



## FORUM

« AROUND THE WEB, AUGUST 4 |

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### Civil 'death penalty' leaves no defense

Business and legal reform groups last week filed an amicus brief with the Nevada Supreme Court, urging the court to reconsider its decision in *Bahena v. Goodyear* that deprived the company of its ability to defend itself in a product liability case.

A Clark County trial court issued originally ordered sanctions to punish what it considered to be discovery violations by Goodyear Tire & Rubber Co. in a lawsuit over a fatal automobile accident allegedly caused by a defective tire. The district court struck Goodyear's answer as to liability and damages. No defense possible, which explains why this kind of sanction is called the "civil death penalty."

On July 1, the state Supreme Court upheld the penalty despite the absence of any finding that the company had engaged in willful or malicious conduct during discovery or that the issue prejudiced the plaintiffs' case. (Opinion [here](#).) The result was a \$30 million judgment against the company.

The brief, available [here](#), argues:

This Court's decision in *Bahena v. Goodyear Tire* was a shot heard around the United States business community. The ruling deprived a business of its most fundamental right in the American civil litigation system: the constitutional right to defend oneself in court. When the trial court struck Goodyear's answer, it took away Goodyear's right to defend itself against Plaintiffs' charges. Goodyear was precluded from showing that the tire in question was not defective, that its tire did not cause the accident, that its product was misused or that instructions were not followed. Goodyear was deemed liable. Full stop. No defenses allowed. All that was left for the jury to decide was how much Goodyear would have to pay. The finality of striking a defendant's answer as to liability is the reason the sanction is nicknamed "the civil death penalty" in some courts and the business community throughout the United States.

Joining my employers at the National Association of Manufacturers in the brief were the NFIB Small Business Legal Center, American Tort Reform Association, American Insurance Association and the National Chamber Litigation Center, Inc. Counsel were Victor Schwartz and Phil Goldberg of Shook, Hardy and Bacon.

It's asking a lot for the court to reconsider its decision, but the case is alarming for both the extreme outcome and its potential setting of precedent: Case law overwhelmingly holds that an order striking all defenses to liability dictates the outcome of a case, and due process protections are required. If Nevada can so easily remove constitutional due process protections, companies will face more difficult litigation burdens there that could make it into a magnet litigation jurisdiction.

The ruling further creates an incentive for plaintiffs to make discovery as long and complicated as possible in the hopes that the defendant company makes an error - one that could be seized on as enough to justify this "civil death penalty."

Sherman "Tiger" Joyce of the American Tort Reform Association wrote a column for the [Washington Legal Foundation](#) last September on the issue. "[The Emerging Business Threat](#)

Of Civil 'Death Penalty' Sanctions," reported on the previous infliction of the civil death penalty in Florida. A Broward County trial judge applied the "civil death penalty" against E.I. DuPont De Nemours, striking all of DuPont's defenses in a case alleging that a formulation of the company's fungicide Benlate(TM) harmed part of the shrimp population in Ecuador in the early 1990s. Joyce writes:

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.

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