Legal Opinion Letter

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THE EMERGING BUSINESS THREAT OF CIVIL 'DEATH PENALTY' SANCTIONS

by
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The civil justice system's ultimate sanction is to strike a party's pleadings, which nullifies any defense a party has to a lawsuit regardless of the merits of the underlying claims. We call this sanction the "civil death penalty" because it takes away the constitutional right to defend oneself. Traditionally, this "civil death penalty" has been the sanction of last resort, reserved only for the most egregious conduct, when no other sanction will work. Such a sanction may be merited, for instance, where key evidence is intentionally destroyed that deprives the other side's right to a trial on the merits. But recently, personal injury attorneys have begun using this sanction as just another litigation tactic against civil defendants. These defendants have been threatened or hit with the "civil death penalty" sanction even when their alleged misconduct was not in bad faith and when the plaintiff was not prejudiced in any way.

Here's the personal injury lawyers' "civil death penalty" playbook: Incite discovery disputes and accuse defendants of failing to comply with discovery requests and court orders. Repeat this step several times. When the judge is sufficiently irritated with the defendants, go for the knock-out punch by arguing that defendant's repeated attempts to "obstruct justice" displays the defendant's incurable bad faith for which no sanction short of the "civil death penalty" will do. In plaintiff-friendly jurisdictions, such as those the American Tort Reform Association (ATRA) calls as Judicial Hellholes,™ judges are increasingly willing to play along. The defendant is liable by fiat. No trial. No evidence.

Two recent cases in Florida and Nevada involving potential multimillion-dollar damage awards illustrate this ominous "litigation by sanction" trend. Death penalty sanctions occurred in both cases even though the courts provided no support for any findings that the defendants' failure to disclose the information or comply with the discovery order was willful or malicious, or that the plaintiffs were prejudiced in any way. Yet, defendants were deemed "guilty" by judicial decree, with the only issue for trial being how much the defendants had to pay. Not surprisingly, ATRA has repeatedly included both of these jurisdictions in its Judicial Hellholes™ report.

The Florida DuPont Case. In June, a Broward County trial judge issued death penalty sanctions against E.I. DuPont De Nemours (DuPont), striking all of DuPont's defenses in a case alleging that a formulation of the company's fungicide Benlate™ harmed part of the shrimp population in Ecuador in the early 1990s. The judge's basis for issuing the sanction and taking away DuPont's right to defend itself was plaintiffs' allegation that they learned only this year, in 2009, that "a new formulation" of Benlate™ had been shipped to Ecuador in the early 1990s and that this new formulation had not been separately registered with the U.S. Environmental Protection Agency (EPA). The judge bought this argument, fuming that the "civil death penalty" was needed because DuPont hid this information, did not distinguish "new" Benlate™ in its defenses, and argued that Benlate™ was preempted from state tort suits under the Federal Insecticide, Fungicide, and Rodenticide Act.

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As it happened, the personal injury lawyers' facts and characterizations were wrong. There was no intent to hide anything. Plaintiffs had long been in possession of documents about the minor adjustments made to Benlate™ in 1991; plaintiffs' experts even submitted materials to the court referring to the new formulation back in 2005. More importantly, the differences are not relevant to the case, so even if this fact should have been part of the litigation earlier, plaintiffs have not been prejudiced. New Benlate™ only added two nontoxic, inert ingredients. The active ingredients are the same. Indeed, plaintiffs make no allegations that these differences are even relevant to shrimp deaths. Also, EPA protocol said that new Benlate™ need not be separately registered because it was only for export. Thus, the notion that new Benlate™ was not separately registered is a red herring.

The Nevada Goodyear Case. Also recently, a Clark County trial court issued "death penalty" sanctions against Goodyear Tire & Rubber Co. (Goodyear), the effect of which was a $30 million judgment against the company. The underlying case arose from a fatal automobile accident allegedly caused by a defective tire. There was no finding that the extreme sanction was based on any willful or malicious conduct, or that the discovery issue prejudiced the plaintiffs' case.

The Nevada Supreme Court held a hearing on the case in June 2009. *See Bahena v. Goodyear Tire & Rubber Co.*, Case No. 49207 (Nev. 2009). During oral arguments, Goodyear's attorney Dan Polsenberg explained the troubling trend and "phenomena" of courts issuing extreme and unjust sanctions. "Judges are… changing the rules of the game," Polsenberg stated. "Courts are enforcing rules differently from how they used to and differently from each other. And what they are doing is coming in and [issuing] extreme sanctions just for punishment and just for deterrence rather than to actually address willfulness or prejudice."

Insufficient Standards for Death Penalty Sanctions. A defendant's vulnerability to unjust "civil death penalty" rulings is, in part, due to a lack of clear standards in many state jurisdictions. While some states have developed meaningful criteria for when striking a pleading may be appropriate, most rely on more generalized notions of bad faith. Thus, these extreme sanctions can be unpredictable, inconsistent, and easily abused – particularly when local judges have campaign ties or other connections, to plaintiffs' counsel. In the DuPont matter, for example, a named partner in the plaintiffs' firm helped run the judge's most recent election campaign.

Some states have taken concrete steps to assure that when it comes to taking away one's constitutional right to defend oneself, a court must be acting properly and there can be no perception of improper use. In Texas, for example, a court *must* consider and "test" lesser sanctions before resorting to death penalty sanctions in all but "exceptional cases." *Cire v. Cummings*, 134 S.W.3d 835, 842 (Tex. 2004). Also, it must be "fully apparent that no lesser sanctions would promote compliance with the [discovery] rules." *Id.* at 841 (internal citation omitted). Other states consider whether the failure to comply with a discovery order actually prejudices the opposing party. *See, e.g.*, *Stephens v. Trust for Public Land*, 479 F. Supp. 2d 1341, 1346 (N.D. Ga. 2007). These rulings recognize that discovery disputes are common, people make mistakes, and not all facts come out during a case, all of which are increasingly likely given complexities with e-discovery. The "civil death penalty," though, is only appropriate when this happens as a result of malicious, prejudicial and irreconcilable misconduct.

Litigation by sanction is an ill-conceived tactic, and courts should avoid the "civil death penalty" whenever possible because it takes a case away from a jury. Conscientious appellate courts should develop fair and predictable standards for how the "civil death penalty" is used. Business associations and groups of others often sued by personal injury lawyers, should participate in *amicus* briefs to help develop those standards. If courts fail to act, legislatures should consider their role in protecting the basic due process right of defending oneself. Unless a plaintiff has been deprived of his or her right to a trial on the merits because of the defendant's intentional malfeasance, juries should be allowed to weigh the evidence and determine a case on its merits.

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