COMMENTS TO THE ADVISORY COMMITTEE ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

SUBMITTED BY ADAMS AND REESE LLP

1/6/14

The law firm of Adams and Reese LLP appreciates the opportunity to submit comments to the Advisory Committee on Civil Rules (Committee) regarding the preliminary draft of proposed amendments to the Federal Rules of Civil Procedure. Adams and Reese is a firm of over 300 lawyers with offices in the states of Louisiana, Texas, Alabama, South Carolina, Florida, Mississippi, Tennessee, and the District of Columbia. The firm's practice is exclusively civil law, in both federal and state courts.

Adams and Reese LLP supports the efforts of the Committee to streamline and make more efficient and fair the rules of discovery.

The comments respectfully submitted herein by Adams and Reese focus on the need for clarity regarding the scope of the Rule 37(e) ESI preservation requirement and possible sanctions for failure to preserve ESI.

SCOPE OF ESI PRESERVATION

The need to address the scope of the Rule 37(e) ESI preservation requirement and when sanctions should be permitted is illustrated well by a recent situation that one of our clients confronted. (*NACCO Materials Handling Group v. The Lilly Company*, 278 F.R.D. 395, U.S.D.C. W.D. Tennessee, 2011). In the particular situation cited, our client, a small family owned forklift dealership, was sued by a billion dollar global forklift manufacturer claiming that employees of our client had illegally accessed the plaintiff's secure website to order forklift parts.

Upon the initiation of litigation, the defendant issued a litigation hold to key personnel in its parts department, which was the only department recognized as having made access to the plaintiff's secure website, and to the company's senior management. The defendant forklift dealer did not instruct every employee in the company to preserve ESI and did not retain an ESI expert, but relied on its in-house IT director (who split his time between his IT duties and as a trainer for forklift repair) to implement appropriate ESI preservation measures. The dealer's IT director searched and saved all files reasonably determined to involve the issues raised in the complaint. But the forklift dealer did not cease its ordinary and established protocols with regard to file back-up and, though key personnel were instructed to preserve all ESI, the forklift dealer did not instruct all employees to disable "auto-delete" functions on web browsers or in temporary internet file folders.

Even though the plaintiff manufacturer had waited some four months after first discovering the alleged access to its website before filing suit (or otherwise notifying its former forklift dealer), the plaintiff contended that information contained in the temporary internet files which *might* show access to the manufacturer's website had been lost due to the forklift dealer's failure to instruct *all* employees (not just the key personnel identified by the defendant as being the ones most likely to have ESI) to disable all "auto-delete" functions in web browsers, temporary internet files, etc. and to affirmatively preserve ESI.

The Magistrate sanctioned the forklift dealer for failing to ensure against the potential overwriting of the temporary internet history files without any finding of willful or intentional destruction of relevant ESI. Moreover, there was no evidence that any relevant evidence was actually lost or destroyed.

It is notable that this sanction resulted from discovery allowed by the Court while our client had pending a 12(b)(6) motion to dismiss challenging whether the plaintiff had stated plausible claims for relief. Our client sought to have discovery stayed pending resolution of the motion to dismiss but the request was denied. While our client's appeal of the sanction ruling was pending before the District Judge, our client decided to settle the lawsuit largely due to the cost and harshness of the looming sanctions and the potential disruption they would cause to this small business if the sanctions were not reversed.

We provide this example to the Committee to illustrate the problems that can result from what essentially was a default to awarding discovery sanctions under a "strict liability" approach without any showing of willful, wanton intent to destroy or failure to preserve evidence. This situation becomes more problematic where, as was the case here, discovery was allowed to proceed without first resolving a pending 12(b)(6) motion to dismiss the case.

Based on experiences like this, Adams and Reese supports the need, as set forth by the Lawyers for Civil Justice (LCJ), to amend Rule 37(e) so as to address the need for clarity regarding the scope of the Rule 37(e) ESI preservation requirement, including when sanctions should be possible.

We thank the Committee for the opportunity to submit these comments.

Glen M. Pilié
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
Telephone: 504-585-0260