed while the appeal was still pending, the district court could have considered the merits of the Rule 11 claim during the pendency period, and the court of appeals could have consolidated the merits and the Rule 11 issues on appeal.\textsuperscript{105} In this case, there would have been no loss caused by the piecemeal appeal, other than the de minimis inefficiency in the district court’s consideration of the Rule 11 claim. On the other hand, if the Rule 11 motion had been made after the finality of the appeal, the loss of efficiency in the appeals court would be similar to that of the district court.\textsuperscript{106} In sum, the cost of fragmented and piecemeal appeals, at least in the case of \textit{Pensiero}, was not exceptional.

Finally, regardless of whether the policies of allowing post-judgment Rule 11 motions outweigh the policy against piecemeal appeals, it is contended that the supervisory rule promulgated by the Third Circuit is unnecessarily restrictive.\textsuperscript{107} When a post-judgment motion for Rule


\textsuperscript{103} The Third Circuit has found a Rule 11 claim to be both collateral to and separable from the issues to be proved at trial. \textit{Pensiero}, 847 F.2d at 98. The court itself discussed with approval the district court’s ability to make a determination “without conducting an extended appraisal” due to the trial judge’s “familiarity with the case and the circumstances surrounding the filing.” \textit{Id.} at 99.

\textsuperscript{104} This argument is based on the independent nature of the Rule 11 claim and the fact that a Rule 11 issue “often does not require a hearing.” \textit{See id.} at 98-99. There is, however, one additional cost associated with an inquiry conducted after the merits have left the district court. “In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of current familiarity with the matter.” \textit{Id.} at 99. However, the burden of this cost on judicial efficiency is doubtful in light of the normal presumption that Rule 11 proceedings are limited to a “proceeding on the record.” \textit{See Fed. R. Civ. P. 11 advisory committee’s notes.}

\textsuperscript{105} This approach has ample support. \textit{See, e.g., Overnite Transp. Co. v. Chicago Indus. Tire Co.}, 697 F.2d 789, 793 (1983) (citing Terket v. Lund, 623 F.2d 29 (7th Cir. 1980)). For a complete discussion of both cases, see \textit{supra} note 72. For a discussion of other cases adopting the view that the district court has power to consider post-judgment motions for sanctions during the pendency of the appeal, see \textit{infra} notes 109 & 113 and accompanying text.

\textsuperscript{106} The Third Circuit, like the district court, would have been required to make a collateral and separate Rule 11 determination. Such an inquiry, if made in the first place, would have the advantage of familiarity, but that is all.

Because \textit{Pensiero} involved a summary judgment which was affirmed without opinion, the judicial expense was less than a similarly fragmented appeal from a trial and an appellate decision prior to consideration of the Rule 11 claim.

\textsuperscript{107} The argument is: (1) the Third Circuit was concerned about piecemeal appeals; (2) piecemeal appeals can be avoided by prompt post-judgment
11 sanctions is made promptly following notice of appeal on the merits, the district court could consider the sanctions issue before the appeal; thus, consolidation on appeal could still occur.\textsuperscript{108} Several courts have noted the potential for consolidation of promptly filed post-judgment motions for attorney's fees, and have allowed such motions.\textsuperscript{109} Therefore, the position adopted by the Third Circuit is more restrictive than necessary to further the court's policy of avoiding piecemeal claims.

It is recommended that the Third Circuit adopt a different approach to the timeliness of Rule 11 motions than was taken in \textit{Pensiero}.\textsuperscript{110} In considering an alternative formulation, the court should balance the actual costs of piecemeal appeals and the Rule 11 policies favoring post-judgment motions, while looking for a timeliness requirement that best serves both interests. Under such a test, a better construction of the rule would merely require Rule 11 motions to be filed within a reasonable time, under the circumstances, after a final judgment on the merits.

\textsuperscript{108} The Seventh Circuit recognized that refusal to allow district courts to consider promptly filed post-judgment motions for fees can actually cause piecemeal appeals. \textit{Terket v. Lund}, 623 F.2d 29, 34 (7th Cir. 1980). The Seventh Circuit noted:

\begin{quote}
If the district court may proceed after the substantive judgment is appealed, it may be able to decide the attorneys' fees issue before the pending appeal has been fully briefed and argued. Then, if the order on attorneys' fees is properly appealed, that appeal could be consolidated with the pending appeal for consideration by [the court of appeals]. . . . Therefore, district courts in this circuit should proceed with attorneys' fees motions, even after an appeal is filed, as expeditiously as possible.
\end{quote}

\textit{Id.} (emphasis added). \textit{See also} \textit{Langham-Hill Petroleum, Inc. v. Southern Fuels Co.}, 813 F.2d 1327, 1331 (4th Cir.) ("Piecemeal appeals will be avoided if district courts promptly hear and decide claims to attorney's fees. Such practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits."); \textit{cert. denied}, 108 S. Ct. 99 (1987).

\textsuperscript{109} The Seventh Circuit, in reiterating its approval of \textit{Terket}, restated its timeliness rule: a "motion for [attorney's fees] must be made \textit{within a reasonable time after the entry of a judgment} regardless of whether or not appeal has been taken on the merits of the case." \textit{Overnite Transp. Co. v. Chicago Indus. Tire Co.}, 607 F.2d 789, 793 n.4 (7th Cir. 1980) (citing \textit{Terket}, 623 F.2d at 34) (emphasis added). \textit{See also} \textit{Muthig v. Brant Point Nantucket, Inc.}, 838 F.2d 600, 604 (1st Cir. 1988) (allowing post-dismissal motion for Rule 11 and requiring filing be made within reasonable time); \textit{Gordon v. Heimann}, 715 F.2d 531, 538-39 (11th Cir. 1983) ("Rather than set a time limitation by judicial fiat, we conclude that requests for attorney's fees may be made by motion within a reasonable period of time after the final judgment in a case.") (footnote omitted).

\textsuperscript{110} While \textit{Hicks} represents one extreme, that Rule 11 motions are timely even if filed after the conclusion of the litigation, \textit{Pensiero} represents the opposite extreme, that Rule 11 motions are untimely if filed at any time following a final judgment in the district court.
in the district court.\footnote{111} This would eliminate the confusion over what constitutes a final judgment, promote the deterrence policies of Rule 11, and still avoid piecemeal appeals. Further, the costs associated with this change in the rule would be minimal, for in most cases the subsequent Rule 11 determination by the district court could be consolidated with an appeal on the merits.\footnote{112} In sum, allowing post-judgment motions for Rule 11 sanctions that are filed within a reasonable time of final judgment in the district court will serve the policies of Rule 11 without causing piecemeal appeals.\footnote{113}

\footnote{111} For a discussion of those cases that have adopted the “reasonable time” limit for filing post-judgment Rule 11 motions, see supra note 109 and accompanying text.

\footnote{112} In most cases, it is contemplated that a “reasonable time” would be soon after a final judgment in the district court, within time for consolidation on appeal with the merits. However, when the offending paper is a motion which was filed just prior to the final judgment, an examination of the reasonableness of a Rule 11 claim by the aggrieved party may take longer than an analogous examination of an offending pleading filed at the outset of the litigation. This is where a “reasonable” standard of timeliness improves the level of fairness when compared with a straightforward limit expressed in days.

\footnote{113} Subsequent to completion of this article, the United States Court of Appeals for the Ninth Circuit decided the case of Community Electric Service v. National Electrical Contractors Association, 869 F.2d 1235 (9th Cir. 1989). Community is noteworthy because the Ninth Circuit expressly disagreed with the Third Circuit’s decision in Pensiero.

In Community, the defendants motioned for Rule 11 sanctions following the dismissal of the underlying claim on the merits. \textit{Id.} at 1239. The plaintiffs then argued that the Rule 11 motion was untimely. \textit{Id.} at 1242. The court disagreed, however, and held “the timeliness of the Rule 11 motion rests within the [trial] judge’s discretion.” \textit{Id.} This discretion, however, is limited by the local rules of court for the Central District of California which sets a 30-day limit on requests for attorney’s fees. \textit{See id.}

In the course of reaching its decision, the Ninth Circuit pointed to several other approaches to post-judgment Rule 11 motions, including that of the Third Circuit in Pensiero. The Ninth Circuit, in discussing the Pensiero decision, stated, “The Third Circuit employs a more demanding approach that we decline to adopt. Although we agree with that court’s concerns regarding early notification and the efficient use of judicial resources, ... we believe these matters rest properly within the sound discretion of the trial judge.” \textit{Id.} (citation omitted).

The Ninth Circuit’s rule differs somewhat from that suggested in the present article. One particular contrast stems from the 30-day limit imposed by the local rule of court governing the District Court for the Central District of California. Nevertheless, the Ninth Circuit’s holding allows the district judge to apply the factors governing the reasonableness formula suggested in the present article, including such factors as deterrence and efficiency. Thus, the Ninth Circuit’s holding in Community is an acceptable alternative to the holding in Pensiero.