

Heavy Civil Sanctions To Get Hard Look In Supreme Court

By **Andrew Strickler**

Law360, New York (October 5, 2016, 9:51 PM EDT) -- The U.S. Supreme Court's look at a \$2.7 million penalty against Goodyear and a pair of lawyers stemming from a decade-old product liability suit promises to clear up any uncertainty about the goal of civil sanctions and the limits on judicial power to hit litigants with compensatory punishment, experts said.

Last week, the high court granted certiorari on the big-ticket discovery fraud order against the tire giant, local counsel and an attorney acting as litigation coordinator. Sidestepping a question about an award of fees for a bad-faith finding, the court limited review to an alleged circuit split on the requirement for a direct connection between a litigant's conduct and a compensatory sanction. Importantly in this case, the sanction was handed down after the case had already settled.

Central to those issues is a 22-year-old Supreme Court opinion holding that some "indirect contempts" by litigants — including discovery failures — fall under a judge's broad authority to sanction and outside the higher due process protections of a criminal action, said professional liability expert Jeff McCarron of Swartz Campbell LLC.

The high court "should be concerned with a statement of that kind, when the analysis should properly stick, as a starting point, to the purpose of the sanction," McCarron said.

"Without question, the objective of a criminal sanction is to punish past conduct, while a civil sanction is supposed to enforce compliance with the court, which was not possible in the case under review," he said.

The Goodyear case and parallel litigation consolidated in the Supreme Court wind back to 2003, when members of the Haeger family were seriously injured when a tire on their motor home blew, triggering a lawsuit against Goodyear. During discovery, the Haeger plaintiffs requested "all" tests for their tire model.

In 2010, just before trial, the Haegers and Goodyear settled. More than a year later, a Haeger attorney saw an article about testing that Goodyear had done on its tires that wasn't produced in the suit and filed a motion for sanctions.

A district court subsequently found that Goodyear, local counsel Graeme Hancock of Fennemore Craig PC, and onetime national coordinating counsel Basil Musnuff "engaged in repeated and deliberate attempts" to frustrate the case by keeping discoverable data out of court.

Concluding that it could not impose sanctions under Rule 11 or Section 1927, the court looked to Rule 37, ultimately ordering defendants to pay "all of the [Haegers'] attorneys' fees and costs ... incurred after Goodyear served its supplemental responses" to an initial discovery request — some \$2.7 million.

A Ninth Circuit panel last year backed the court's finding of bad faith and affirmed the inherent authority of a court to impose such a sanction.

In its May petition to the Supreme Court, Goodyear argued that its due process rights were violated when it was hit with what was essentially a criminal sanction untethered from the underlying conduct.

Invoking the court's 1994 decision in *United Mine Workers of America v. Bagwell*, the company argued that sanctioned parties "must be afforded the protections of criminal due process where sanctions are punitive, but not where they are compensatory."

In its argument against review, Haeger counsel said the Ninth Circuit had not strayed from *Bagwell* because the panel found an "appropriate causal link" between the plaintiffs' fees and costs and the previous discovery misconduct.

The *Bagwell* decision, which involved court fines issued against striking Virginia mineworkers, held that contempt sanctions are inherently remedial, while a criminal contempt fine can only be constitutionally imposed through a jury trial. In his majority opinion, Justice Harry Blackmun used document discovery failures as an example of actions that may happen outside the court's immediate oversight but yet properly fall under a judge's broad power to impose sanctions because they directly impede adjudication.

"Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority," Justice Blackmun wrote.

McCarron said the high court likely wanted to address the "retroactive" Goodyear sanction and look again at the underlying purpose of a civil sanction long after the underlying litigation was closed.

The court "is going to have to consider, or really reconsider, its statement in the mineworkers case and go back and look at it in the same kind of analysis performed in contempt cases," he said.

Attorneys for Goodyear, the Haeger litigants, and Musnuff did not reply to requests for comment Wednesday.

Mayer Brown LLP partner and IP litigator Colleen Tracy James said that the review comes at a time when many courts are increasingly concerned with striking a better balance between discovery failures, a litigant's actual damages and any possible sanction for the offending party.

That trend was reflected in recent amendments to the Federal Rules of Civil Procedure and a new Rule 37(e) regarding sanctions for failure to preserve electronic information, James said.

While the new rules set the bar at a determination of bad faith in e-discovery, they also acknowledge the appropriateness of a punitive response from the court under the right circumstances.

"Basically, the thinking is, 'We have to take into consideration the question of whether there really was

bad faith, and if so, what was the real harm and what was the prejudice?" she said.

Hancock is represented by Andrew M. Jacobs, James R. Condo and Lisa M. Coulter of Snell & Wilmer LLP. Goodyear is represented by Pierre H. Bergeron and Lauren S. Kuley of Squire Patton Boggs LLP. Musnuff is represented by Mark I. Harrison and Jeffrey B. Molinar of Osborn Maledon PA.

The Haegers are represented by John J. Egbert of Jennings Strouss & Salmon PLC and David L. Kurtz of The Kurtz Law Firm.

The cases are Hancock et al. v. Haeger et al., case number 15-1398, The Goodyear Tire & Rubber Co. v. Haeger et al., case number 15-1406, and Musnuff v. Haeger et al., case number 15-1124, all in the Supreme Court of the United States.

--Editing by Mark Lebetkin and Catherine Sum.

All Content © 2003-2016, Portfolio Media, Inc.