

## High Court Reins In Judges On Misconduct Sanctions

By **Andrew Strickler**

*Law360, New York (April 20, 2017, 2:43 PM EDT)* -- A unanimous U.S. Supreme Court decision Tuesday setting boundaries on litigation sanctions will discourage judges from handing down penalties that go beyond making victims whole to more severely punish attorneys and their clients who engage in discovery shenanigans or other misconduct, experts say.

The decision — which upended a \$2.7 million fine against Goodyear Tire & Rubber Co. for withholding a key test in a vehicle crash case and remanded the case for further review — also puts a heavier burden on those seeking such penalties to show exactly which instances of misconduct triggered particular legal fees they wouldn't have otherwise paid. As the court found, orders imposing such penalties should be restricted to "the fees the innocent party incurred solely because of the misconduct."

Jeff McCarron of Swartz Campbell LLC said the plain-English decision from Justice Elena Kagan should impose some discipline on judges inclined to use compensatory penalties intended to cover lawyer fees and costs triggered by misconduct as a punitive measure.

He also noted that the court clearly rejected the assumption by the district court that levied the fine that the litigation — Goodyear and the family that sued it after an RV crash settled before the family learned of the tire test — would have unfolded much differently had Goodyear acted properly.

That part of the decision should also help quell more speculative sanction calculations pegged to fees which could have been incurred even if misconduct had never happened, he said.

"Here the Supreme Court is saying, in essence, no matter what you call the sanction, if it's an amount more than the costs that can be attributed directly to misconduct, it's not compensatory and not allowed," he said. "Hopefully we can apply this to state court decisions as well."

The case stems from a lawsuit filed in 2005 against Goodyear by members of the Haeger family, who were injured in a motor home crash they alleged was caused by faulty tires.

In 2010, just before trial, the Haegers and Goodyear settled. More than a year later, a Haeger attorney saw an article about a heat test Goodyear had done on its tires that wasn't produced in discovery.

An Arizona district court, considering a Haeger post-settlement sanctions motion, found 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.

The judge ordered the defendants to pay all the Haegers' legal fees and costs incurred after Goodyear's first flawed discovery response — some \$2.7 million — including for work that they would have had to have done even absent any misconduct.

Anticipating that the sanction might be reversed on appeal for a lack of direct causation, the district court also issued a "contingency" sanction order of \$2 million, representing the original calculation minus some \$700,000 expended by the family developing claims against other defendants.

To support the far-reaching sanction, the court also reasoned that the case "more likely than not would have settled much earlier" had Goodyear turned over the test.

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

Goodyear has argued that its due process rights were violated with what it characterized as a criminal sanction, and one disconnected improperly in a nominally compensatory fine from the actual costs shouldered by the family due to the misconduct.

In a straightforward and relatively brief analysis, Justice Kagan said compensatory sanctions are "pretty much by definition" pegged directly to actual litigant fees, and thus require a direct "but for" link between the misdeed and the opposing party's costs, a key element missing from the district court's reasoning.

The appeals court also applied the wrong standard when it agreed that a particular point in the case — the date of Goodyear's initial discovery stiff-arm — could be used as a starting point for a compensatory sanction calculation.

"But that is a temporal limitation, not a causal one and ... is wide of the mark," Justice Kagan said. Meanwhile, the Haegers "cannot demonstrate that Goodyear's nondisclosure so permeated the suit as to make that misconduct a but-for cause of every subsequent legal expense, totaling the full \$2.7 million."

The court remanded sanction to the district court for a "do over" under a strict "but for" causal standard. The court also declined to address whether Goodyear waived its right to challenge the \$2 million sanction when it didn't object to that part of the district court decision at previous phases of the case.

John Egbert of Jennings Strouss & Salmon PLC, who represents the Haegers in the appellate courts, called the decision a "clarification and reassertion" of the principles underlying misconduct sanctions, and predicted that the Ninth Circuit would affirm the \$2 million sanction.

Egbert also noted that Justice Kagan accepted that in some circumstances whole categories of fees could be shifted to a bad-actor litigant as a sanction "in one fell swoop," even under a strict causal analysis.

"District court judges are still left to decide when misconduct crosses the line so much that all the later fees can be awarded in a lump sum," he said.

Mayer Brown LLP partner Colleen Tracy James, who was not involved in the case, said a decision giving judges even more latitude in setting fee-based fines would have likely resulted in more “draconian” penalties with scant relation to actual legal expenses.

But even with the clarified direct-cause standard, James said judges and litigants will still be challenged to clearly demarcate all the ramifications of serious instances of misconduct in complex cases.

“It will be interesting to see how the district courts apply this test,” she said. “The ‘but for’ test is still very open-ended and the courts are going to have to figure out each time where it begins and where it ends.”

Pierre Bergeron of Squire Patton Boggs LLP, who represents Goodyear, did not respond to messages. Hancock and Musnuff settled their claims in October.

Goodyear is represented by Pierre H. Bergeron and Lauren S. Kuley of Squire Patton Boggs LLP.

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

The case is *The Goodyear Tire & Rubber Co. v. Haeger et al.*, case number 15-1406, in the Supreme Court of the United States.

--Editing by Rebecca Flanagan and Kelly Duncan.