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August 16, 2011

Honorable David G. Campbell
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 623
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2156

Dear Judge Campbell:

Introduction and Summary

The current debate about preservation and sanctions should address complicated questions regarding the source of a duty to preserve and the source of a power to sanction. These questions affect the scope of rulemaking authority. I believe that they render elusive, at best, one goal of rulemaking in this area – promoting uniformity and enhancing predictability. *See* Thomas Y. Allman, *Preservation and Spoliation Revisited: Is it Time for Additional Rulemaking?* (paper for Duke Conference), at 3-4, http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/02E441B3AD64B2D9852576DB005D976D/$File/Thomas%20Allman%2C%20Preservation%20and%20Spoliation%20Revisited.pdf?OpenElement.

In diversity cases, it is generally acknowledged that state law defines the duty to preserve evidence[1] and that *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), requires the federal court to look to that duty. Few cases address the issue of whether *Erie* requires that the federal court also follow state law in fashioning a sanction for breach of that duty. Those that do generally conclude that it does, consistent with the rationale of the key Supreme Court decision on sanctions and consistent with the over-arching principle that state law should govern outcome-determinative questions.

[1] Cases establish that state law governing the trigger for preservation essentially is uniform, and, with slight variations in verbal formulation, arises when litigation is extant or reasonably anticipated. *See* Andrea Kuperman, Memo on Elements of a Potential Preservation Rule (Sept. 23, 1910), at 198 *et seq.*, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf. Notably, that standard is consistent with standard insurance industry practice requiring that insureds notify insurers of potential claims "when the insured actually knew or should have known of the possibility that it might be held liable for occurrence in question, or that a claim or lawsuit might ensue which might be covered under its insurance policies. Stephen Plitt, *et al*., *Couch on Insurance*, 191:9 (3d ed. 2011) (footnotes omitted). No diversion from the "reasonably anticipated" standard currently is contemplated by the committee. *See* Draft Notes of Discovery Subcommittee (Sept. 20, 2010), pp. 2-3, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf (pp.159-60).

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It is possible to craft a federal rule that defines federal duties to preserve and that prescribes federal sanctions for breach of those federal duties. Such a rule would be useful for federal question cases, but I do not believe that it could, consistent with the Rules Enabling Act, displace state law in diversity cases.

Discussion

Let me focus the discussion on a hypothetical set of facts. Posit that P, a citizen of state X, sues D, a citizen of state Y, in state court in Y, asserting that D violated the law of Y. D has long had clear notice that P was likely to file this claim. D did not purposefully destroy critical documents but through its negligent failure to implement a litigation hold critical documents were destroyed. The substantive law of Y requires that negligent failure to implement a litigation hold be sanctioned by a jury instruction requiring adverse inferences be drawn against Y. May a federal standard require that such an instruction be given only if there is bad faith?

Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991), is the leading case on authority of federal courts to issue sanctions. The Supreme Court faced the question of whether, in a diversity case, a district court had inherent authority to impose attorney fees on a litigant as a sanction for bad-faith conduct in litigation. The answer was yes. *Id*. at 50.[2] *Chambers* has been widely cited as authority for the proposition that a federal court has inherent authority to sanction. *See.,e.g,* Allman, *Preservation and Spoliation Revisited, supra*. That description is accurate but incomplete, as *Chambers* contemplates that sanctions that are potentially outcome-determinative are governed by *Erie*.

[2] One Duke Conference participant has suggested that *Chambers* teaches "that bad faith is required before a court can resort to inherent authority to award attorney fees as a sanction." John M. Barkett, *The Duty To Preserve: Lawyers Beware!*, 25-WTR Nat. Resources & Env't 53, 54 (2011). The *Chambers* opinion discusses bad faith because bad faith was present in the case but nowhere does the opinion indicate that use of inherent authority is limited to cases of bad faith. Its counsel is more circumspect: "Because of their very potency, inherent powers must be exercised with restraint and discretion. See Roadway Express, supra, 447 U.S., at 764, 100 S.Ct., at 2463. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Id*. at 44-45. In *Roadway Express*, attorney fees were ordered against counsel as a sanction for conduct that did not amount to bad faith. *Roadway Express*, 447 U.S. at 766. Sanctions against parties call for even greater circumspection, but again are not limited to acts of bad faith. *See, e.g., Link v. Wabash R. Co.*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1389 (1962) (affirming, under inherent authority, sanction of dismissal for want of prosecution, and finding that use of inherent authority is justified "to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts."). Neither lower courts nor commentators are uniform in their approach to what level of culpability justifies particular sanctions. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 533 (D. Md. 2010) ("The different approaches among the Circuits regarding the level of culpability that must be shown to warrant imposition of severe sanctions for spoliation is another reason why commentators have expressed such concern about the lack of a consensus standard and the uncertainty it causes.").

In *Chambers* the party sanctioned argued that the punitive purpose of the sanction in question, an award of attorney fees, was inconsistent with applicable state law, which precluded punitive damages. *Id*. at 51. The court rejected this argument because there was no conflict between state and federal law, and because nothing about the sanction the federal court fashioned offended the rule that outcome-determinative issues should be governed by state law:

> Only when there is a conflict between state and federal substantive law are the concerns of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), at issue. As we explained in Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), the "outcome determinative" test of Erie and Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), "cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S., at 468, 85 S.Ct., at 1142. Despite Chambers' protestations to the contrary, neither of these twin aims is implicated by the assessment of attorney's fees as a sanction for bad-faith conduct before the court which involved disobedience of the court's orders and the attempt to defraud the court itself.

Id. at 52-53. The Court explained:

> [T]he imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation. Consequently, there is no risk that the exception will lead to forum-shopping. Nor is it inequitable to apply the exception to citizens and noncitizens alike, when the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed. As the Court of Appeals expressed it: "*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, *and abides by the rules of that court*, the result in his case will be the same as if he had brought it in state court. It does not allow him to waste the court's time and resources with cantankerous conduct, even in the unlikely event a state court would allow him to do so." 894 F.2d, at 706.

Id. (emphasis added). The Court added:

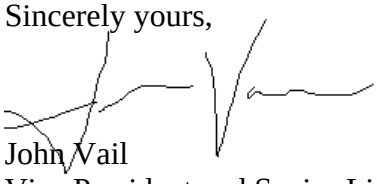
> We agree with the Court of Appeals that "[w]e do not see how the district court's inherent power to tax fees for that conduct can be made subservient to any state policy without transgressing the boundaries set out in Erie, Guaranty Trust Co., and Hanna," for *"[f]ee-shifting here is not a matter of substantive remedy, but of vindicating judicial authority."* 894 F.2d, at 705.

Id. at 54 (emphasis added). Thus, *Chambers* suggests that when a sanction does involve a substantive remedy, *Erie* is applicable. In the posited hypothetical, the jury instruction is a matter of substantive remedy.

Chambers, essentially, endorsed conflict-preemption in reverse in diversity cases – federal rules can define sanctions, provided those sanctions do not conflict with state law governing sanctions. Any conflict renders the federal rule invalid.

The committee cannot diverge from state law with regard to sanctions for breaches of state-imposed duties. If sanctions differed between state and federal courts, choice of forum could be outcome determinative, in violation of the Rules Enabling Act and the *Erie* doctrine.

Sincerely yours,



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