# LAWYERS FOR CIVIL JUSTICE

## COMMENT TO
## THE CIVIL RULES ADVISORY COMMITTEE

FEBRUARY 10, 2013

## *The "No Fault Exception" of Proposed Rule 37(e)(1)(B)(ii) Should Be Stricken Since It Is Inconsistent With the Rule's Substance, Purpose and Intent*

Lawyers for Civil Justice respectfully submits these preliminary views on what we refer to as the "No Fault Exception" created by proposed Rule 37(e)(1)(B)(ii) for consideration by the Discovery Subcommittee of the Civil Rules Advisory Committee. The "restyled" proposed Rule 37(e), which was approved for publication by the Standing Committee at its January 2013 meeting, is attached as an Appendix.

Proposed subsection (e)(1)(B)(ii) would create a No Fault Exception to proposed Rule 37(e)'s required showing of substantial prejudice and willfulness or bad faith, that would allow imposition of case-altering sanctions where, even though there may not have been willfulness or bad faith, a party was "irreparably deprived … of any meaningful opportunity to present a claim or defense" by a failure to preserve.

While we certainly applaud the intended purpose of Rule 37(e) and strongly support its publication for comment, we share the concerns that were expressed at the Standing Committee's January meeting regarding the No Fault Exception. And, although an effort to amend the exception to address those concerns may be underway, we believe that the only adequate response to those concerns is to delete it. Therefore, LCJ respectfully urges the Committee to strike subsection (e)(1)(B)(ii) from the final draft that will be submitted to the Standing Committee for approval.

### NO FAULT, NO SANCTION

Proposed Rule 37(e) would limit the imposition of sanctions to cases where the failure to preserve information caused "substantial prejudice" ***and*** was "willful or in bad faith."[1] The No Fault Exception, however **fundamentally undermines** the basic conceptual framework of the new rule which is premised on abandoning use of mere negligence or gross negligence, see *e.g.*,

[1] The differences among circuits and districts currently exist on two important issues: (i) the mental state of the party that failed to preserve certain discoverable material, and (ii) the amount of prejudice that a movant seeking sanctions must show. Companies have been fearful for years that an innocent mistake despite best intentions could result in a sanction order. Over preservation has unfortunately been the logical, if wasteful, result. Microsoft's submission to the Rules Committee in 2011 gave concrete examples, reporting that for every "one-page trial exhibit, Microsoft . . . preserves almost 340,000 pages." The new Rule, combined with a revised Rule 26(b)(1), would materially reduce such wasteful over-preservation. Robert D. Owen, *Skating Along the eDiscovery Cliff: Will Newly Proposed Civil Rules Amendments Help to Refocus Litigation on the Merits?* (Part I) 13 DDEE 51, 01/31/2013.

*Pension Committee*,[2] in favor of a standard based on specific *mens rea:* bad faith and willfulness. Yet, in the case of an *accidental* or *inadvertent* data loss, the No Fault Exception could be used to impose a *severe* penalty based on what amounts to a strict liability standard—i.e. in the absence of *any* culpable conduct.

If there was **no fault** there should be **no sanction**. As was pointed out at the Standing Committee meeting, should a party be sanctioned when a witness dies or information is lost as a result of an Act of God? A game-changing sanction is no more appropriate in the context of Rule 37(e) than it would be where the death of an adversary's key witness makes him unavailable for deposition or trial. There is no good reason, based on policy or case law, to authorize use of such a severe penalty where a party has not acted willfully or in bad faith. In *Silvestri v. GM*,[3] where a dismissal was based on the fact that an automobile was unavailable for analysis through no fault of the defending party, there was ample evidence that, in fact, the loss of the evidence "may have been" deliberate.[4] The court found it unnecessary to decide that issue, choosing to focus only on the prejudice. However, there is no need for the exception, because proposed Rule 37(e) adequately deals with such situations where there are, as in *Silvestri*, ample grounds to conclude that the requisite predicate culpability exists.

**DILUTION BY CASE LAW**

Proposed Rule 37(e) is designed to provide a single, uniform national rule to eliminate conflicting judge-made standards for sanctions and thus "reassure" those who would otherwise be tempted to practice costly "over-preservation" for fear of being branded a spoliator. According to the Draft Committee Note, proposed Rule 37(e) "rejects decisions [such as *Residential Funding*][5] that have authorized the imposition of sanctions – as opposed to [curative] measures authorized by Rule 37(e)(1) – for negligence or gross negligence."[6] Moreover, the Rule is designed to provide sufficiently comprehensive rule-based remedies that courts will refrain from using the "looser notions of inherent powers" to "circumvent the protections established by the new Rule 37(e)."[7] Therein lies another problem with the No Fault Exception.

While the No Fault Exception is intended to be rare and narrow, it nevertheless will open up the rule to dilution by case law, as has occurred with existing Rule 37(e). The history of the Federal Rules provides many unfortunate examples of clauses that have been interpreted in ways the drafters never intended.[8]

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[2] 685 F. Supp. 2d 456, 462 (S.D. N.Y. May 28, 2010).
[3] 271 F.3d 583 (4th Cir. 2001).
[4] *Id.*, 593. Silvestri "**knew** the significance of preserving the automobile . . . yet Silvestri took no steps to assure General Motors equal access to the evidence or to give General Motors notice of his claim." (emphasis added).
[5] 306 F.3d 99, 108 (2nd Cir. 2002).
[6] Report of the Civil Rules Committee to the Standing Committee, Dec. 5, 2012 at 16. ("REPORT");http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf#pagemode=bookmarks.
[7] REPORT at 10.
[8] The classic example is found in the decisions that refuse to read the current Rule 37(e) as applicable to losses that occur after a duty to preserve has attached. *See, e.g.*, *Major Tours v. Colorel*, 2009 WL 2413631, at *4 (D. N.J. Aug. 4, 2009)(citing *Peskoff v. Faber*, 244 F.R.D. 54, 60 (D.D. C. 2007)("this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation");

By contrast to the *de minimis* risk of "irreparable" prejudice, there is a great risk that parties and courts will use the No Fault Exception in ways this Committee never intended. It is not hard to imagine parties making tactical threats of sanctions under the exception to extract settlements *whenever* there is an inadvertent loss of data—irreparable or not. The use of the phrase "irreparably deprived" – as a description of future state of evidence at trial is so vague and ambiguous that it is impossible to anticipate its applications, and is an invitation to decisional mischief.

For example, it is not entirely clear what is meant by such a situation resulting in a lack of "meaningful opportunity" to present a claim or defense: does that extend to a *single* claim and defense – or to a party's overall opportunity to vindicate its interests? Moreover, because "irreparably deprived" cannot be assessed until all the evidence is in, courts will err on the side of caution, holding decisions (and absolution) in abeyance, and as a result keep the entire status quo of uncertainty, risk and over-preservation in place throughout the pre-trial stages of cases despite a contrary intent of the rule makers.

**PRACTICALITY**

There is also no *practical* reason for the No Fault Exception in the ESI context. The risk that parties will ever be stripped of claims by cataclysmic data losses is decreasing by the day.[9] The world has evolved to a point where paper files have been digitized, electronic messages are replicated in multiple custodial in-boxes and nearly all electronically stored information is distributed and stored across multiple servers. It is hard to imagine how any party will ever be deprived of *every* shred of evidence in this increasingly paperless world. It makes no sense to draft an exception that is inconsistent with and would undermine the rule's substance, purpose and intent to address a problem that is extremely rare even today and is becoming increasingly hypothetical.

**RULE MAKING POWER**

One final point: Some have argued that the federal rules are somehow disabled by the *Erie* doctrine from even dealing with spoliation sanctions. That argument is misplaced and inconsistent with the clear holding in *Chambers v. NASCO.*[10] Provisions adopting uniform national rules governing litigation abuse, such as proposed Rule 37(e), are clearly within the rulemaking power of the legislative branch in conjunction with the judiciary as acknowledged in *Chambers.* Moreover where there is "indication of an intent to displace the inherent power," the

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*Pandora v. Chamilia*, 2008 WL 4533902, at *8, n.7 (D. Md. Sept. 30, 2008) (quoting from Zubulake IV to the effect that "once the duty to preserve attaches, any destruction is, at a minimum, negligent"). While *Chin v. Port Authority*, 685 F.3d 136,162 2nd Cir. 2012) has dramatically undercut the logic that per se use of litigation holds is required or justifies assumptions as to relevance, it comes too late to undo the damage done by an ambiguous Committee Note in the 2006 Amendments. Accordingly LCJ supports the complete replacement of the current Rule 37(e) with a new rule.

[9] Even in the "physical object" world, remedial measures, akin to those referenced in "restyled" Rule 37(e)(1)(A) are always available to a court where culpability is not shown but severe prejudice exists. In the case of product liability cases, testing of models from the same batch or controlled experiments on the features at issue could be ordered to supply any missing evidence.

[10] 501 U.S. 32(1991); See Hanna v. Plumer, 380 U.S. 460 (1965).

courts must respect that decision.[11] As Justice Kennedy clarified in dissent in *Chambers*, a court "should rely on rules, and not inherent powers, whenever possible," because the rules, once adopted in accordance with the Rules Enabling Act, are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions."[12]

**CONCLUSION**

The Committee's proposed Rule 37(e) represents a truly meaningful attempt to address the problem of over preservation and has the potential to reduce substantially needless burdens and costs that are borne currently by all participants in the civil litigation system. That work, and the potential for much-needed change, should not be undone by an exception that, under scrutiny, (a) is not needed and (b) will lead to unintended consequences. Therefore, we urge the Subcommittee to recommend deletion of the No Fault Exception in the version of proposed Rule 37(e) that we trust will be approved for publication at the April meeting. We will have further comment regarding other improvements to the proposed Rule that should be considered during the very important public comment process.

Respectfully submitted,

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[11] *Id.* at 49, n. 13.
[12] *Id*. at 66 (citing to 28 U.S.C. § 2071, et seq.)

The Standing Committee approved the following "restyled" text of proposed Rule 37(e) for publication at its January 2013 meeting:

**Rule 37(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.**

**(1)** *Curative measures; sanctions.* If a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation, the court may

**(A)** permit additional discovery, order the party to undertake curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

**(B)** impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the failure:

**(i)** caused substantial prejudice in the litigation and was willful or in bad faith; or

**(ii)** irreparably deprived a party of any meaningful opportunity to present a claim or defense.

**(2)** *Determining reasonableness and willfulness or bad faith.* In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including:

**(A)** the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

**(B)** the reasonableness of the party's efforts to preserve the information;

**(C)** whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party engaged in good-faith consultation about the scope of preservation;

**(D)** the proportionality of the preservation efforts to any anticipated or ongoing litigation; and

**(E)** whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

APPENDIX