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11-CV-I

November 3, 2011

Via electronic mail to Rules_Comments@ao.uscourts.gov

Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Civil Rules Advisory Committee Meeting Nov. 7-8;
Preservation Rule and *Erie*

Dear Judge Campbell:

I wanted to comment briefly before the meeting on a matter on which I have commented before: the application of the *Erie* doctrine in the context of sanctions or curative instructions for violations of a duty to preserve. I will illustrate my concerns using the subcommittee's draft text (Category 3 approach, Bates stamped pp. 70-74 of materials for upcoming meeting, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf) and recent case law from Minnesota.

In *Miller v. Lankow*, 801 N.W.2d 120, 128 (Minn. 2011), the Minnesota Supreme Court in August declared as follows:

> Here, we specifically reaffirm our rule that custodial parties have a duty to preserve relevant evidence for use in litigation. Id. at 116. We also reaffirm our previously stated rule that, even when a breach of the duty to preserve evidence is not done in bad faith, the district court must attempt to remedy any prejudice that occurs as a result of the destruction of the evidence. Id.

The court was citing its 1995 decision in *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995). In that case, the court had approved striking the testimony of a plaintiffs' expert in a design and manufacturing defect case because the testimony was based on the examination of a vehicle that the plaintiffs' negligently had failed to preserve for examination by the defendant. In that case, the court had noted:

777 6th Street NW - Suite 520 - Washington, DC 20001
Tel (202) 944-2803 Fax (202) 965-0920 infoccl@cclfirm.com

> Because the critical item of evidence no longer exists to speak for the plaintiffs' claims or to the defendant's defense, the trial court is not only empowered, but is obligated to determine the consequences of the evidentiary loss.

Id. at 119.

These cases do not illuminate a distinction the subcommittee has rightfully recognized between curative measures, which these cases seem to address under the subcommittee's nomenclature, and sanctions, a term better reserved for punitive measures. They do, however, establish rules of Minnesota law that must be respected by a federal court sitting in diversity, and cannot be supplanted by federal rule. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010) ("What matters is what the [federal] rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not.")

The Category 3 approach would not permit a court sitting in diversity to reach the same result as the Minnesota court reached, as the conduct at issue is merely negligent and the sanction appears to be addressed under Rule 37(b)(2)(A)(ii). *See* Discussion Draft of Rule 37(g)(2), p.71. The LCJ approach, Proposed Rule 37(e), p. 74, suffers a similar problem, assuming the action is a "sanction" for purposes of the proposed rule.

A rule such as Rule 37(b)(2)(A) proposed by Tom Allman, p. 81, which prescribes sanctions for violations of a duty separately owed to the federal court, could co-exist with the Minnesota rule, provided it did not preclude the federal court from following Minnesota law with regard to breach of any duty imposed by Minnesota law.

Thank you for the opportunity to clarify and amplify my prior comments. I look forward to seeing you next week.

Very truly yours,

John Vail
Vice-President and Senior Litigation Counsel

Cc: Judge Campbell, chambers, via electronic mail
Magistrate Judge Grimm, chambers, via electronic mail