

## APPELLATE PRACTICE

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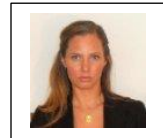
*Phil Goldberg and Kathryn Constance discuss the impact that a recent Supreme Court decision could have on sanctions over discovery and other litigation disputes.*

## The U.S. Supreme Court Reins in Discovery Sanctions

### ABOUT THE AUTHORS



**Phil Goldberg** is the Managing Partner of Shook, Hardy & Bacon's Washington, D.C. office and the Director of the Progressive Policy Institute's Center for Civil Justice. He filed an amicus brief in *Goodyear v. Haeger* on behalf of the National Association of Manufacturers and serves on the IADC Civil Justice Response and Appellate Practice Committees. He can be reached at [pgoldberg@shb.com](mailto:pgoldberg@shb.com).



**Kathryn Constance** is Senior Counsel to the Electronic Discovery Institute, a non-profit organization dedicated to resolving electronic discovery challenges.

### ABOUT THE COMMITTEE

This Appellate Practice Committee is available to all members who routinely practice in state and federal appellate courts, as well as trial lawyers who handle their own appeals. The Committee publishes quarterly newsletters addressing various appellate related topics and recent trends in appellate practice. The Committee also offers CLE programs focusing on appellate related issues that often arise before, during, and after trial. Networking among members is also encouraged through Committee meetings held during bi-annual IADC meetings. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article contact:



**John B. Drummy**  
Vice Chair of Publications  
Kightlinger & Gray, LLP  
[jdrummy@k-glaw.com](mailto:jdrummy@k-glaw.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The U.S. Supreme Court, in the little-known case *Goodyear v. Haeger* this past term, set important limits on a judge's inherent authority sanctions, which could have significant implications in discovery disputes. The Court held that when imposing sanctions, a judge must determine which fees and costs would not have been borne "but for" the misconduct and can assess only "the fees the innocent party incurred solely because" of that misconduct. This ruling is important for defense lawyers because it should restrain judges from over-penalizing corporate defendants and provide a check on plaintiffs' lawyers who seek to unfairly game the sanction system.

This particular case arose out of a discovery dispute, where the plaintiffs alleged that Goodyear failed to turn over a document they believed was responsive to their discovery requests. The judge agreed with the plaintiffs and fined Goodyear \$2.7 million in sanctions, which represented *all* of the plaintiffs' legal fees and costs incurred *after* the alleged discovery violation. The judge acknowledged that he did not draw any causal connection between the failure to produce this document and fees incurred. Rather, he found that the discovery failure tainted the entire litigation and assessed all of the subsequent fees and costs.

In a unanimous 8-0 decision, the Supreme Court vacated the sanction. See 581 US \_ (2017). The Court explained that fee-shifting sanctions are constitutionally limited to reimbursing the aggrieved parties for costs they would not have incurred "but for" the

alleged malfeasance. They are solely compensatory sanctions. If an award extends beyond the costs and fees caused by the alleged malfeasance, it crosses the boundary and becomes a punitive sanction. If the court seeks to impose punitive sanctions, the defendant is owed heightened due process protections such as those afforded in criminal proceedings, including a higher standard of proof.

While the opinion was fairly short, the ruling could have a large impact if properly implemented. Defense counsel could use it to ensure that there remains a semblance of balance between inherent authority and rule-based sanctions, and to impede plaintiffs' lawyers from manipulating sanctions to generate money for cases, particularly those that lack substantive merit.

#### **Inherent Authority vs. Rule-Based Sanctions**

The tension between inherent authority and rule-based sanctions relates back more than twenty-five years to *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). In *Chambers*, the Court provided judges with inherent authority to "assess attorney's fees when a party has acted in bad faith" during discovery even when procedural rules existed to sanction that misconduct. In an effort to achieve some balance, the Court pointed out that fee shifting sanctions, like other penal measures, "must comply with the mandate of due process."

Justice Kennedy dissented in *Chambers* over his concern that inherent authority sanctions

had to be more limited. He feared that courts would treat inherent powers “as the norm and textual bases of authority as the exception” even when the written rules were on point and resulted from well-considered deliberations. *Chambers*, 501 U.S. at 63 (Kennedy, J., dissenting). He turned out to be prescient, as lower courts have regularly invoked inherent authority over rule-based sanctions because it provides them with more discretion and less appellate oversight.

The *Goodyear* ruling provides some needed checks and balances. By limiting inherent authority sanctions to truly compensatory damages, *Goodyear* protects against the creation of a super-sanction devoid of any structure or restrictions.

Consider, for example, the impact that unbounded inherent authority sanctions would have on the recent amendments to the Federal Rules. In 2015, the Federal Rules underwent several modifications to curb the potential that discovery sanctions would distort litigation outcomes. These changes added important protections to parties in discovery proceedings where preservation and document production present complex undertakings. They were the result of much deliberation, including more than 2,350 comments.

Among the changes to the Federal Rules was to Rule 37(e), which specifies measures a court may employ if information that should have been preserved is lost and not produced in discovery. The new Rule permits sanctions “only when there is prejudice to another

party” and the financial sanction must be “no greater than necessary to cure the prejudice.” Additional non-monetary sanctions can be taken if the court finds “the party acted with the intent to deprive another party of the information’s use in the litigation,” such as creating a presumption that the lost information was unfavorable. Thus, the new Rule 37(e) developed standards for when a court has sanction authority and what those sanctions could be.

Prior to *Goodyear*, several courts asserted the ability under *Chambers* to sanction shop between their inherent authority and new Rule 37(e). Now, judges imposing either sanction should hold hearings to determine which fees and costs were caused by the misconduct. In this way, the Court reduced the attractiveness of inherent authority sanctions. Courts can still use them when rule-based sanctions are on point, but inherent authority sanctions should not become the exceptions that swallow the entire Federal Rules.

### **Checking Litigation Gamesmanship**

The other key aspect to this ruling is that, by placing a restraint on a judge’s inherent authority to sanction, the Court helped curb discovery gamesmanship. We all appreciate that the purpose of discovery is to facilitate the search for truth. But, too often, the lopsided imbalance of discovery costs and burdens on defendants in complex litigation hinders the pursuit of justice.

Many plaintiffs' lawyers are skilled at leveraging discovery requests to trigger sanctions. They create a perception of bad faith by inundating courts with motions to compel additional discovery and motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent. The lawyer's goal is to stoke a judge's anger, accuse the other party of obstructing justice, and seek sanctions. This practice is termed "litigation by sanction" because, by racking up enough sanctions, the merits of the case might never be reached at all.

However, regardless of how well one tries to comply with discovery demands, there can almost always be allegations that a page, document or flash drive has not been produced. A violation appearing to be in "bad faith" may be from a mistake, misunderstanding, or inability to adhere to voluminous or complex production orders. As the Advisory Committee on Civil Rules has found, "the notion of having all information on a subject is almost unattainable."

The Court's "but for" causation requirement in *Goodyear* provides an important check on litigation by sanction and inflamed jurists. Rather than making Goodyear pay \$2.7 million to cover the plaintiff's entire litigation costs, the fine will likely be far less than \$1 million and tailored to only those costs truly incurred as a result of the alleged violation. Causation, therefore, provides a clear, fair, and predictable standard by ensuring that a sanction is tailored to the misconduct. It also

delineates the line between what is needed to make a party whole and pure punishment.

As the Supreme Court appreciated, parties subject to sanctions, just as with liability, are entitled to due process protections. If a remedial sanction is greater than compensation, as here, it raises the same "acute danger of arbitrary deprivation of property" that the Court observed in *Honda Motor Co. v. Oberg*. 512 U.S. 415, 432 (1994). Similarly, as the Court held in *BMW of N. Am. v. Gore*, regardless of whether the award is for sanctions or liability, a person must "receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty." 517 U.S. 559, 574 (1996).

The punishment for violating a discovery order is paying the costs that one wrongly made another party incur. A judge, no matter how rightly or wrongly inflamed, can no longer fine a party more without providing a higher level of due process.

### **Conclusion**

*Goodyear* is not an elixir against all discovery abuse, but it should make judges mindful that inherent authority sanctions have limits. They should defer to rule-based sanctions when possible and make sure that all sanctions are carefully tailored to the alleged misconduct.

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