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Asymmetry and Adequacy in Discovery Incentives: The Discouraging Implications of *Haeger v. Goodyear*

Jeffrey W. Stempel

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**ASYMMETRY AND ADEQUACY IN DISCOVERY
INCENTIVES: THE DISCOURAGING IMPLICATIONS OF
*HAEGER V. GOODYEAR***

*Jeffrey W. Stempel**

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*A faith that makes losing a sin will make cheating a sacrament.*¹

I. INTRODUCTION

Discovery remains a part of litigation disliked by bench and bar, even though discovery consumes the bulk of litigation time and expense. In addition to the sheer drudgery and contentiousness, there is also the fear that one's litigation opponents are holding back information that could prove important to a claim or defense.

For example, the manufacturer of a defective product may have testing data that shows it was on notice of the product's dangerous propensities at the same time it was failing to warn users (e.g., asbestos);²

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1. Michael Gerson, *An Administration Without a Conscience*, The WASH. POST (July 13, 2017), https://www.washingtonpost.com/opinions/in-trumps-world-innocence-is-proved-by-guilt/2017/07/13/07e69a82-67ea-11e7-8eb5-cbcc2e7bfb_story.html?utm_term=.8d2592b9c7b1 [http://perma.cc/TRM3-ATPS].

2. See generally PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985) (explaining that asbestos manufacturers were aware as early as the 1930s of the dangerous propensity of the material, which, if inhaled, caused various lung diseases, but

the Dalkon Shield³), and declined to make modest and inexpensive modifications that would remedy the danger. The tests may also reflect negligence in design, manufacture, or use instructions. A plaintiff with access to such information has a case that is almost a sure winner and will probably be settled on favorable terms. But if the information is successfully hidden or destroyed, a defendant who caused serious injury or death may well escape liability altogether and will also certainly be able to settle for less than the true value of the case (and the true cost of the damage done by the defendant's conduct). The cheating defendant effectively externalizes the costs of its culpability upon victims and society at large, while retaining profit from the misconduct.

But most discussion of discovery has focused not on this danger of injustice from too little discovery but on the dangers of too much discovery. Today's dominant narrative of civil litigation argues that the bulk of discovery abuse consists of excessive attempts to obtain information that raise costs for defendants.⁴ This is a problem of

manufacturers continued to market the product without warning until it was banned in the mid-1970s, during which time it was widely used as an insulator at industrial sites).

3. The Dalkon Shield was an intrauterine birth control device (IUD) marketed by A.H. Robins. Company tests revealed that the device, which was implanted in the womb, held danger of infection due to wicking of bacteria through a string used to secure the device. Robins successfully defended or settled (at lost rates) many suits during the 1970s and early 1980s until these tests and other incriminating documents—which Robins had wrongfully hidden from discovery—were revealed, at which time the success ratio of plaintiffs changed so greatly that Robins was forced into bankruptcy. *See generally* MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* (1985); SUSAN PERRY & JIM DAWSON, *NIGHTMARE: WOMEN AND THE DALKON SHIELD* (1985); SHELDON ENGELMAYER & ROBERT WAGMAN, *LORD'S JUSTICE: ONE JUDGE'S BATTLE TO EXPOSE THE DEADLY DALKON SHIELD I.U.D.* (1985).

4. *See, e.g.*, Advisory Committee on the Federal Civil Rules, FED. R. CIV. P. 26 advisory committee's note to 2015 amendment (“The 1983 Note stated that the new provisions were added ‘to deal with the problem of over-discovery.’”) (quoting 1983 Committee Note). The Committee's 2015 Note described the “proportionality” requirement added in the 2015 Amendments as intended to have the objective of guarding “against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.” By contrast, there has been comparatively less concern about under-discovery due to a party's concealment of information. In addition, court decisions such as *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which imposed more stringent pleading burdens upon plaintiffs, were animated in significant part by concern that once a complaint survived a Rule 12 motion to dismiss, the plaintiff could pursue extensive and expensive discovery for even weak claims. *See also* R.L. Marcus, *Misgivings About American Exceptionalism: Court Access as a Zero-Sum Game*, in *REVISITING PROCEDURAL HUMAN RIGHTS: FUNDAMENTALS OF CIVIL PROCEDURE AND THE CHANGING FACE OF CIVIL JUSTICE* 64 (Alan Uzela & C.H. Van Ree eds., 2017) (“The theme arises regularly—that the difficulty of defeating groundless claims on the pleadings combined with the high cost of responding to discovery, the difficulty of obtaining summary judgment ending the case, and the nightmarish prospect of a ‘bet the company’ jury trial compel corporate defendants to settle cases without regard to their merits.”).

expansive discovery abuse, while the concealment of information is one of *restrictive* discovery abuse. The conventional wisdom that has dominated since the mid-1970s routinely worries about expansive discovery abuse, while reflecting undue tolerance of the restrictive discovery abuse of secreting, shredding, or altering documents.⁵ The former is thought common while the latter is thought rare, both because of the integrity of the practicing bar and because the risks of getting caught are too great.

Concern over expansive discovery abuse is overwrought, and the sanguine view of restrictive discovery abuse—that it is either rare, relatively harmless, or both—understates the problem. Expansive discovery abuse is comparatively transparent and easily policed by courts. Targets of expansive discovery abuse can and do object and can obtain protective rulings if their objections are valid. Perpetrators of expansive discovery abuse may be sanctioned. By contrast, restrictive discovery abuse is furtive and insidious. It resists detection and if detected may not admit of readily apparent remedy. Although the system works reasonably well much of the time, self-policing by the profession and the fear of sanctions is probably insufficient to adequately deter the restrictive discovery abuse of improperly hiding information.

The assumption that attorneys largely play by the rules is, in my experience, correct. Lawyers routinely produce even the most damning information, often without undue resistance, which is of course the way the system should work.⁶ But the assumption is not universally true.

5. See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOKLYN L. REV. 659, 662–65 (1993) (describing the 1976 Pound Conference organized by Chief Justice Burger that had a strong theme positing the existence of a substantial over-litigation and over-discovery problem that required curtailment). See sources cited *supra* note 4 and accompanying text.

American procedure hit its liberal high point around 1970, when former limitations on federal-court discovery were lifted and the new class action procedures (adopted in 1966) began to be used in earnest. Since then, the changes that have occurred have generally been in a direction that could be said to retreat from the broadest possibilities of open-access procedure.

Actually, the reaction to American procedure's liberality apogee began soon after 1970. In 1976, a major conference occurred sounding themes that have recurred since then—that claims without foundation were too often made, and that broad discovery imposed unwarranted costs on defendants, sometimes prompting them to settle groundless cases to put an end to the drain of litigation in the wide-open American system.

Marcus, *supra* note 4, at 59 (citing to the proceedings of the 1976 Pound Conference, 70 F.R.D. 79 (1970)).

6. At least that's my view. The adversary system means that attorneys advocate for clients, not that they should be obstructing on behalf of clients. Unfortunately, much of the profession—and even the judiciary—takes a different view that I find more than a little dispiriting. See, e.g., *Rauenhorst v. United States*, 104 F.R.D. 588 (D. Minn. 1985) (refusing to reopen the case because of

Lawyers sometimes fail in their discovery responsibility, either through miscalculation or through outright cheating.⁷ *Haeger v. Goodyear Tire & Rubber Co.*,⁸ appears to be a case of outright cheating, but one that has not produced all that much detriment for the offending litigant.⁹ The Supreme Court appears to have been more concerned about the risk of over-punishing this cheating defendant than the cheating itself and the risk such behavior poses for civil litigation at large.

Arguably more problematic than the erroneous unspoken assumption about universal attorney integrity (any population subgroup will have its deviants)¹⁰ is the assumption that in the current civil litigation system incentives encouraging discovery compliance are sufficient. *Haeger* strongly suggests they are not. However, the unanimous *Haeger* decision has engendered little criticism to date.¹¹ The acceptance of the *Haeger*

non-disclosure of information where the information was not sought with sufficient specificity; the Court takes the view that discovery should begrudgingly be given and that narrow reading of discovery requests and resistance to discovery is acceptable or even laudable attorney behavior); *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 509 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983) (viewing the norm in responding to discovery as narrow construction of an adversary's discovery request in which discovery is resisted and yielded haltingly).

7. See, e.g., *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) (“[C]ourts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.”) (failing to produce relevant requested documents); *Eppes v. Snowden*, 656 F. Supp. 1267, 1279 (E.D. Ky. 1986) (explaining that where fraud is committed upon the court, the court has inherent power to dismiss claim “to protect the integrity of its proceedings”). For additional examples and illustrations, see generally David R. Hague, *Fraud on the Court and Abusive Discovery*, 16 NEV. L.J. 707 (2016).

8. 137 S. Ct. 1178 (2017).

9. Although Goodyear will surely pay sizeable fees on remand, the amount as yet is uncertain. In the immediate wake of the Supreme Court decision, it appeared that the Goodyear sanction might be roughly a fourth of the amount initially imposed by the trial court, which could be a relatively small price to pay if it achieved the advantageous result of settling the Haeger family tort claim and similar claims at a discount. *Haeger* and other claims presented a large damage exposure that was arguably reduced by having secreted the documents in question. However, as discussed below, the trial court on remand again imposed the full \$2.7 million sanction as well as declaring Goodyear vicariously liable for the misconduct of its counsel. See *Haeger v. Goodyear Tire & Rubber Co.*, 2018 U.S. Dist. LEXIS 37321 (D. Ariz. March 7, 2018). See *infra* note 122.

10. Of course, at least as regards to professional integrity, the population subgroup of lawyers should have fewer problems than others because admission to the profession involves a “character and fitness” examination that state bar organizations appear to take quite seriously while also maintaining a complaint-and-discipline apparatus for those already admitted to the bar. But despite this, as regular reading of state bar magazines or West Advance sheets reveals, a nontrivial number of attorneys will commit infractions, sometimes sufficiently serious to merit disbarment. But, as state bar counsel will often admit, at least privately, the bar lacks sufficient resources to catch all culprits and tends to respond primarily to client complaints, which often involve lack of communication and responsiveness. By contrast, a lawyer shredding documents, concealing documents, or otherwise obstructing access to information may be doing it with the full support and approval of the client.

11. But see *Jeb Butler, Haeger v. Goodyear: Just Put the Cookie Back in the Jar*, LAW360 (Apr. 28, 2017) (“If the chances of getting caught are low, and the penalty is merely that you go back

outcome is perhaps not surprising. *Haeger* arguably follows established rules that constrain courts to the degree suggested by the Supreme Court.¹² But the apparent failure to see the *Haeger* result as problematic should be disturbing to the legal profession, at least if it genuinely wants discovery to be an aid to truth-finding and fair adjudication.

A significant part of the problem is the troublesome narrative that discovery problems and “abuse” are largely problems of claimants seeking excessive discovery that is unduly burdensome and costly relative to the case at hand. The adoption of a proportionality standard in the 2015 Amendments to Rule 26 reflects the success of this narrative,¹³ as does the 1993 change to Rule 26 requiring that discovery be relevant to a claim

to where you started, there is little incentive to play fair.”); *The Goodyear G159 Motorhome Tire Blow-Outs & Its Testing Process*, RIEFF & BILY, <https://www.reiffandbily.com/corporate-delay-denial-and-concealment-of-evidence-inflicts-additional-costs-on-personal-injury-victims/> [http://perma.cc/E9ZS-29ZB] (plaintiff law firm website discussion of case) (describing other instances of defendant concealment of documents, concluding “Delay and Deny is the Discovery Game Played by Some Corporate Counsel”). And, of course, *Haeger* is a recent decision for which criticisms may be in the metaphorical pipeline of forthcoming or future commentary.

12. As Justice Robert Jackson famously quipped (at least I regard it as a quip, albeit an important and telling one): “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Once the Supreme Court has decided a matter, there is a (to me disturbing) tendency to consider the result obvious and obviously correct. This conveniently overlooks that one or more lower court judges had a different view of the matter, at least in the majority of the Court’s reported opinions in which certiorari is typically granted, because at least some members of the Court are troubled by the analysis below. But notwithstanding what might be termed the “Jackson Finality Principle” and the attendant need for legal actors to conform conduct to the final ruling in a matter, there often remains reasonable counter-arguments.

As discussed in Section II, *infra*, both the trial judge and two of three appellate judges believed the large sanction award against Goodyear had support in Court precedent. *See Chambers v. NASCO*, 501 U.S. 32 (1991) (upholding pursuant to inherent judicial power sanctions award of all counsel fees incurred by victimized litigant on ground that wrongful conduct pervaded the entire litigation). As Justice Jackson elaborated in a part of his *Brown v. Allen* concurrence that has received less attention:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial portion of our reversals of state courts would also be reversed.

344 U.S. 443, 540 (1953). I guess that’s more than a quip.

13. *See* FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendment (“Parties may obtain discovery regarding any unprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”). The express proportionality requirement in the text of the Rule, which did not exist prior to the 2015 Amendment (although there was considerable case law to this effect), whatever its merits, is clearly focused on a perceived problem of over-discovery rather than under-discovery or outright concealment of information.

or defense, rather than merely the subject matter of the dispute.¹⁴ And then there was the 1993 Amendment imposing limits of 25 interrogatories per party¹⁵ and 10 depositions per side,¹⁶ as well as limitations that may be created by local rules or standing orders. Even the meet-and-confer requirements adopted in 1993,¹⁷ which are of course perfectly logical in encouraging informal resolution, fit nicely as part of an overall legal and judicial retrenchment regarding the availability of discovery. They institutionalize opportunity for discovery resisters by creating the presumption that there will be compromise in which a requesting party is encouraged to reduce discovery demands in order to appear “reasonable.”¹⁸

Since the mid-1970s, the prevailing narrative has blamed discovery seekers more than discovery resisters.¹⁹ In that narrative, discovery problems are largely the problems of plaintiffs that are too unrealistic,

14. See FED. R. CIV. P. 26(b)(1) advisory committee’s note to 1993 amendment (stating that information is discoverable if relevant to a claim or defense in the case, replacing former language linking discoverability to relevance to the subject matter of the case).

15. See FED. R. CIV. P. 33(a)(1) advisory committee’s note 1993 amendment (limiting the number of interrogatories to 25 per party absent court order granting additional interrogatories). Prior to the 1993 Amendment, there was no stated limit. Although many courts had local rules limiting interrogatories, most appear to have permitted more than 25 per party, with 40 or 50 being a common limit.

16. See FED. R. CIV. P. 30(a)(2)(A)(i) advisory committee’s note to 1993 amendment (limiting depositions to ten per side without court permission). Prior to the Amendment, there was no limit in the Rule.

17. See FED. R. CIV. P. 26(f) advisory committee’s note to 1993 amendment (establishing the requirement that parties confer “as soon as practicable” to plan discovery and cooperate regarding discovery). Although this aspect of the Rule can of course result in smoother production of more information, and cooperation is generally a good idea, it also establishes a regime in which a party resisting discovery is given an immediate forum for pushing back against sought-after discovery rather than being prompted to provide discovery.

18. Regarding the general contraction of access to relief for claimants alleging injury, see generally Brooke D. Coleman, *What If?: A Study of Seminal Cases as if Decided in a Twombly/Iqbal Regime*, 90 OREGON L. REV. 1147 (2012) (explaining that many important historical decisions enhancing rights would likely have been precluded if decided under restrictive pleading standards set forth in the “*Twigbal*” cases); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261 (2009) (noting increasingly restrictive civil rules adverse to claimants and aspects of civil rulemaking favorable to status quo and defendants); Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587 (2011); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003); Stempel, *supra* note 5.

19. See Stempel, *supra* note 5, at 662–64 (viewing 1976 Pound Conference organized by Chief Justice Warren Burger as something of an inaugural kickoff for campaign against liberal pleading, support for jury trial, and availability of broad discovery that characterized 1958-1970; the theme of the conference was that America was overly litigious, in terms of size, cost, and efficacy as well as frequency and that contraction was in order); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOKLYN L. REV. 1155, 1156-59 (1993) (same).

sloppy, lazy, or greedy in frequently seeking excessive discovery. Overlooked or dismissed out of hand is the possibility that as much or more “discovery abuse” is committed by defendants failing to properly respond to valid information requests. This asymmetry unduly favors defendants, as reflected by the travails of the *Haeger* plaintiffs and counsel. The entire episode should be disturbing to the profession. While wasteful discovery is of course regrettable, it is largely a transparent problem that can be effectively regulated at its source²⁰ or “fixed by money”²¹ in cases where excessive discovery is permitted. By contrast,

20. To engage in excessive discovery, a litigant must, by definition, seek discovery, which in turn requires discovery requests that can be objected to by the receiving litigant, requiring judicial supervision. Expansive discovery, whether reasonable or abusive, is thus highly transparent and in plain sight before the court, which can limit or refine such discovery requests. By contrast, restrictive discovery abuse, such as concealment of a document or destruction of a document is, by definition, furtive and will never be subject to judicial control, unless the concealment or fraud is found out.

21. By “fixed by money,” I mean that the detriments allegedly flowing from purportedly excessive discovery are detriments of higher disputing costs, rather than substantive injustice of outcome. While excessive costs should be avoided where reasonably possible and, of course, can cumulate to become a significant legal-social problem, they are not of the same kind, quality, or magnitude of problems related to inaccurate outcomes or the prevention of the effective functioning of the legal system as an avenue for redressing injury, vindicating rights, and deterring misconduct. For example, a defendant erroneously forced to produce more information than necessary can usually deduct these costs as a business expense and reduce its taxes. Often, defense costs are paid by an insurer and are factored into the insurance company’s business model. Even if this results in higher premiums, unless this also produces skyrocketing costs or a significant contraction in the amount of liability insurance available, the damage done by excessive discovery remains largely a manageable problem that at most increases disputing costs but in a probably insignificant amount in the grander scheme of business.

Even if not optimal social policy, it produces economic activity and benefit for lawyers and adjunct legal services and personnel. Although running on this sort of economic stimulus program would perhaps be political suicide for a candidate, the fact remains that money is not necessarily “wasted” by expanded litigation. At a minimum, not all of the amount spent on over-litigation constitutes economic waste. The net costs and benefits are more difficult to discern and may even be positive depending on how litigation costs are deployed and how those making a living through dispute resolution spend or invest their compensation.

By contrast, if a manufacturer successfully conceals the dangers of its product and avoids or unduly minimizes liability, there has not only been individual injustice for the injured claimants, there is often also injustice for others who never bring suit because of the discouraging litigation landscape. And there is the risk, or even certainty, of future needless injury because harmful or dangerous products remain on the market, or at least remain longer than they would had litigation functioned properly at the outset. The Dalkon Shield episode is a particularly good example of this. *See supra* note 3. The manufacturer won early cases by concealing documents that were later revealed by former in-house counsel with a pang of conscience. Thereafter, plaintiffs fared far better, so much so that the company was forced into bankruptcy reorganization. The asbestos mass tort presents an example of not just early and undeserved defense victories, but a complete lack of claims for decades before the problem was discerned sufficiently to prompt litigation. *See supra* note 2. To be sure, one can make a case that since the dam burst in the 1970s and 1980s regarding asbestos liability, the system swung too far in favor of excessive compensation for questionable injury. But that is a different problem and not the

the secretion or destruction of relevant information (restrictive discovery abuse) can easily lead to unfair results and a failure of the litigation system to achieve its goals of holding wrongdoers accountable, compensating victims, and creating incentives for better behavior.

II. THE *HAEGER* SAGA

In June 2003, the Haeger Family (Leroy; Donna; son, Barry; and daughter-in-law, Suzanne) were driving in their Gulf Stream Coach motorhome, which was insured by Farmers Insurance Co. (Farmers).²² “While traveling on the highway, one of the motor home’s front tires failed, followed immediately by the motor home leaving the road and tipping over. The Haegers suffered serious injuries as a result.”²³ The case involved Goodyear’s G159 tire, which was developed in the late 1990s for use by urban delivery trucks driving limited distances at moderate speeds.²⁴ A particular model also fit motorhomes.²⁵ A number of plaintiffs, in addition to the Haegers, alleged that Goodyear officials knew those tires were subject to tread separation and blow-outs when driven long distances at freeway speeds, yet Goodyear “continued making them from 1996 to 2003, and never halted sales.”²⁶ The tires “were designed to withstand sustained temperatures of 194 degrees” but the tests allegedly concealed by Goodyear “showed that, at 75 mph, the G159s hit temperatures up to 229 degrees, becoming subject to potential tread separation and blowout.”²⁷ Goodyear continued to sell the tires to motorhome manufacturers and owners after 1998, when the national speed limit was increased from 55 m.p.h. to 75 m.p.h., a speed at which tires would become hotter, particularly when bearing higher weight loads.²⁸ The Haegers alleged that the failure rate of G159 tires used on motorhomes was nearly 15 times higher than comparable Firestone tires that had been the subject of a Firestone recall in 2000 that was prompted

fault of the availability of discovery. On the contrary, defendants who rightfully resist questionable claims benefit from broad discovery that exposes the weakness of such claims.

22. *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 941 (D. Ariz. 2012), *aff’d*, 793 F.3d 1122 (9th Cir. Ariz. 2015).

23. *Id.* A local newspaper article provides a succinct sketch of the case. *See* Dennis Wagner, *Judge: Goodyear deceptive in defense of flaws in tire*, ARIZ. REPUBLIC (Sept. 3, 2015), <https://www.azcentral.com/story/news/arizona/investigations/2015/09/03/goodyear-deadly-tires-coverup/71618544> [<http://perma.cc/B529-PQRJ>].

24. Wagner, *supra* note 23.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

by fatal accidents involving the Firestone tires.²⁹ The Haegers also alleged that there were more than 600 claims involving the G159 tire, with 35 of the incidents taking place in Arizona.³⁰

Goodyear's defense was alleged negligence by LeRoy Haeger for applying the brakes too strongly when the tire failed.³¹ Haeger counsel became convinced that Goodyear was not disclosing all requested documents and pressed for an order compelling discovery, including materials subject to confidentiality in other G159 liability cases.³² The trial court rejected the request, noting that "Goodyear's lawyers were officers of the court who could be trusted to abide by legal rules."³³ Eventually, the trial judge's opinion changed. Ruling on the sanctions motion, the trial court concluded that "Phoenix attorney Graeme Hancock, representing Goodyear, made false declarations about the existence and availability of test results. The judge said Goodyear's national coordinating counsel for G159 cases, Basil Musnuff, and in-house attorney Deborah Okey, prepared and approved disclosures and motion with similar false avowals."³⁴ The court ordered payment to the Haegers and sanctions were imposed. "The company and Musnuff were sanctioned \$2.2 million. Hancock was fined \$548,240. . . . A State Bar of Arizona spokesman said Hancock is the subject of an investigation, but the probe has been stayed because of continuing legal proceedings focused on the alleged misconduct."³⁵

Thickening the plot was evidence that Goodyear's conduct in other cases had been less than exemplary.³⁶ But the trial court decision was

29. *Id.* See also *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 941-42 (D. Ariz. 2012), *aff'd*, 793 F.3d 1122 (9th Cir. Ariz. 2015) (summarizing case) and at 943-54 (providing lengthier and more precise description of the tire heat tests phases of discovery dispute).

30. Wagner, *supra* note 23. The idea that a tire manufacturer might sell a tire that degraded at high speeds even when the maximum speed limit was 55 m.p.h. is a bit shocking. Drivers routinely exceed the speed limit. Can it possibly be reasonable for a manufacturer to conclude that if a product is safe so long as used strictly within the confines of the law or usage instructions that it is therefore safe to sell? That approach has already been rejected in cases involving coffeemakers that were left on as a homeowner left for work and clothes dryers that were still running or that should have had lint filters cleaned after each use. It is surely unreasonable to expect such precise usage by consumers. Vehicle owners will routinely exceed the speed limit, particularly a 55 m.p.h. speed limit, particularly on freeways like I-25 in New Mexico that are often uncrowded. A driver unafraid of police detection can easily travel at 80-90 m.p.h. and feel the speed is apt and the vehicle under control. The feeling may be illusory, but such consumer use is common. Is speeding supposed to be punishable by death? If not, a marketing decision premised on strict adherence to a 55 m.p.h. speed limit is itself irresponsible.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. As summarized in a newspaper account:

controversial in that it made a sanction award of attorneys' fees against the offenders that was measured from the very outset of the case, rather than being closely tailored to the amount of counsel fees incurred by the Haegers solely as a result of Goodyear's concealment of key testing documents.

The centerpiece of the lawsuit, of course, was the Haegers' claim of G159 tire failure, but there were other defendants in the litigation: trailer manufacturer Gulfstream and chassis manufacturer Spartan Motors, Inc.³⁷ Goodyear appears to have been the target defendant from the outset, which is not surprising in light of the tire failure that led to the rollover.³⁸

In a 2006 wrongful-death case, a Pinal County [Arizona] judge ruled the company 'has frustrated both the letter and the spirit of the discovery and disclosure rules.'

One year later, according to Nevada court records, the company was ordered to pay \$30 million in a wrongful-death judgment that stemmed from a wreck involving a different tire but similar courtroom conduct. Three occupants of a van were killed and seven others injured.

[Nevada Eighth Judicial District (Clark County-Las Vegas)] Judge Sally Loehrer ruled that Goodyear acted in bad faith, withheld evidence, stonewalled and used other "BS" tactics. . . .

The Haegers are now pursuing a second civil suit against Goodyear, alleging they were defrauded in the federal case.

Id. See also Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592 (Nev. June 1, 2010) (Nevada case to which the newspaper article refers) (upholding striking of answer denying liability as discovery sanction, which resulted in \$30 million judgment against Goodyear); Bahena v. Goodyear Tire & Rubber Co., 245 P.3d 1182 (Nev. Dec. 30, 2010) (clarifying earlier holding in response to petition for rehearing).

37. Farmers Insurance, the Haegers' automobile insurer, was also part of the lawsuit. Farmers undoubtedly paid insurance benefits, most likely for the damage to the vehicle and first-party no-fault medical payments for the Haegers, in order to acquire rights against Gulfstream, Goodyear, and chassis manufacturer, Spartan, via subrogation. Subrogation is the process (either as a matter of equity or contractual agreement) where an entity that has paid the debt properly belonging to another may seek repayment. *See* JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL AND KNUTSEN ON INSURANCE COVERAGE § 11.01 (4th ed. 2016). For example, a house may burn to the ground because of negligent electrical wiring. The homeowner's insurance pays the policy limits to the homeowner and then may pursue a claim for repayment by the electrician whose faulty wiring was responsible for the loss. It is unclear how much Farmers paid and the degree to which it funded and directed the resulting litigation against Spartan and Goodyear alleging injury due to product defect. Both by operation of law, and usually by express terms of the automobile insurance policy, the insurer that pays for injuries to the policyholder may seek recompense from the tortfeasor. The typical auto policy provides first-party (in which the insurer pays the policyholder) coverage for damage to a vehicle as well as providing certain additional first-party benefits such as paying medical bills and providing for household services during convalescence, but these "medpay" benefits are usually relatively modest (e.g., \$10,000 to \$25,000) in amount. Assuming the Haeger vehicle had a typical Gulf Stream price range of \$20,000 or more for trailers or cabs and \$65,000-\$80,000 or more for a motor home, it is clear that Farmer's financial stake in the claim against Goodyear was considerably smaller than that of the Haegers in view of the family's serious injuries.

38. *See* Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1184, n.1 (2017) (showing that the Haegers reached a settlement with Gulf Stream and summary judgment was granted in favor of Spartan); Goodyear Tire & Rubber Co. v. Haeger, 906 F. Supp. 2d 938, 943-54 (D. Ariz. 2012),

The Haegers' primary theory of liability was that the tire was not adequate for use on a large vehicle, such as the Gulf Stream, at high speed because of the heat buildup on the tires.³⁹ To that end, the Haegers' counsel at the outset of the case propounded broad discovery requests seeking testing information and results bearing on the issue.⁴⁰ Goodyear resisted discovery mightily and achieved some success, requiring the Haegers' counsel to continue to press for information, eventually obtaining orders to compel discovery and taking Goodyear's Rule 30(b)(6) deposition.⁴¹

Despite the clarity of the plaintiff's request for information, Goodyear did not produce responsive documents in its possession and dissembled or outright lied about the existence of such information.⁴² The case remained alive as the Haegers survived Goodyear's efforts at pretrial disposition and was slated for trial in 2010.⁴³ On April 14, the first day of trial, Goodyear settled with the Haegers for an undisclosed sum.⁴⁴

aff'd, 793 F.3d 1122 (9th Cir. Ariz. 2015) (describing the breadth of plaintiff's initial and continued document production requests seeking tire testing information as well as Rule 30(b)(6) deposition of Goodyear).

39. *See Haeger*, 906 F. Supp. 2d at 943–47 (showing that the Haegers' counsel consistently sought information regarding heat testing of the tires involved in the rollover and that of related products).

40. *See id.* The Haegers' discovery requests were clearly broad enough to encompass tire testing documents withheld by Goodyear and about which Goodyear denied existence.

41. *See id.* at 947–54 (describing extensive discovery battles in the litigation and court orders compelling discovery).

42. *See id.* at 945–67 (describing at length and in detail Goodyear's discovery misconduct and falsehoods). I realize that Goodyear takes exception to the trial judge's description of events. However, unless Judge Silver was completely distorting the record and fabricating information, Goodyear's excuses and its "side of the story" appear unworthy of belief. The 50-page trial court opinion, which appears well-supported by the record and records of Goodyear conduct in other cases, seems unassailable in its findings that Goodyear and its counsel knowingly and blatantly violated the Federal Rules regarding discovery as well as relevant sections of the ABA Code of Professional Conduct (and its Arizona equivalent). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.1-3.4 (requiring veracity and factual support for attorney assertions and fairness to opposing parties and third parties).

Neither the Ninth Circuit decision reviewing and affirming (by a 2-1 split) Judge Silver's order or the Supreme Court reversing the order questioned the accuracy of the trial court's determinations regarding Goodyear's actions, misconduct, the relevance of information sought, and the chronology of non-production. *See Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233 (9th Cir. 2016), *rev'd*, 137 S. Ct. 1178 (2017) (showing no questioning of the accuracy of the trial court fact-finding or determination of discovery violation); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178 (2017) (finding the same as the lower court, but reversal on the legal ground that despite the facts found, it was impermissible to impose upon Goodyear fee-shifting in the amount of plaintiff's total legal fees as this became a punitive sanction without providing Goodyear the due process protections of criminal contempt).

43. *See Haeger*, 813 F.3d at 1240. Although the Haegers did not obtain the testing information requested, the case was slated for trial in April 2010 and settled on the first day of trial.

44. *See id.* According to the Ninth Circuit panel majority (Justices Milan Smith and J. Clifford Wallace), "[b]ased on the information derived from the results of at least one of the Other G159 [the

tire model at issue in the case] Cases. . . without having the relevant information in their possession due to [Goodyear's] deceit, the Haegers apparently settled for a small fraction of what they might otherwise have done." *Id.* This assessment was challenged by dissenting Judge Paul Watford:

It's anyone's guess how the litigation would have proceeded if Goodyear had disclosed all responsive test results from the start. The case might have settled right away, as the district court assumed, but that seems unlikely. The test results did not provide conclusive proof that the Haegers' tire failed due to its defective design. To be sure, the test results were favorable to the Haegers: The results supported the Haegers' theory that Goodyear sold tires that were prone to failure when used on motor homes at highway speeds, especially in hot driving conditions like those prevailing at the time of the Haegers' accident in Arizona [an apparent misstatement in that the accident took place on Interstate 25 in New Mexico; the Haegers sued in their home state of Arizona]. But even if those test results had been put before a jury, Goodyear still planned to argue that the Haegers' own tire, which had endured more than 40,000 miles of wear and tear, failed because it struck road debris, not because the tire was defective. And Goodyear has consistently maintained (whether rightly or wrongly) that the test results it concealed do not accurately predict tire behavior in real-world driving conditions.

If anything, it seems more plausible to assume that the case would have proceeded to trial had the test results been timely disclosed.

Id. at 1255–56 (Watford, J., dissenting). Judge Watford's analysis regarding case outcome cannot be dismissed. Perhaps—even with all information before the court and jury—the case would not have settled, Goodyear could have won, or the Haegers could have obtained a judgment smaller than the settlement they agreed to while deceived. If so, this of course drains some of the outrage from my argument that Goodyear's fraud on opposing counsel, plaintiffs, and the court is a more serious problem than the expense associated with arguably excessive discovery.

But Judge Watford's analysis also overlooks not only the threat Goodyear's conduct poses to the judicial system as a whole, but also the scores of lawsuits against the tire in question. The problems of the G159 tire suggest that whatever the individual merits of the *Haeger* claim, Goodyear was making a problematic product. "Where there's smoke, there's fire" may be a cliché, but it is a cliché born of real-world experience.

Further, if Goodyear's prospects at trial were so rosy even with the presence of the concealed testing documents, why did Goodyear go to such great (and fraudulent and unethical) lengths to conceal the documents? At a minimum, this suggests that Goodyear thought the information, if known, would enhance the prospects of plaintiff victory. Goodyear constructively held this thought so strongly that it was willing to violate the law, and its counsel were willing to violate their professional responsibilities as officers of the court. Companies and lawyers rationally do not do this in the interests of shielding relatively unimportant documents from disclosure.

Judge Watford's minimization of the importance of the documents, whatever its merits as to case value, is more than a bit disturbing in its lack of outrage, or even much concern over lawyer and litigant behavior and its impact on the litigation system as a whole. "No harm, no foul" may be the right approach to officiating basketball or football, but it seems exactly the wrong approach for policing discovery compliance. While it may be "anyone's guess" what would have happened had the documents not been concealed, the judicial system is being forced to "guess" because of a particular litigant's misconduct. Requiring the victim of misconduct to demonstrate specifically traceable injury effectively rewards the party that cheated regarding discovery requiring the victim to engage in a lengthy, difficult, and time-consuming process of proof. I would prefer that the burden be shifted. The discovery violator should be required to prove absence of injury to the other parties in the case.

Whatever the merits of the dispute (e.g., if the *Haegers'* case was weak), this should not excuse blatant unilateral violation of the rules of discovery and professional responsibility. Those rules should be followed scrupulously regardless of the strength of the suit. Further, the strength of a suit can only be assessed for settlement purposes if relevant information is brought to light. A party's knowing, willful,

Subsequently, the Haegers' counsel became aware that Goodyear's claim of having produced all relevant test results responsive to discovery requests was questionable and sought sanctions.⁴⁵ Then the process of sanction-seeking began, which resulted in the trial court's 2012 imposition of the \$2.7 million sanction and further review.⁴⁶

The trial court's approach to sanctions essentially was to impose payment of counsel fees on Goodyear. This was the relief that the Haegers' counsel requested, likely because the termination of the case foreclosed other sanctions that might be available in pending cases, such as entry of judgment against Goodyear as to liability, striking defenses, or establishing facts.⁴⁷ In light of the pronounced discovery abuse found by the trial court (both concealment and a cover-up of the concealment), the trial court was more than willing to impose fees as a sanction. The harder question was setting the apt amount of fees to be imposed and allocating the fees among the offending counsel.

The court appreciated that a fee award generally reflects the amount of legal expense imposed upon the victim of the misconduct. Unsurprisingly, Goodyear argued that the fees for which it could be held responsible for were relatively modest in amount, limited to the legal activity related to production of the heat tests on the G159 tire, including

and self-serving concealment of such information is itself an egregious wrong regardless of the overall merits of a claim or its likelihood of success.

45. *See id.* at 1240 ("Some time after the case had settled, [the Haeger's counsel] . . . saw an article stating that Goodyear had produced internal heat and speed testing in a separate case involving the G159 tire, and he realized that Goodyear had withheld evidence it was required to produce during discovery."); *Haeger*, 906 F. Supp. 2d at 958–59 (explaining that nearly one year after settlement, Haeger counsel wrote Goodyear counsel expressing concern regarding the adequacy and honesty of disclosures based on knowledge of *Schalmo v. Goodyear*, a case resulting in multi-million dollar verdict against Goodyear where reference was made to tire tests encompassed in the *Haeger* discovery requests that were not produced in *Haeger* but were produced in *Schalmo*).

46. *See id.* at 960.

47. Rule 37(a)(5)(A) provides that if a motion to compel discovery is granted,

[T]he court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified;
- or
- (iii) other circumstances make an award of expenses unjust.

FED. R. CIV. R. 37(a)(5)(A). Where a litigant fails to obey a discovery order, Rule 37(b)(2)(A) states that the "court where the action is pending may issue further just orders" which "may include" the substantial remedies. Rule 37 further provides that a court additionally "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified." FED. R. CIV. R. 37(b)(2)(C).

motions to compel discovery.⁴⁸ Haeger counsel took the position that Goodyear's misconduct so pervaded the proceeding that an award of all plaintiff's counsel fees was apt, citing as authority *Chambers v. NASCO*, a matter in which the Supreme Court affirmed massive sanctions against a defendant on the ground that his misconduct had permeated the entire proceeding from its outset.⁴⁹ The *Haeger* trial court agreed (the Supreme Court would later characterize the trial court as perhaps sensing it was on "thin ice") but stated the sanctions alternatively to permit severance of a portion of the sanctions should a reviewing court find certain plaintiff counsel fees insufficiently linked to the battle over the tire heat performance tests.⁵⁰

Goodyear took the position that *Chambers v. NASCO* was inapplicable, in that Goodyear's conduct—even if as bad as asserted—related rather squarely to specific discovery documents, while the conduct of sanction recipient Russell Chambers had pervaded the entire NASCO litigation from its outset. Goodyear further argued that the Supreme Court's subsequent decision in *International Union, United Mines Workers of America v. Bagwell*⁵¹ implicitly backed away from the broad approach to sanctions found in *Chambers v. NASCO*, as had the Ninth Circuit's ruling in *Miller v. City of Los Angeles*.⁵² Both *Bagwell*⁵³ and *Miller*⁵⁴ found trial court sanctions to sound sufficiently in the nature of punishment, rather than compensation, and thus to require the enhanced

48. See *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1185 (2017); *Haeger*, 813 F.3d at 1237; *id.* at 1254 (Watford, J., dissenting).

49. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 56–57 (1991).

50. See *Goodyear*, 137 S. Ct. at 1185 (citations omitted) ("Perhaps sensing thin ice, the District Court also made a 'contingent award' in the event that the Court of Appeals reversed its preferred one. . . . Here, the District Court recognized the possibility that a 'linkage between [Goodyear's] misconduct and [the Haegers] harm is required. . . .' If so, the court stated, its fee award should be reduced to \$2 million. The deduction of \$700,000, which was based on estimates Goodyear offered, represented fees that the Haegers incurred in developing claims against other defendants and proving their own medical damages.").

51. 512 U.S. 821 (1994).

52. 661 F.3d 1024, 1029 (9th Cir. 2011).

53. See *Bagwell*, 512 U.S. at 823–24. In *Bagwell*, the court imposed \$52 million in sanctions (not a misprint) in response to its disruption of a mining operation and rejected the trial court's and Virginia Supreme Court's characterization of the fines as coercive civil contempt rather than punitive criminal contempt for violating court orders.

54. See *Miller*, 661 F.3d at 1030. In *Miller*, counsel for a police officer defendant in a civil rights claim in which plaintiff was shot violated an in limine evidentiary ruling barring counsel from suggesting that plaintiff was armed. Trial ended in a hung jury, prompting the trial court to conclude that the violation of the in limine order necessitated a second trial and thus supported an award of all plaintiff's counsel fees as a sanction imposed on defendant. The Ninth Circuit panel, in a 2-1 decision, found insufficient causal connection between the misconduct and the hung jury and need for a second trial.

due process—such as those for criminal contempt or punitive damages—whereas the *Chambers* decision found imposition of the entirety of the opposition’s counsel fees to be sufficiently compensation-based to be permissible pursuant to a court’s inherent judicial authority.⁵⁵

The *Haeger* trial court rejected Goodyear’s limiting argument and applied a lodestar analysis calculating fees according to an hourly rate and the amount of hours expended despite the contingency fee of Haeger counsel. The trial court imposed upon Goodyear and counsel a sanctions award of \$2.7 million in counsel fees: \$ 2,192,961 jointly payable by Goodyear and its lead counsel Basil Musnuff, and \$548,240 payable by Graeme Hancock, Goodyear’s local counsel.⁵⁶

The Ninth Circuit affirmed in a 2-1 panel decision.⁵⁷ Goodyear successfully petitioned for certiorari, with the Court vacating the judgment and remanding for further proceedings.⁵⁸ As part of its decision, the Court provided a roadmap of sorts to counsel seeking counsel fees as a sanction.⁵⁹ Although helpful in guiding counsel seeking an award of counsel fees that will withstand review, the Court’s *Goodyear* decision makes for a legal landscape in which restrictive discovery abuse is likely to be insufficiently punished. As a consequence, restrictive discovery abuse is likely to be under-deterred, encouraging more of it, much of which will be undetected. As illustrated by *Haeger*, a court’s inherent judicial authority exercised after conclusion of a case is distinctly narrower—and less capable of encouraging discovery compliance—than the range of sanctions available if restrictive discovery abuse is detected while the case is pending.

The court must find bad faith before it can use its inherent power to impose counsel fees as sanctions. Despite this finding of bad faith, the amount of counsel fees imposed on the offending party is limited to the

55. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991). Although not mentioned in the analysis, *Chambers*, on which the Court divided 5-4, can be seen in retrospect as a high-water mark of sorts in the Court’s willingness to permit broad exercise of inherent judicial authority that the Court was unwilling to extend to cases with any less egregious misconduct or less linkage between wrongdoing and harm to the opposition. The problem with this approach, however, is that it curtails inherent judicial authority from exercising broad powers in defense of the justice system as well as particular victimized litigants.

56. *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1237 (9th Cir. 2016), *rev’d*, 137 S. Ct. 1178 (2017). Goodyear in-house counsel Deborah Okey, although implicitly criticized, was not individually sanctioned.

57. See *id.* *But see id.* at 1255 (Watford, J., dissenting).

58. See *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1190 (2017).

59. *Id.* at 1187–89.

amount of fees incurred by the innocent party as a result of the misconduct, a point emphasized in *Haeger*.⁶⁰

Haeger and current law unduly limit judicial power to deal with restrictive discovery abuse. But before assessing *Haeger*, it is worth noting that its result, although reasonable in light of existing precedent, was not mandated, a point appreciated by three of the four lower court judges hearing the case.

It is a reasonably general proposition that fee-shifting should generally be limited to the amount of legal activity engendered by the offending party that results in legal expenditures by the victim. But *Chambers v. NASCO* permitted an award of essentially all of a victim's counsel fees in a case where a defendant's outrageous conduct permeated an entire lawsuit.⁶¹ Readers of *Chambers v. NASCO* tended to read the decision as granting broad inherent powers to trial courts that, where apt, could exceed the limitations of federal rules.⁶² After the trial court's sanctions opinion in *Haeger*, it is not hard to see Goodyear's misconduct in similar light in that Goodyear was arguably going beyond the concealment of a few discrete documents but engaged in massive stonewalling in response to plaintiff's discovery efforts.

While the discovery imbroglio over tire heat testing can of course be characterized as simply a dispute over isolated documents, it can also be

60. *Id.* at 1185–89.

61. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51–53 (1991).

62. See Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge is Like an 800-pound Gorilla*, 14 REV. LITIG. 195, 196–97 (1992):

[In *Chambers*,] the Supreme Court held, in essence, that a federal judge is like the proverbial 800-pound gorilla. The majority held that federal judges have all the judicial power necessary to manage their own proceedings and to control the conduct of those who appear before them, including the inherent power to punish abuses of the judicial process. Thus, federal judges have a license to sanction lawyers and litigants virtually at will and without regard to any limitations in the Rules and statutes.

Accord, Jennifer McConnell Treece, Note, *Finding Limitations on the Federal Courts' Inherent Power to Sanction: Chambers v. NASCO, Inc.*, 27 TULSA L.J. 717 (1992) (“In *Chambers*, the Supreme Court recognized the inherent power of federal courts to impose whatever sanctions they determine are appropriate in light of the circumstances of each case. Under this most recent definition of the inherent power of the federal courts, attorneys as well as litigants are exposed to severed sanctions for misconduct, subject only to minimal standards and the court's discretion.”). See also Baker, *supra*, 14 REV. OF LITIG. at 202 (“[T]he lower federal courts have internalized the inherent power to sanction.”) (noting 21 decisions where significant sanctions were imposed pursuant to exercise of inherent power).

These assessments may have overstated the breadth of inherent power sketched in *Chambers* and certainly are incorrect in light of the Supreme Court's subsequent *Bagwell* and *Haeger* opinions. But reading these assessments by commentators, one can understand why *Haeger* trial judge Silver and two of three reviewing Ninth Circuit judges thought imposing full fee-shifting sanctions upon Goodyear and counsel was permissible.

fairly characterized as the heart of the case. The plaintiff's theory from the outset of the case was that the tire that caused the accident failed because it overheated when used on a large vehicle at freeway speed and therefore was a defective product to sell as a tire for recreational vehicles, which of course are large and can be anticipated to be used on freeways at speeds greater than 55 m.p.h.⁶³

Because the Haegers' theory of the case was all about the tire's ability to handle heat on the highway, Goodyear documents related to the tire's heat fitness, particularly specific heat tests, were central to the case. Although Goodyear may not have engaged in misconduct at the outset, its misconduct arguably permeated the case in a manner sufficiently similar to the misdeeds of Russell Chambers that supported entire case fee-shifting in *Chambers v. NASCO*.

The Court was unanimously unwilling, despite Goodyear's acute and prolonged misconduct, to make this assessment that three of the four judges previously ruling on the case had accepted. Instead, the Court took a much more limited view of the importance of the heat tests and the discovery battles over them. Although perhaps correct as a matter of doctrine, it was a rapid embrace by the Court of the approach most favorable to Goodyear. The Court, rather eagerly, struck down the sanction and constricted judicial inherent power to police late-breaking restrictive discovery abuse and seemingly gave no consideration to an alternative but defensible approach that would have supported Goodyear's victims. One might ask what Goodyear—a violator of its duties to the judicial system—did to warrant such charitable treatment from a High Court that decides fewer than 80 cases a term.⁶⁴

In the wake of the Court's *Haeger* opinion, counsel seeking counsel-fee sanctions and courts ruling on such motions now have clearer guidance. Perhaps this justifies the Court's willingness to hear and decide *Haeger* in lieu of spending its limited time deciding a case with a more sympathetic victim. Guidance is, of course, one of the Court's roles regarding the federal law generally, as well as constitutional matters. But in light of the relative rarity of cases like *Haeger* that involve large discovery sanctions, one can certainly question the Court's decision to make room on its limited docket to lend a hand to a blatant, and perhaps serial, discovery violator.

63. See *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 942–43 (D. Ariz. 2012), *aff'd*, 793 F.3d 1122 (9th Cir. Ariz. 2015); Wagner, *supra* note 23.

64. The Court justified the certiorari grant as one resolving a conflict in the circuits which pitted the Ninth Circuit against sanction-limiting decisions of the Fourth, Seventh, and Eighth Circuits (*see Goodyear*, 137 S. Ct. at 1185-86, n.3) and sided with the majority of circuits on the issue.

In addition, the decision handed Goodyear a public relations victory of sorts. The case has been portrayed in both the popular and legal press as a complete victory for Goodyear⁶⁵ that tends to overshadow the fact (agreed upon by all 13 judges or justices who viewed the case) that Goodyear engaged in egregious violations of discovery rules and litigation ethics. Whatever its faults, the “passive virtues” approach of Alexander Bickel, suggesting that the Court might accomplish more by deciding less,⁶⁶ would seem a valid counterpoint to the Court’s intervention on behalf of what appears to be a bad, perhaps even very bad, legal citizen.

65. See, e.g., The Assoc. Press, *High Court Sides With Goodyear in Personal Injury Dispute*, U.S. NEWS & WORLD REPORT (Apr. 18, 2017), <https://www.usnews.com/news/best-states/arizona/articles/2017-04-18/high-court-sides-with-goodyear-in-sanctions-dispute>; The Assoc. Press, *News in Brief: High Court Sides with Goodyear in Dispute*, MYDAYTON DAILY NEWS (Apr. 19, 2017), <https://www.mydaytondailynews.com/news/local/high-court-sides-with-goodyear-personal-injury-dispute/3c38UYNIhSo4zMopynqp5I/> [<http://perma.cc/4QHV-BH8V>]; Howard Fischer, *U.S. Supreme Court Throws Out \$2.7M Awarded to Tucson Couple*, ARIZ. DAILY STAR (Apr. 20, 2017), http://tucson.com/news/local/us-supreme-court-throws-out-m-awarded-to-tucson-couple/article_e4cfa177-d17a-50bc-8442-984bcd3eb9a.html [<http://perma.cc/W2GC-C6WG>] (article reprinted in several Arizona newspapers); Debra Cassens Weiss, *Supreme Court overrules \$2.7M sanction for discovery misconduct*, ABA JOURNAL (Apr. 18, 2017), <http://www.abajournal.com/news/article/supreme-court-overrules-2.7m-sanction-for-discovery-misconduct> [<http://perma.cc/YA8U-XMDP>]; Giovanni Bruno, *Supreme Court Sides with Goodyear Over Personal Injury Dispute*, THE STREET (Apr. 18, 2017), <https://www.thestreet.com/story/14090682/1/supreme-court-sides-with-goodyear-over-personal-injury-dispute.html> [<http://perma.cc/QH7D-2CW2>]; Ambrogio Visconti, *Goodyear Tire & Rubber Co. v. Haeger et al.*, NORTH AMERICA GLOBAL LEGAL CHRONICLE (Apr. 26, 2017), <http://www.globallegalchronicle.com/goodyear-tire-rubber-co-v-haeger-et-al/> [<http://perma.cc/GMJ9-UB3Z>] (“Squire Patton Boggs recently secured a victory before the U.S. Supreme Court. . . .”); Howard Fischer, *US Supreme Court tosses Tucson couple’s \$2.7M tire lawsuit judgment*, WHITE MOUNTAIN INDEPENDENT (Apr. 21, 2017), http://www.wmicentral.com/news/latest_news/us-supreme-court-tosses-tucson-couple-s-m-tire-lawsuit/article_1bf7e5ca-86b4-5bf4-916d-901837cdbe0c.html [<http://perma.cc/584P-QVD4>] (stating that the Court “threw out” the trial court’s decision); Andrew Strickler, *High Court Reins In Judges on Misconduct Sanctions*, LAW 360 (Apr. 20, 2017), <https://www.mayerbrown.com/files/News/58e0e122-b4f6-40d3-b722-e61938e8a0d8/Presentation/NewsAttachment/6b5ce3a0-a956-4f92-af8f-f6e10b06088b/HighCourtReinsInJudgesOnMisconductSanctions.pdf>; Dustin Quiroz, *Supreme Court voids \$2.7 million award against Goodyear in Arizona case*, ARIZ. PBS, CRONKITE NEWS (Apr. 19, 2017), <https://cronkitenews.azpbs.org/2017/04/18/supreme-court-voids-2-7-million-award-against-goodyear-in-arizona-case/> [<http://perma.cc/HC8T-S3ZS>].

66. See Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (suggesting that the Supreme Court may properly avoid decisions or make them indirectly by refusing review). *But see* Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (attacking the concept as inconsistent with judiciary’s obligation to decide cases and questions).

III. THE INSUFFICIENCY OF DISCOVERY INCENTIVES (OR EVEN PERVERSE INCENTIVES) REFLECTED IN *HAEGER*

Even if one regards the legal analysis of the High Court's *Haeger* opinion unassailable and applauds its decision to insert itself into the case and the issue, the litigation world it reflects demands criticism. *Haeger* illustrates an unfortunate tear in the seam of discovery enforcement, which in turn reflects a problem in obtaining full and fair discovery, which in turn imperils the judicial system's ability to provide a full and fair airing of legal disputes.

Discovery—whatever its problems and costs—exists to enable litigants to obtain the true facts so that a dispute can be accurately adjudicated. The legal system depends on the efficacy of discovery, which makes even a modest amount of what might be termed “restrictive” discovery abuse a cause for concern.

Unfortunately, the legal profession has recently paid considerably more attention to the expansive discovery abuse of unreasonably broad, costly, cumbersome, or time-consuming discovery, designed primarily to wear down the opposition rather than to illuminate the factual context of the dispute. Simultaneously, leaders of the profession—and now perhaps the Court—have shown relatively little concern regarding the restrictive discovery abuse that occurs when a party succeeds in providing too little discovery and perhaps even knowingly concealing relative information.

Goodyear's concealment of tire testing information at the core of the *Haeger* lawsuit provides a paradigmatic case of restrictive discovery abuse. That Goodyear, to some extent, is “getting away with it” is troubling enough. More troubling still is that the Court's *Haeger* opinion, although providing a guide to seeking fee-shifting sanctions for discovery enforcers, also provides a template for restrictive discovery abusers who want to keep incriminating documents from seeing the light of day. *Haeger* shows that an unscrupulous defendant can minimize the punishment it receives if caught by being sure to settle the lawsuit after first having used its failure to disclose as leverage for paying less in settlement than would be the case if the truth were known.⁶⁷

67. Surprisingly (at least to me), the Haegers' counsel did not attempt to set aside the settlement in the case that took place prior to discovery of Goodyear's concealment of tire heat tests, although they filed a separate fraud suit against Goodyear essentially alleging that they were defrauded by Goodyear's discovery misconduct, and that this resulted in an unreasonably low settlement which should require Goodyear to pay an additional amount equivalent to the value of a reasonable settlement. See *supra* note 21 and accompanying text.

But despite the second lawsuit, the Haegers' failure to see to set aside the settlement tends to undermine their claim that they would have obtained a substantially larger settlement or a large verdict

Haeger ended in a settlement. Consequently, Rule 60(b), regarding vacation of judgments, was inapplicable. If there had been a judgment on the merits or a consent judgment based on a settlement, Rule 60(b)(3) fraud grounds would appear to support vacating any judgment and allow the Haegers to proceed to trial. The rule provides that a court “may relieve a party . . . from a final judgment, order or proceeding” if there has been “fraud . . . misrepresentation, or misconduct by an opposing party.”⁶⁸ However, such a motion must be made not only “within a reasonable time” but “no more than a year after the entry of the judgment or order or the date of the proceeding.”⁶⁹ In other words, a litigant who cheats but is not discovered for more than a year after entry of judgment may refute the adage that “crime doesn’t pay.” Rule 60(b) also provides a catchall provision, which is not time-limited, that states that a court may vacate a judgment for “any other reason that justifies relief.”⁷⁰ However, the provision has been construed narrowly and cannot substitute for the enumerated Rule 60(b) subdivisions.⁷¹

Although the law regarding voidability of contracts (settlement agreements are contracts) is less clear and not subject to a controlling federal rule, contracts obtained by fraud usually can be set aside.⁷² *Haeger* counsel failed to attempt this option or to put the case back on track toward trial of the tire failure case and instead focused on obtaining sanctions and commencing a separate suit seeking damages for fraud.⁷³

and judgment if Goodyear had fulfilled its discovery obligations. If that were the case, one would think the Haegers would be better off simply going to trial on the case on the merits. They might even be able to introduce evidence of Goodyear’s discovery misconduct as part of the claim in addition to a newly pending claim backed by the tire’s previously concealed heat tests that would presumably have substantially increased value. But the Haegers did not take this path. Perhaps because they could not have, but also perhaps because the settlement they received was not one they wanted to unwind.

68. See FED. R. CIV. P. 60(b)(3).

69. See FED. R. CIV. P. 60(c). The Haegers’ counsel apparently learned of Goodyear’s deception in time to bring a Rule 60(b)(3) motion had there been a judgment rather than merely a settlement agreement. See *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 958–59 (D. Ariz. 2012), *aff’d*, 793 F.3d 1122 (9th Cir. Ariz. 2015) (“Close to one year after the present case settled, [the Haegers’ counsel] wrote to [Goodyear lead counsel] and stated he had ‘great concern regarding the adequacy and honesty of the disclosures made’ in this case.”).

70. See FED. R. CIV. P. 60(b)(6).

71. See STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY, Rule 60(b)(6), at nn. 128-51 (2017) (narrow construction of Rule 60(b)(6)).

72. See JOSEPH M. PERILLO, CONTRACTS §§ 9.21–9.24 (7th ed. 2013) (contracts procured by fraud may be avoided); E. ALAN FARNSWORTH, CONTRACTS § 4.10 (4th ed. 2004) (same).

73. Although the Haegers’ counsel’s tactic exposed considerable wrongdoing by Goodyear, it remains puzzling that the Haegers made no attempt to have the case adjudicated with the evidence that had been missing at the time of the first trial. Whether wise or not (the parties have been so fastidious about keeping settlement terms confidential that there have been no reports in the public domain as to settlement terms), the decision to leave the settlement alone, however tainted it may

If the case were still pending at the time Haeger counsel learned of Goodyear's concealment of relevant evidence, plaintiffs could have availed themselves of a range of options stated on the face of Rule 37, including:

- i. directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- ii. prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- iii. striking pleadings in whole or in part;
- iv. staying further proceedings until the order is obeyed;
- v. dismissing the action or proceeding in whole or in part;
- vi. rendering a default judgment against the disobedient party; or
- vii. treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination [because this is governed by Rule 35].⁷⁴

Fee-shifting is one of the remedies available to a court when it encounters expansive or restrictive discovery abuse in a pending case.⁷⁵

By contrast, when the case is no longer pending, Rule 37 is inapplicable. Although 28 U.S.C. § 1927 applies to litigation abuse, it is restricted to an “attorney or other person admitted to conduct cases” who has vexatiously multiplied or delayed proceedings.⁷⁶ The statute can thus reach counsel but not the client who is encouraging misbehavior by counsel.⁷⁷ In addition, even egregious discovery abuse like Goodyear's can be characterized as conduct that, although vexatious, does not result in the multiplication or delay of proceedings. Also, the statute is, as a

have been, set the case on a problematic path. Relatedly, the Haegers sought, and the Court focused upon, fee-shifting as a sanction when, with the wisdom of hindsight, it appears consideration of other sanctions that could have been available in a pending case may have been more efficacious. But any questioning of the Haegers' actions taken in the wake of Goodyear's concealment pales in comparison to the larger problem illustrated by *Haeger*: once a case is no longer pending before the court, the court's range of options regarding discovery compliance narrows substantially.

74. See FED. R. CIV. P. 37(b)(2).

75. Regarding fee-shifting, Rule 37 further provides that a court “[m]ust require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” See FED. R. CIV. P. 37(d)(3).

76. 28 U.S.C. § 1927 (2018).

77. See GREGORY P. JOSEPH, SANCTIONS: THE LAW OF LITIGATION ABUSE § 21(c)(1), at 432 (“Section 1927 applies only to attorneys, and not to clients, pro se litigants or any other non-lawyers.”) (boldface removed).

practical matter, not as easily available when a matter settles, because this generally means that there will be no searching judicial scrutiny of counsel's conduct. *Haeger v. Goodyear* is unusual, not only for the size of the sanction and the notoriety of the case, but also because of the tenacity of the Haegers' counsel and the trial court in illuminating the concealment and pursuing relief. Concealment or destruction of materials is unlikely to be discovered after settlement, a fact that militates in favor of more severe sanctions when violators are caught.

Consequently, as all three levels of courts involved in *Haeger* concluded, the inherent power of the courts was the apt vehicle for imposing any sanctions to be incurred by Goodyear. Under current law, imposing sanctions pursuant to a court's inherent power not only requires a finding of bad faith, but also limits the fees imposed upon an offending party to the legal costs imposed on the victim. Inherent judicial power need not be so constricted and should not be if it is to be useful in combating restrictive discovery abuse.

Although the question before the Court was a narrow one involving fee-shifting sanctions, the implicit message of *Haeger* is that inherent power sanctions, both fee-shifting and otherwise, are difficult to obtain if not compensatory. Logically, the same range of Rule 37 sanctions that are available during the pendency of a matter should also be available to combat restrictive discovery abuse pursuant to a court's inherent power.

Haeger reveals a facet of the legal system in which the ability of a court to deter discovery misconduct and provide incentives for discovery compliance is weak-kneed. A violator whose violation is not discovered until after case resolution, particularly when the resolution is by informal settlement rather than entry of judgment, appears realistically to face only the limited sanction of fee-shifting—and limited fee-shifting at that.

In the meantime, the discovery violator has potentially engineered an unfairly favorable settlement engendered by the successful secretion of relevant information from the demanding party. Even if caught, any fees imposed on the violator will not only need to be proportional to the legal costs inflicted, but will also have to be sufficiently linked and proven by the victim of restrictive discovery abuse. This imposes an additional logistical burden on the victim that reduces effective compensation or discourages the victim from pursuing sanctions altogether. Fees paid later are paid in less valuable dollars that may not be rectified by adding interest to the award. Even in a time of low inflation, a dollar paid in 2017 (or later, in light of the remand) is worth less than a dollar paid in 2007 (when much of the discovery abuse of *Haeger* took place).

Haeger was an unusual case in that the discovery abuse was blatant, and the victims' counsel became aware of the abuse and acted to prosecute the abuse before a trial court willing to examine the matter at length. Despite this perfect opportunity to make an example of a discovery violator, the result was a connotative "watering down" of sanctions. Instead of the strong statement of *Chambers v. NASCO*, favoring inherent judicial power and condemning litigation abuse,⁷⁸ *Haeger* delivered a constrained concept of inherent power and a comparative "shrug of the shoulders" regarding restrictive discovery abuse. If the legal system is serious about discouraging restrictive discovery abuse such as Goodyear's, or that of other defendants withholding or destroying documents, a more powerful enforcement system is in order.

IV. IMPROVING DISCOVERY COMPLIANCE INCENTIVES

Haeger shows the need for a more effective sanctions regime that enhances the incentives for discovery compliance, as well as one that is more flexible and less linked to fee-shifting as the main sanction to be imposed. The very nature of fee-shifting is compensatory in nature: reimbursing the victim of discovery abuse for the expenses suffered due to the discovery abuse. But the full consequences of the abuse, such as failing to obtain adequate settlement or adjudication—or the continuing deception of the public regarding a dangerous product—are not reached by current attitudes toward the proper exercise of judicial power. The prospect of fee-shifting alone is not enough to encourage compliance by well-heeled litigants in high stakes circumstances and may not even be sufficient to compel compliance by lawyers and law firms with sufficiently deep pockets and applicable malpractice insurance.⁷⁹

What is needed is both more flexibility and a less elevated concept of fair due process for accused discovery violators as well as a shift in priorities from compensation toward incentives. Rather than just considering the micro harm inflicted on the opposition, discovery sanctions in contexts like *Haeger* need to do more about macro harm to

78. See *Chambers v. NASCO, Inc.*, 501 U.S. 32. But despite the egregious wrongdoing of defendant Chambers in *Chambers v. NASCO*, its strong statement enjoyed only 5-4 support from the Court, which perhaps explains the subsequent backsliding on inherent judicial power in *Bagwell* and *Haeger*.

79. Liability insurance policies, such as those covering professional negligence, typically exclude coverage where injury is expected or intended, or results from criminal or other prohibited activity. But in cases where courts fail to make a specific finding of intentional wrongdoing, attorney policyholders may succeed in obtaining coverage, or at least partial coverage, through settling with the insurer. See STEMPEL & KNUTSEN, *supra* note 37, § 1.06.

victims and society at large. The focus should not be overly confined to reimbursement in a particular case. Instead, or in addition, the Court should be willing to use sanctions to send a message to tempted potential discovery violators that the consequences of getting caught will be severe.

This means that the Supreme Court—and the judicial system at large—should be more willing to allow trial courts policing discovery to engage in some degree of enforcement behavior in and of itself, without the need to link severe discovery violations to specific injury or expense. In isolation, the case-specific and infraction-specific cost imposed on a restrictive discovery abuse victim may be relatively modest. But the damage done to the judicial system from collective restrictive discovery abuse can be enormous. Consequently, use of inherent judicial power to police discovery abuse and other litigation misconduct should, at least when violations are egregious as in *Haeger*, focus less on compensation and more on deterrence.

Because a good deal of restrictive discovery abuse goes undetected, litigants and lawyers caught hiding material generally must be stringently sanctioned in order to create an environment sufficiently supportive of compliance. To be sure, there is room for debate regarding the economics and psychology of deterrence regarding the relative importance of the likelihood of detection and the severity of punishment when violations are found. Improved detection of restrictive discovery misconduct would certainly be welcomed, but it is realistically less attainable than the improved deterrence that would result from making an example of those who are caught cheating.

For pending cases, sanctions and enforcement pursuant to the Federal Rules already accomplish much of this—or at least can do so if judges embrace these powers and decline to pull punches—at least when restrictive discovery abuse is caught while the case remains pending. In addition to options provided by Rule 37, there is Rule 11, Rule 16(f), Rule 26(g), Rule 56(h) as well as (for counsel) 28 U.S.C. § 1927.⁸⁰ The range of options, particularly pursuant to Rule 37, is sufficiently broad that a court in practice can punish offenders without being subject to the type of due process constraints imposed by the Supreme Court in *Haeger*. Trial court Rule 37 sanctions are of course reviewable, but subject to the deferential abuse-of-discretion standard after the court has made its decisions based on a preponderance of the evidence.

80. See FED. R. CIV. P. 11; FED. R. CIV. P. 16(f); FED. R. CIV. P. 26(g); FED. R. CIV. P. 56(h); 28 U.S.C. § 1927 (2018).

However, if a case is over because of settlement or final adjudication more than a year in the past, these Rules are essentially inapplicable, and sanctions are bounded by the common law of inherent judicial power.⁸¹ Even at its arguable apogee in *Chambers v. NASCO*, this inherent power is constrained, hardly making judges the “800-pound gorillas” characterized by some.⁸²

Even to award purely compensatory fees, there must be a finding of bad faith by the offender. By contrast, Rule 37 requires only that the party or counsel lose without substantial justification for its position,⁸³ while Rule 11 requires only an objectively unreasonable assertion of fact or law.⁸⁴ And per the Supreme Court’s *Haeger* ruling, anything beyond compensatory fee-shifting requires a finding akin to criminal wrongdoing before sanctions may be imposed pursuant to a court’s inherent power.

To effectively achieve increased incentive for compliance and deterrence of misconduct, greater judicial power to render substantial sanctions without the higher barriers of criminal contempt may be wise, at least in the context of restrictive discovery abuse that is not discovered until after conclusion of a case. As reflected in *Haeger*, fee-shifting after the fact may be insufficient to encourage discovery compliance. And after settlement and judgment, civil contempt loses its considerable power to prompt compliance.

A prime justification for the distinctions between civil contempt and criminal contempt is that the offender “holds the keys to his own cell” and can stop civil contempt sanctions simply by complying with a court order.⁸⁵ For that reason, courts have been tolerant of rather severe civil contempt impositions. But when a case has concluded, there is, at least according to the Court’s *Bagwell* and *Haeger* opinions, nothing really left to coerce. This in turn makes any punishment of consequence beyond

81. Rule 60(c)(1) provides that all Rule 60(b) motions must be made within a “reasonable time” but that motions pursuant to Rules 60(b)(1) (mistake); 60(b)(2) (newly discovered evidence); or 60(b)(3) (fraud) must be made “no more than a year after the entry of the judgment or order or the date of the proceeding.” But, of course, if there is never a judgment entered and only an informal settlement of a claim, Rule 60 is inapplicable. However, if a court dismisses a claim based on the request of settling parties, this presumably functions as an order that can be attacked via Rule 60(b)(3) if the settlement was reached as a result of fraud—provided the victim of fraud discovers it and acts within a year or less. FED. R. CIV. P. 60(c)(1); FED. R. CIV. P. 60(b)(1)-(3).

82. See *Baker*, *supra* note 62, at 197.

83. FED. R. CIV. P. 37(d)(3).

84. FED. R. CIV. P. 11(c).

85. See *Int’l Union v. Bagwell*, 512 U.S. 821, 829 (1994); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911) (“[One imprisoned for civil contempt] . . . ‘carries the keys of his prison in his own pocket.’ He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.”) (quoting *In Re Nevitt*, 117 F. 451, 461 (8th Cir. 1902)).

simple fee-shifting limited to counsel fees an arguably punitive measure. This subsequently requires enhanced due process protections for the (in my view, undeserving)⁸⁶ restrictive discovery offender, which burdens the court and discourages aggressive enforcement of the discovery rules.

This limited view of inherent authority is at odds with many of the Court's general pronouncements on the subject.⁸⁷ Less than six weeks after *Haeger*, the Court gave a reasonably strong endorsement of inherent power in *Dietz v. Bouldin*,⁸⁸ upholding the trial court's power to recall a jury and demand correction of clear jury error.⁸⁹ Appreciating the distinctions of timing reveals that allowing courts like the *Haeger* trial court to impose punishment beyond counsel fees is not greatly different in kind or degree than the discovery enforcement tools available pursuant to Rule 37 for pending claims. The range and effective power of discovery sanctions post-resolution should be placed on an equal footing with those available prior to resolution.

For example, if the *Haeger* trial court had learned of Goodyear's failure to reveal the heat tests of its tires and was faced with a continued refusal to disclose, the court could have held Goodyear in civil contempt. This is a procedure that is considered consistent with due process and fairness despite use of the "preponderance of the evidence" standard, rather than the heightened "beyond a reasonable doubt" standard or "clear and convincing evidence" standard, notwithstanding the prospect that

86. Arguing reduced concern regarding due process or that some litigants are less "deserving" of due process than others is not likely to be a popular position. But differing circumstances require different approaches. At the outset of a case, particularly in the criminal context, those accused of wrongdoing begin with a strong presumption of blamelessness. However, a defendant found to have engaged in discovery concealment after months or years of litigation hardly deserves the same due process protections as a defendant merely accused of misconduct. Assuming normally fair trial court operations, a court should be able to impose sanctions upon the defendant found to have wrongfully concealed information without the necessity of precise linkage between the restrictive discovery misconduct and traceable injury to other parties. There is, at that point, a strong systemic interest in making sure that the sanctions against the discovery-violating party really "sting." This interest should not be diluted by the compensatory rationale. Neither should the interest be encumbered with the need to make an express finding of criminal contempt.

87. See, e.g., *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962) ("[Trial courts possess inherent power] to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

88. 136 S. Ct. 1885 (2016).

89. In *Dietz v. Bouldin*, the parties had stipulated to minimum damages of a minimum of plaintiff's \$10,000 medical bills, but the jury, perhaps thinking that these had been paid by first-party insurance, rendered a verdict of \$0 in damages. After the jury had been discharged, the trial judge realized that this was an impossibility and clear error in need of correction. The jury was recalled, re-instructed about the impact of a stipulation, and eventually returned a verdict of \$15,000. See *id.* at 1888.

civil contempt sanctions can easily equal or exceed the amount of sanctions based on fee-shifting.

The *Haeger* trial court, for example, could have fined Goodyear \$10,000 each day it continued to refuse or delay production of the heat tests.⁹⁰ If Goodyear leans on its sword for even a month, it has incurred \$300,000 in civil contempt sanctions. If it waits a business quarter before complying, the company incurs close to \$1 million in sanctions. If it holds out the better part of a year, it incurs more in civil contempt liability than the amount of fee-shifting sanctions that was invalidated by the Supreme Court. And it is hardly unheard of for corporate leadership to delay releasing adverse information until after a status call with investors, the vesting of stock options for top management, or the completion of a merger or acquisition. Consequently, one can easily envision civil contempt sanctions equaling or exceeding the amount of the sanction overturned by the Court in *Haeger*.

In any of these scenarios, Goodyear's misconduct is essentially the same. In the actual case, the misconduct was simply not discovered (in large part because it was so pervasive and concealment was successful for some time) until after coercive civil contempt sanctions were not an option. This asymmetry can only encourage bad behavior and brinkmanship by ethically challenged defendants and counsel.

Similarly, in the actual *Haeger* case, the uncovering of the concealed discovery prior to settlement or trial would have permitted the trial court to essentially declare Goodyear at fault, leaving only a damages calculation hearing that would undoubtedly have produced a large judgment in view of the gruesome nature of the plaintiffs' injuries.⁹¹ But this very severe sanction would not be subject to the same shackles placed upon the trial court's fee-shifting sanction.⁹²

90. For example, in *Halderman v. Pennhurst State Sch. and Hosp.*, 526 F. Supp. 423 (E.D. Pa. 1981), the court imposed a \$10,000 per day fine on the Pennsylvania Department of Public Welfare for failure to implement court orders. *See also* 533 F. Supp. 641 (E.D. Pa. 1982); 533 F. Supp. 649 (E.D. Pa. 1982) regarding further aspects of the enforcement segment of the case. Rather than comply, the State paid the fine until it reached roughly \$1.3 million, at which time the Court directed that the funds be used to satisfy the Court's orders. In effect, the recalcitrant defendant was forced to comply indirectly even though it never literally complied in the face of the coercive civil contempt fine.

91. *See* Wagner, *supra* note 23 (describing the severity of the Haegers' families' injuries).

92. *See supra* text accompanying note 59, listing sanctioning options of trial court pursuant to Rule 37. Although the array of Rule 37 sanctions is powerful, all must comport with due process. Consequently, a court's decision to strike the liability defenses of a cheating defendant would be judged according to whether it was too severe of punishment in relation to the "crime" of discovery concealment. To support stripping liability defenses, a defendant's conduct would need to be severe. However, even this yardstick is probably harder on defendants and more favorable to plaintiffs than the Supreme Court's strictures on the use of counsel fees as a sanction for suppressing discovery. The

Because its misconduct worked so well for so long, Goodyear got a better deal. Any rational litigant or actor, if tempted toward misconduct at all, will conclude that the best course is one of total ruthlessness in clinging to a discovery violation. Even if detection cannot be avoided, if it can be delayed (and perhaps linked to an early, sufficiently attractive but undercompensating settlement offer)⁹³ until the case is over, the defendant arguably wins by losing.⁹⁴

A situation of this sort sacrifices the public interest in favor of undue sensitivity about protecting the rights of violators. To be sure, a litigant or lawyer accused of litigation misconduct deserves fair notice and opportunity to be heard as well as the benefit of the doubt in close cases. But this restriction on a court's inherent power to punish abuse of the litigation process may be an overdose of due process, one made more suspect in that it is rendered on behalf of an entity that can hardly be considered a downtrodden victim in need for protection from government overreaching.

Alternatively, one can defend the Supreme Court's *Haeger* approach by arguing that the additional burdens placed on a trial court wanting to impose a large sanction is not oppressive and is only incrementally greater than the work the court has already done during its investigation of the matter. For example, in *Haeger*, the trial judge conducted an extensive inquiry followed by a lengthy written opinion documenting the discovery misconduct and meting out specific sanctions.⁹⁵ One can reasonably argue

Goodyear v. Haeger Court appears to require fairly close matching of the amount of fees expended with the misconduct in question. By contrast, there need not be close matching of discovery abuse and liability defenses. It appears to be sufficient under Rule 37 that the misconduct in question simply be severe and have pervaded the litigation even if it did not inflict a calculable amount of costs upon the victimized party or impact the liability aspects of a case in a particular way.

93. For example, in *Haeger* itself, one can see the potential for such a strategy to work. A defendant hides information. Without the information, the case, although reasonably strong, is still far from a sure win and may even be an uphill battle, particularly if the tire was older or there are other arguably contributing factors to the event. Plaintiff is willing to settle at a discount that would never be accepted if the truth were known. Once the settlement is in place, later detection of the misconduct may be unpleasant for the defendant but may result in a smaller net loss than a fair settlement or adjudication with all facts known. And the defendant retains a reasonable hope that its misconduct may never be detected. For defendants not troubled by the ethics of the matter or the larger public policy concerns of effective judicial function, these look like favorable odds.

94. The calculation for lawyers tempted to lean toward the dark side is less obvious. Even if the results for the concealing litigant are improved by more vigorous, repeated misconduct that forestalls a day of reckoning, counsel may face the risk of bar discipline or a tarnished reputation. But if the "bad" lawyer dodges the bullet of bar discipline, he or she may depressingly be in greater demand by litigants who want a "tough" lawyer who will join them in stonewalling discovery attempts, even when the relevance and need for production of information is clear.

95. See *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938 (D. Ariz. 2012), *aff'd*, 793 F.3d 1122 (9th Cir. Ariz. 2015).

that it would not have been that much more burdensome to have converted the process to a criminal contempt hearing that would have supported the imposition of fines equivalent to or exceeding the fee-shifting award struck down by the Supreme Court. Fair enough. But this assessment, even if freed from the “Monday morning quarterbacking” of the Supreme Court, is a little dismissive of litigation realities, insufficiently considers the scarcity of judicial resources, and also underappreciates the perverse incentive structure created that aids and abets litigation abusers.

Trial courts are busy. They dislike policing discovery disputes, particularly when the nature of the dispute requires the court to seriously consider professional misconduct by counsel. It takes a lot to motivate close court scrutiny of discovery misconduct and to trigger the sanctioning process. Requiring the court to engage in criminal trial style scrutiny of civil litigants and counsel will make the process more unattractive still.

Beyond the inconvenience and discouragement, heightened due process rights for accused discovery abusers overlook a very practical aspect of the situation. Well-capitalized defendants have an incentive not only to engage in restrictive discovery abuse but also to fight hard and long when discovered. Almost by definition, the defendant (corporate or individual) that conceals a clearly relevant, discoverable⁹⁶ document has conducted, however amorally, a cost-benefit analysis and concluded that secreting the document is more important than the costs of keeping it secret. This includes costs incurred if caught cheating, perhaps discounted by the odds of getting caught. Consequently, when caught, the discovery abuser will tend to fight hard rather than surrender.

In cases involving commercial abusers, the United States provides taxpayer-subsidized support for the abuse, efforts to avoid detection, and resistance to sanctions. A company’s litigation expenses are generally deductible as a business expense. The old saying that a company pays in “50-cent dollars” has become a bit dated in light of subsequent reduction in corporate taxation. Nonetheless, these costs remain deductible—even if spent in efforts to defraud the court—and support enhanced and elongated resistance to a court’s potential discovery discipline.

96. I realize that there may be valid grounds (e.g., attorney-client or other privileges) for refusing to produce even an obviously relevant document. But in such situations, the apt response is to identify the document and assert the privilege so that opposing counsel and the court can assess the privilege claim. Nonproduction on grounds of burden or lack of proportionality are more amorphous but logically require the resisting party to provide adequate information regarding what exists that is supposedly so burdensome to produce and disproportional under Rule 26. But there is, so far as I can discern, no legitimate reason to conceal the existence of any requested document, much less a document clearly core to the case.

In addition, commercial actors are the classic “repeat players” mentioned by Galanter who can amortize their litigation outcomes across a broad risk pool as well as deploying collective expertise and economy of scale both in conducting discovery (and all litigation), pushing the envelope on discovery positions, and resisting discovery sanctions.⁹⁷ Goodyear itself—and the G159 tire cases—provides a textbook example. The company undoubtedly would have preferred not to face the litigation, but nonetheless enjoyed advantages not possessed by plaintiffs like the Haegers.

Goodyear coordinated its defense through in-house counsel and a lead outside counsel, and it could establish a protocol for efficient response and cost containment. It could also enlist the services of top-notch local counsel possessed of great credibility before a court.⁹⁸ Goodyear could seek protective orders (that plaintiff counsel and courts may be too quick to embrace) and prevent information learned in Case A from becoming known by opposing parties in Cases B and beyond. Facing more than just one possible loss in a single case, Goodyear could rationally invest resources to defend a single claim that were out of proportion to the value of the isolated case and potentially wear down plaintiffs and counsel, setting the stage for relatively “lowball” confidential (again, perhaps too quickly agreed to by counsel and courts) settlements that remove a range of discovery sanctions from consideration should Goodyear get caught.

97. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (creating typology of “repeat players” such as businesses, governments, and insurance companies, and “one-shot” players like individual natural persons). The former normally possess considerably greater resources than one-shot players and litigate with sufficient frequency to develop enhanced experience, skill, knowledge, economy of scale, political and judicial connections, and have the ability to spread litigation losses across a range of disputes, enabling them to take risks unacceptable to one-shot players. The latter are often under-financed, under-represented, inexperienced, less knowledgeable, and lack the financial strength for protracted, lengthy, or repeated litigation. Neither can they reduce their taxes by the amount spent pursuing a claim. Perhaps most important, they are not able to average out wins and losses, which makes them more risk-averse and willing to accept settlements worth more than the value of a claim as determined by a risk-neutral claimant with sufficient resources. The Galanter typology is now widely accepted as a matter of considerable concern regarding the fairness of adjudication and continues to receive contemporary attention from scholars. See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017) (noting that this can work in favor of plaintiffs in cases where the repeat players are plaintiffs’ counsel with experience prosecuting similar matters).

98. For example, Goodyear’s local counsel in *Haeger*, Graeme Hancock, was a partner in Fennimore Craig, PC, considered by many the top law firm in Arizona and on everyone’s list of the top half-dozen or so firms in the state. A defendant like Goodyear can in effect buy (or at least rent) the reputation of local counsel as a shield against the court’s potential skepticism when Goodyear claims to have no additional documents responsive to a discovery request.

Plaintiffs are at a clear competitive disadvantage. Only unusually zealous pursuit by Haeger counsel, coupled with a trial judge willing to take on the burden of policing discovery abuse in a settled case, brought Goodyear's misconduct in the matter to light. A well-heeled repeat player like Goodyear can also make life more difficult for plaintiffs by engaging in legislative advocacy on its behalf as well. For example, alone or in concert with other manufacturers, Goodyear can seek to restrict contingency fees or punitive damages, pursue damages caps on "non-economic" damages, or restrict punitive damages. These and other "tort reforms" effectively lower the value of the tort claims.⁹⁹

Against this backdrop, the Supreme Court's *Haeger* decision reflects a system that simply does not do enough to discourage restrictive discovery abuse—the concealment or spoliation of relevant material. By contrast, the current system has vigorous means of discouraging expansive litigation abuse via Rules 11, 16, 26, 37, and inherent judicial power. A plaintiff that refuses to answer interrogatories deservedly suffers complete defeat,¹⁰⁰ but a defendant who hides documents and then makes misrepresentations to the court arguably obtains a net victory.¹⁰¹

This problem of misplaced incentives and imbalance of power can be significantly rectified if courts are simply willing to make minor adjustments to the sanction regime. As a general principle, remedies for discovery abuse discovered after a case ends should be equivalent to those existing prior to the end of the case. There should be no incentive for suppressing information in hopes of delaying detection of discovery, cheating in order to conclude a case, and thereby restricting judicial remedies for restrictive discovery abuse.¹⁰² The post hoc remedies should equal the "pre-hoc" remedies.

99. Limitations on non-economic damages not only reduce recovery generally but weigh particularly heavily upon claims involving homemakers, children, and the elderly because they typically are not earning high incomes and thus suffer less "economic" loss after an injury. Limitations on contingency fees make it more difficult for prospective plaintiffs to procure legal representation.

100. See, e.g. *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639 (1976).

101. This is not to say that that other enforcement methods may eventually compel better behavior by defendants. See Dennis Wagner, *Safety group wants records opened on Goodyear tire-linked deaths*, THE REPUBLIC (Jan. 10, 2018), www.azcentral.com/sotry/news/local/arizona-investigations/2018/01/10/safety-group-wants-records-opened-goodyear-tire-linked-death/1006051001 [<http://perma.cc/3UNF-NV5K>] (describing Center for Auto Safety efforts to obtain and publicize information about dangers of G159 tire). But as the overall tire litigation reflects, defendants have considerable power to prevent full examination of an allegedly defective product, particularly if they do not comply with valid discovery requests.

102. At the risk of belaboring the point: extensive discovery abuse such as overbroad or disproportional discovery requests will almost always be apparent at the outset of a matter or at least before conclusion of the matter. Save for a small set of cases where parties seeking discovery obtain it by misrepresentation (which nonetheless is subject to testing by opposing counsel prior to a

As discussed above, the discovery sanctions available while a matter is pending are extensive and go well beyond fee-shifting. These sanctions take on a punitive air that fosters deterrence: establishment of facts; dismissal of claims; dismissal of an entire suit; striking a defense; adverse inference jury instructions; civil contempt; limitations on discovery, or on the conduct of parties or counsel. But none of this requires satisfaction of criminal law burdens of persuasion or trial by jury. A judge applying a “preponderance of the evidence” analysis has this range of options at his or her disposal.

Discovery sanctions imposed after settlement or adjudication should logically follow the same pattern and use of the “preponderance of the evidence” standard. Courts assessing discovery abuse discovered after resolution should simply be less concerned with the due process rights of the discovery abuser. Just as past criminal behavior leads to the loss of some privileges of citizenship, clear discovery abuse—particularly the restrictive discovery abuse of concealing information—should soften the zeal of the Supreme Court and policymakers for limiting the exposure of offenders to sanctions. Either inherent judicial power must be enhanced to a level as strong or stronger than that of *Chambers v. NASCO*, or appropriate rulemaking should provide for enhanced ability to sanction future Goodyears after settlement or judgment without the constraints of *Haeger*.

Arguably, there is no need for use of a heightened evidentiary standard in assessing discovery misconduct. It is, after all, civil litigation. And accused discovery violators receive plenty of notice and opportunity to be heard by the sanctions investigation and adjudication process. The analysis of the *Haeger* trial court opinion, although damning for Goodyear and counsel, was thorough, measured, and explanatory. A typical criminal jury trial or a civil jury’s imposition of punitive damages is no more thorough.

As *Haeger* shows, discovery sanctions can be substantial in amount. They may also be imposed on individuals as well as the artificial persons that seem to enjoy greater protection under the law than their flesh-and-blood ancestors. And there may be professional consequences for counsel.¹⁰³ These types of sanctions may be sufficiently close to punitive that they should be treated in the same manner as punitive damages. In

discovery order and can even be challenged all the way to a court of appeals by resisting discovery), it will be functionally impossible for extensive discovery abuse to be committed or judicially ordered after conclusion of a case.

103. And there appears to have been some for the sanctioned Goodyear counsel, at least informally, in that all three are in different jobs than before the discovery of their wrongdoing.

such cases, courts have a ready-made template for assessing the reasonableness of sanctions that does not remove discovery sanctioning from the civil realm.

Punitive damages are recoverable when a litigant has demonstrated willful indifference or conscious disregard for the rights of others (the precise language differing from state to state). The state of mind and culpability requirement of clear and convincing evidence is nearly the same in all states.¹⁰⁴ In addition to the states' criteria for imposing punitive damages and policing the size of punitive awards, the U.S. Supreme Court has set forth three guideposts for evaluating the fairness of punitive damages: (1) the reprehensibility of the misconduct, (2) the size of the punitive award in relation to the size of the compensatory award, and (3) the quantum of analogous regulatory sanctions.¹⁰⁵

Regarding the relation of compensatory and punitive damages, the Court has taken the position that in cases where compensatory damages were significant, a punitive damages award should not be more than nine times the size of the compensatory damages awarded.¹⁰⁶ This aspect of Supreme Court doctrine is criticism-worthy in that it seems drawn from relatively thin air as well as suggesting that even reprehensible behavior may earn little sanction if it is unsuccessful. But this aspect of the Court's jurisprudence has arguably been ameliorated by lower court decisions permitting much larger punitive-to-compensatory ratios when the amount of compensatory damages is relatively low but the severity of misconduct is high.¹⁰⁷

104. See generally JOHN J. KIRCHER & CHRISTINE WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE (2d ed. 2017) (prevailing evidentiary standard for procuring an award of punitive damages is "clear and convincing evidence" of wrongdoing, rather than the lower "preponderance of the evidence" standard); RICHARD L. BLATT, ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES 2007-2008: A STATE BY STATE GUIDE TO LAW AND PRACTICE (2012-2013) (same).

105. See *BMW of North America v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

106. See *State Farm*, 538 U.S. at 425.

107. See, e.g., *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 153-54 (4th Cir. 2008) (affirming \$80,000 punitive award in a case where \$1,000 damages set by statute were recovered; conduct of defendant in recklessly misinforming plaintiff about account status and refusing to provide payment coupon book where plaintiff became delinquent and received lowered credit rating was not heinous but was sufficiently reprehensible to support punitive award) ("Our sister circuits agree that when a jury only awards nominal damages or a small amount of compensatory damages, a punitive damages award may exceed the normal single digit ratio because a smaller amount 'would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter."); *Abner v. Kansas City So. R.R.*, 513 F.3d 154, 165 (5th Cir. 2008) (affirming punitive damages award of \$125,000 in case of \$1 nominal damages) (citing *Kemp v. AT&T*, 393 F.3d 1354, 1364-65 (11th Cir. 2004) (permitting punitive damages of \$250,000 where compensatory damages were only \$115.05)); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003) (finding

Notwithstanding concerns that the Court's punitive damages law may be unduly restrictive, it appears less restrictive than the Court's approach to sanctions for restrictive discovery abuse. Policing restrictive discovery abuse discovered after settlement appears to be limited strictly to compensation and requires something like Sixth Amendment protections for discovery cheats. Just as punitive damages are justified to both punish *and* deter, discovery sanctions should not only rectify the consequences of discovery abuse but also deter such future abuse.

By this yardstick, the *Haeger* trial court's sanction of Goodyear is apt and should not have been invalidated. "Reprehensible" is perhaps a connotatively loaded word that discourages imposition of punitive damages (behavior may be very bad, but ordinary English speakers are slow to use words like "reprehensible," "despicable," or "heinous"). "Reprehensible" has a harsher ring to it than "blameworthy," "shameful," or "atrocious." However, in the 15 years since the Court's last major pronouncement on punitive damages, lower courts have not found the reprehensibility prong to require evil, intentionally injurious, or heinous conduct in order to support a punitive damages award.¹⁰⁸

Goodyear's policy of selective discovery response and concealment in the *Haeger* matter shows conscious disregard for the rights of not only opposing litigants and counsel, but also of the general public and the judicial system. Goodyear actually or constructively knew that hiding the tire tests would reduce the value of the claim and cause economic and, even emotional, injury to the Haegers. Goodyear's conduct can be characterized as evil, even heinous or despicable. Just a cursory read of the trial court's sanctions opinion would appear to satisfy the "clear and convincing evidence" standard.

As to ratio, a conservative estimate of the discovery and motion costs imposed on the Haegers because of Goodyear's cheating would seem to amount to hundreds of thousands of dollars. Multiplying by 9 produces a

that despite the proportionality requirement set forth in *State Farm v. Campbell*, punitive damages are not strictly limited to a 9:1 maximum where compensatory award is not substantial; affirming a punitive award of \$186,000 where compensatory damages were \$5,000 in a case (a ratio of nearly 38:1) where a hotel patron was afflicted with bedbugs when the hotel was aware of problem but had concealed it from patrons). The *Mathias* opinion, written by Justice Richard Posner, applies economic analysis to explain that if punitive liability for outrageous conduct is too closely limited by the compensatory damages, the economics of litigation will discourage suit in such circumstances, leading to under-deterrence and suboptimal social behavior. *See id.* at 677–78. This analysis applies to discovery abuse as well.

108. *See generally* KIRCHER & WISEMAN, *supra* note 104; BLATT, HAMMESFAHF, & NUGENT, *supra* note 104.

sanction equaling or exceeding the \$2.7 million fee award struck down by the High Court.

One might characterize the differences between *Haeger* as a punitive damages case and *Haeger* as a discovery sanctions case as good—evidence that the Supreme Court does not want discovery sanctioning to become a punitive enterprise. I regard it as bad and a wrong turn of the law in a direction that defangs too greatly the tools a trial court has for encouraging compliance with the rules upon which an effective justice system depends.

The *Haeger* situation is complicated in that the trial court imposed sanctions both against Goodyear and its lead outside counsel (in the amount of \$2,192,961) while imposing a separate sanction (in the amount of \$548,240) against local counsel.¹⁰⁹ On one hand, sanctions of this severity against counsel can be justified because an egregious discovery violation by a lawyer is more blameworthy than one done by a lay client. On the other hand, a half-million dollars is arguably too much punishment of the attorney and not enough of the client. This is particularly true for local counsel that is vulnerable to being drawn into a deception web already quite well-spun by the client and other counsel. This Article advocates incentive and deterrence, but there can be too much of a good thing.

Regarding professional consequences, however, the bar's natural reluctance to sanction its members for arguable mistakes stemming from adversarial litigation may justify the stiffness of the fee award against local counsel. As of January 2018, local counsel Graeme Hancock has yet to face any reported discipline from the Arizona Bar, although an examination had reportedly begun, but was stayed pending resolution of the full sanctions issue.¹¹⁰ Neither has Goodyear lead outside counsel Basil Musnuff incurred any reported discipline from the Ohio Bar. This is not to say that bar discipline of prominent lawyers is non-existent. Even Presidents Richard Nixon and Bill Clinton have been disbarred—but not for discovery abuse, which to some extent makes my point about the Supreme Court's and legal profession's insufficient concern for the area. And as a practical matter, unless a case gets attention rivaling that of Watergate or *Jones v. Clinton*,¹¹¹ an understaffed state bar association busy with other pressing matters (e.g., theft of client funds) is unlikely to give restrictive discovery abuse the attention it deserves.

109. *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1254 (9th Cir. 2016), *rev'd*, 137 S. Ct. 1178 (2017).

110. *See Wagner*, *supra* note 23.

111. 72 F.3d 1354 (8th Cir. 1996).

This is not to say that the attorneys associated with Goodyear's misconduct—Hancock, Musnuff, and Okey—did not suffer. In addition to the monetary sanctions, which were subject to an undisclosed settlement with the Haegers, there likely have been other professional consequences short of bar discipline.¹¹² But even if the Goodyear lawyers escaped the worst possible sanctions, it appears they (particularly the individually-sanctioned Hancock) were comparatively punished much more than Goodyear—which may have been the entity forcing the misconduct and is certainly the offending party most capable of paying a monetary penalty.

At the risk of being seen as “soft” on upholding the integrity of the legal profession, I would prefer that clients who encourage restrictive discovery abuse or create a climate in which it thrives should be even more of a target than the lawyers complicit in such abuse. Occasionally, substantial penalties, and even making an example of counsel, may be apt.

112. All three of these attorneys are in different jobs since the trial court's 2012 imposition of sanctions. Graeme Hancock is no longer with Fennemore Craig and is with Young Life International, a youth religion organization. See *Find a Lawyer*, STATE BAR OF ARIZONA, <http://www.azbar.org/findalawyer/> [<http://perma.cc/N8T2-TQM3>] (last visited Mar. 17, 2018); *For the Public*, STATE BAR OF CALIFORNIA, <http://www.calbar.ca.gov/Public> [<http://perma.cc/8NWU-3Z4T>] (last visited Mar. 17, 2018). Mr. Hancock was a religion major prior to attending Stanford Law School, where he was on law review. Notwithstanding his interest in religion, a reasonable observer might regard his move from a prestigious law firm to a nonprofit organization as a step down, perhaps prompted by the fall-out from the sanctions in *Haeger*. However, in 2014, after the sanctions, he was elected to the Executive Council of the Trial Practice Section of the State Bar of Arizona. See *Graeme Hancock*, PHOENIX BUS. JOURNAL (July 9, 2014), https://www.bizjournals.com/phoenix/potmsearch/detail/submission/2904311/Graeme_Hancock [<http://perma.cc/9MBJ-9QC8>].

Basil Musnuff is no longer in private practice but is a senior franchise development consultant for SearchPath, Inc., an employment placement firm. See SEARCHPATH, www.searchpath.com [<http://perma.cc/CL29-B94Q>] (last visited Feb. 24, 2018). Like Mr. Hancock, Mr. Musnuff is well-credentialed as a graduate of Cornell Law School and a former Ohio assistant attorney general and a published author. See Basil J. Musnuff, Note, *Concurrent Jurisdiction Over Civil RICO Claims*, 73 CORNELL L. REV. 1047 (1988). Mr. Musnuff's move, like that of Mr. Hancock's suggests a diminution of professional status.

Deborah Okey is no longer with Goodyear and has apparently retired, having left the company at the end of 2016, after nearly 20 years as an in-house attorney, and now engages in motivational speaking and other appearances. See, e.g., Defense Research Institute (DRI), Women in the Law (Feb. 1-3, 2017, Scottsdale, Arizona) (brochure) (panelist on “Take Charge of Your Career” segment of program). Her biography for the program brochure touts her experience at the tire manufacturer (“In 2010, she was the first woman on the leadership team of the largest strategic business unit of Goodyear—North America. Deborah joined the leadership team in achieving a stunning turnaround of the business unit from a \$300 million loss in 2009 to nearly \$1 billion in segment operating income in 2014.”). Readers cynical about the public relations efforts of former corporate officials may note that the company's loss was during the depths of the largest recession since the Great Depression and that this turnaround is consistent with overall business trends from 2009 to 2014. And unless this retirement was planned prior to the trial court's sanctioning decision, Ms. Okey's change in status could also be viewed as a negative professional consequence of the case.

But should the lawyers incur comparatively more sanctions than the offending client? I have my doubts.

Lawyers are, of course, relatively privileged as compared to most persons. But modern lawyers and law firms “hustle” for business and certain areas of practice have been “commodified” so that lawyers must compete by price, speed, responsiveness, results, and client perceptions. If a high-end client like Goodyear wants counsel to conceal information, even a normally decent, law-abiding lawyer will face substantial pressure to comply. The business of such a client is simply too attractive to make standing on principle easy for all but the most sought-after lawyers who may have the luxury of defying even major clients.

On this score as well, *Haeger v. Goodyear* provides a telling illustration. Local counsel Hancock was a member of one of the state’s elite law firms (Fennemore Craig).¹¹³ But it is hardly farfetched to imagine that if Mr. Hancock had threatened to blow the whistle on Goodyear’s misconduct, Goodyear would have looked to any of a number of other excellent Phoenix-based law firms. Had this happened and Goodyear made the rounds to Snell & Wilmer, Lewis & Roca, Osborn Maledon, or the branch offices of many national firms, how confident can we be that all of these other concededly highbrow firms would have been able to resist Goodyear’s demands? In the fairytale world of legal narrative, when a lawyer stands tall against client misconduct, the client is supposed to conform its behavior. But in the real world of law practice after the Great Recession, it is foolish to think this fairytale inevitably has a happy ending. More policing of a *client’s* discovery misconduct is required.

Equally disturbing, there are signs that the system may be more tolerant of discovery abuse now than in the past. Contrast the Hancock and Musnuff situations today with the fate of Mahlon Perkins in the 1970s. In a complex antitrust matter, Perkins, a partner in a prestigious New York firm, falsely stated that documents reviewed by an expert witness had been destroyed.¹¹⁴ His deception was discovered, he pled guilty to

113. See PHOENIX BUS. JOURNAL, *supra* note 112.

114. See David Margolick, *LAW: The Long Road Back for a Disgraced Patrician*, THE N.Y. TIMES (Jan. 19, 1990), <http://www.nytimes.com/1990/01/19/us/law-the-long-road-back-for-a-disgraced-patrician.html> [<http://perma.cc/3ABM-U6FN>] (“Where once he occupied a stately office on the 34th floor of 30 Rockefeller Plaza, with a panoramic view of Central Park, Mr. Perkins now works out of a tiny 7th –floor rectangle overlooking the discount houses of lower Broadway. The lacquered Chinese cabinets that decorated his office, reminders of his days in China, have given way to battered battleship-gray file cabinets.”) (describing the circumstances that led to the sanction, imprisonment (for one month), and disbarment of Mr. Perkins, the son of a former U.S. consul to China, as well as his post-lawyer career as a volunteer lawyer working with the Center for Constitutional Rights). Mr. Perkins was, at the time of the infraction, a partner at Donovan Leisure Newton and Irvine, a distinguished New York firm. See also Jack Egan, *How Many Surprises*

criminal contempt, was sentenced to prison, served 28 days, and was nearly disbarred.¹¹⁵

Fifty years later, both the judiciary and the profession would profit from reflecting on whether the conduct of Mr. Perkins was more or less blameworthy than that of Okey, Messrs, Hancock, and Musnuff. One can certainly make a good case that in this comparison Mr. Perkins looks like an amateur abuser. He hid material regarding expert preparation. But unless one's adversary is slow of wit, he or she will have a pretty good idea of how an expert will be deployed, what sorts of communications were made, and so on. The Perkins nondisclosure, although of course a serious violation (compounded by misrepresentations to the court), may have had less than zero effect on the outcome of the matter.

By contrast, the documents hidden by Goodyear and counsel involved key evidentiary matter. It could not be obtained simply through thoughtful reflection like that done by a good lawyer in assessing how best to respond to an opposing expert. The Haegers' counsel could not fill in gaps or elect an alternative means of proving that Goodyear knew the G159 tire was not approved for high-speed freeway driving on large vehicles. For that, the Haegers' counsel needed the test documents. The Goodyear counsel misconduct appears to exceed that of a censured, imprisoned, and nearly disbarred attorney.¹¹⁶ What message does that send to the legal profession? And what does it say about the direction in which the profession is evolving?

To be sure, sanctions imposed on counsel have a significant potential for improving compliance. A rational lawyer, even otherwise sufficiently unethical to violate the rules, would presumably be hesitant to risk career-ending violations to please a single client, even one with lucrative

Developed During the Kodak Case, WASH. POST (Apr. 16, 1978), https://www.washingtonpost.com/archive/business/1978/04/16/how-many-surprises-developed-during-the-kodak-case/666d2298-219c-47f9-b70c-9ff3666a771d/?utm_term=.0a5d56b0a798 [<http://perma.cc/7Y6W-Z8QE>] (describing circumstances and the loss at trial of Kodak, the client represented by Mr. Perkins and his firm, a loss attributed in large part to the discovery on the eve of trial of documents concealed by Mr. Perkins that were used to contradict a Kodak expert witness). *But see* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979) (vacating judgment against Kodak and remanding case for new trial). Mr. Perkins died in 2011. *See* Lisa Chamoff, *Mahlon Fay Perkins Jr., Devoted to Discourse, Civic Issues, Dies at 92*, STAMFORD ADVOCATE (Apr. 8, 2011, 11:20 PM) <http://www.stamfordadvocate.com/local/article/Mahlon-Fay-Perkins-Jr-devoted-to-discourse-1329669.php> [<http://perma.cc/H4Y6-45HB>] (noting the decedent's significant professional accomplishments and that he worked at Donovan Leisure from 1949 until 1978, but failing to mention his sanctions or imprisonment).

115. *See* Margolick, *supra* note 114.

116. Tom Goldstein, *Ex-Partner in a Major Firm Is Spared Disbarment*, THE N.Y. TIMES (July 23, 1979), <http://www.nytimes.com/1979/07/23/archives/expartner-in-a-major-law-firm-is-spared-disbarment-tarnishing-of.html> [<http://perma.cc/C9N8-NXXZ>].

business to bestow on counsel. But in the final analysis, a focus on the offending entity suggests more potential for deterrence even when the entity is wealthy and can pay in “50 cent dollars” because of the tax system.

First, it is a bit misleading to describe an entity, at least one as large and sophisticated as Goodyear, as a lay entity. Goodyear not only makes regular use of outside counsel but has a substantial in-house legal department. Constructively, it knows the law as well as any individual lawyer and knows that concealing clearly relevant documents is a violation of the rules. It should be treated just as harshly as an offending attorney.

Second, although it is comforting to celebrate the image of lawyerly rectitude that resists improper demands by clients, in the real world in which law is a business as well as a profession,¹¹⁷ lawyers will bend in the direction of clients, even when clients seek to do the improper. One might realistically expect the model lawyer to seek to persuade the discovery-violating client to modify its behavior, to relent, and to cease and desist. But if the client is insistent, is it realistic to expect the average attorney to withdraw from representing a Fortune 500 client and its attendant billings?

Third, the cheating client may deceive its attorney, but there are circumstances where it is unclear whether the attorney was completely unaware of improperly held discovery. In such cases, possible attorney fault should not be overlooked. But the focus of sanction should be on the client that clearly was engaged in discovery misconduct.¹¹⁸

The incentives for compliance of counsel and client should be aligned. If a fee-shifting discovery sanction is justified, the client and the lawyer should both be responsible, unless the client can clearly demonstrate that discovery misbehavior was solely counsel’s idea. Unless it can meet this standard, which appears completely precluded by the involvement of in-house counsel in *Haeger*, Goodyear should be

117. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (noting that modern law practice is a business and arguing that traditional professional norms will not adequately foster optimal attorney behavior).

118. Where it is clear that the attorney was unaware of client deception regarding the existence of information, the answer is comparatively easy: the client should be the only one sanctioned. Similarly, when an attorney is initially unaware, learns of concealed information, and then takes prompt action to correct the problem, any sanction should fall exclusively upon the client. But in practice, there will be difficult situations where an attorney suspects, then discovers concealment but will need to attempt rectification in a manner least harmful to the client. This in turn may make it difficult to assess the culpability, if any, of counsel.

responsible for the entire amount of the fee-shifting sanction as finally determined.

V. CONCLUSION

For more than four decades, the narrative of the beleaguered corporate defendant has dominated civil procedure discourse. Since the 1976 Pound Conference, if not immediately in the aftermath of the 1970 civil rules amendments that expanded discovery, the conventional wisdom has held that most discovery and litigation abuse results from too many demands and assertions. But the prevailing narrative has little evidence affirmatively supporting it and considerable evidence refuting it. Yet it persists, continuing to distort the legal process.

Haeger stands as yet another illustration of the inaccuracy of the “woe is me, get out your handkerchiefs” crocodile tears cried by corporate America. One of the world’s largest and richest corporations knowingly and calculatingly elected to violate the rules—repeatedly. When caught, it dissembled, distorted the truth, and (in my view and that of the trial judge, although she was too diplomatic to say it) outright lied.¹¹⁹ In this lawless affront to the judicial system, Goodyear was voluntarily, even eagerly, aided by attorneys with decades of collective legal experience, all of whom have remained unsanctioned by their respective bar associations and the federal courts,¹²⁰ even if suffering informal professional harm. Nor

119. See *Goodyear Tire & Rubber Co. v. Haeger*, 906 F. Supp. 2d 938, 967–73 (D. Ariz. 2012), *aff’d*, 793 F.3d 1122 (9th Cir. Ariz. 2015) (finding essentially that Goodyear had misrepresented facts to the court).

120. One might accuse trial judge Silver of blinking a bit on this point as well. Although she is highly critical of the behavior of Goodyear defense counsel and notes that her sanctions decisions may have professional responsibility implications for the offenders, she appears to stop short of initiating sanctions herself. At least I can find no public record that she took any of several actions presumably available to her, such as seeking to have the offending attorneys bar from appearing in the District of Arizona federal courts, reporting the misconduct to the relevant state bars, or otherwise shaming counsel specifically. As to a shaming sanction, she ordered Goodyear to “file a copy of this Order in any G159 [the tire model at issue] case initiated after the date of this Order.” *Id.* at 981. She reasoned:

Based on Goodyear’s history of engaging in serious discovery misconduct in every G159 case brought to this Court’s attention, filing this Order in future G159 cases will alert plaintiffs and the courts that Goodyear has, in the past, not operated in good faith when litigating such cases. It will also serve as notice of the existence of certain tests Goodyear attempted to conceal in previous [G159 tire] cases.

Id.

This sanction is fine so far as it goes. And to call it a “shaming” sanction is perhaps a disservice. As Judge Silver points out, this disclosure does more than just make Goodyear look bad. It also alerts Goodyear’s opponents and other judges that Goodyear is a company that has cheated in the past and perhaps needs to be watched more closely than the average defendant.

was there anything resembling concern by the U.S. Supreme Court regarding the behavior of the defense lawyers in *Haeger*, providing further sad commentary on legal ethics.¹²¹

The Court in *Haeger* eagerly criticized a trial judge that had rolled up her figurative sleeves to examine an issue and attack a rules violation, but essentially said nothing about the defendant corporation's misconduct that prompted the proceeding. The U.S. Supreme Court—a group that repeatedly states that its role is enunciating law rather than correcting errors of application of the law—rode to Goodyear's rescue and rendered a decision that could save the company one or two million dollars in sanctions.¹²² *Haeger* can of course be justified as providing needed

But why limit the disclosure to only newly filed G159 tire cases? It is, of course, possible that Goodyear's discovery shenanigans in the G159 tire cases are an aberration tied to the particular legal team managing those cases. It seems equally possible (or perhaps even more likely) that this sort of discovery resistance hardball cum concealment cum deception is part of the regular Goodyear modus operandi for defending cases. This in turn prompts one to wonder: Why is the court's disclosure order restricted to only G159 tire cases? Shouldn't everyone suing Goodyear be warned about this episode? And why is the disclosure limited to only newly filed G159 tire cases rather than all such cases? Shouldn't the plaintiffs in pending tire cases also be warned? And what about plaintiffs who lost a tire case against Goodyear? If immediately advised, some might be able to have an adverse judgment set aside on fraud grounds pursuant to FED. R. CIV. P. 60(b)(3).

And what about the attorneys involved? Although it is possible their only lapse of professional integrity took place in *Haeger*, is it not equally possible that one or more of them regularly engages in this sort of discovery misconduct, particularly when working in the service of a client that wants them to conceal information notwithstanding the rules? Should lawyers interacting with them not be warned across the board?

I realize these latter suggestions will strike many as overkill, perhaps even engendering a "there but for the grace of God go I" response. Judge Silver is showing some mercy toward counsel, particularly local counsel regarded as less culpable. And one should be reluctant to criticize mercy. Even the best and most ethical of lawyers can occasionally be found in violation of a discovery rule just as even champion advocates lose cases. But *Haeger* is not a case in which the lawyers lost a discovery dispute over which reasonable people might disagree. *Haeger* is a case where the relevance of the requested information was clear from the outset and willfully concealed and withheld by counsel and the defendant. Read the trial court's opinion, a reasonable person might well decide not to trust the offending attorneys. Should others who may be unfamiliar with *Haeger* that are engaged in litigation with these attorneys (or Goodyear, for that matter) not be warned?

121. In this regard, the Supreme Court remains disturbingly consistent in its lack of concern regarding lawyer professional responsibility. For example, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court refused to countenance an assistant district attorney's claim of retaliation for refusing to act upon a suspect affidavit provided by law enforcement. Only Justice Breyer noted that because claimant Ceballos was an attorney, he might have some duties to the judicial system that transcended or countermanded loyalty to an employer. See Jeffrey W. Stempel, *Tending to Potted Plants: The Professional Identity Vacuum in Garcetti v. Ceballos*, 12 NEV. L.J. 703 (2012).

122. But a trial court ruling rendered as this Article was going to press suggests that in spite of its doctrinal victory at the Supreme Court, Goodyear may in the end pay the full amount of the sanction imposed. Recall that the case was remanded to the District of Arizona for consideration of whether Goodyear had waived its right to contest a fee award based in all of plaintiff's legal expenditures. In March 2018, federal district judge Murry Snow, to whom the case was assigned on remand, ruled that Goodyear had indeed waived its right to contest a fee-shifting sanction premised

on a calculation that found Goodyear's document secretion to have tainted the entire case. *See Haeger v. Goodyear Tire & Rubber Co.*, 2018 U.S. Dist. LEXIS 37321 at *14-*19 (D. Ariz. March 7, 2018). The trial court concluded that the time for challenging a sanction measured by the plaintiff's entire amount of counsel fees incurred was at the time the trial court was considering sanctions. Finding that Goodyear did not effectively raise this argument in timely manner, the trial court on remand found waiver by Goodyear. *See id.* *See also Haeger v. Goodyear Tire & Rubber Co.*, 869 F.3d 707 (9th Cir. 2017) (remanding the case to the District of Arizona after the Supreme Court's remand to the Ninth Circuit), in particular the dissent of Judge Milan Smith, which essentially outlined the waiver argument adopted by the trial court and maintained remand was not necessary. 869 F.3d at 709 (Smith, J., dissenting).

The trial court expressed concern that failing to find waiver under the circumstances of the case would encourage "sandbagging" in which a litigant kept a possible argument in reserve for later use rather than presenting the argument to the trial court in timely fashion. *See Haeger v. Goodyear Tire & Rubber Co.*, 2018 U.S. Dist. LEXIS 37321 at *18-*19 (quoting *Freytax v. C.I.R.*, 501 U.S. 868, 898 (1991)) (Scalia, J., concurring in part and concurring in the judgment).

In addition, the court found that Goodyear was vicariously liable for the misconduct of its counsel. *Id.* at *11-*13 ("[A] principal is commonly liable for the conduct of its agents."). Goodyear was responsible because it retained final approval regarding discovery. *Id.* at *11-*12. *See also Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938 (D. Ari. 2012) (initial trial court sanction decisions). Goodyear counsel, however, were found not to face any additional liability by virtue of their 2016 settlement with plaintiffs. *Id.* at *13-*14.

The trial court's decision on remand arguably avoids injustice in the individual case in that it requires Goodyear to pay the full amount of counsel fees incurred by the Haegers, a result akin to that of *Chambers v. NASCO*. In a perhaps ironic ending to the episode, Goodyear may ultimately be required to pay sanctions based on all of plaintiff's counsel fees in spite of its victory before the Supreme Court. But Goodyear undoubtedly will appeal. Thus, the ultimate amount of any monetary sanction to be imposed on Goodyear thus remains unclear.

In addition, consequences continue for Goodyear in that disclosure of its hidden documents has been ordered and it has become the target of regulatory action. *See Estate of Haeger v. Goodyear Tire & Rubber Co.*, Case No. CV 2013-052753 (Ariz. Sup. Ct. Maricopa County, Apr. 4, 2018) (ordering unsealing of documents); U.S. Dept. of Transportation, National Highway Traffic Safety Administration, Investigation No. PE 17-009 (seeking information regarding G159 tires). But these developments arguably only put Goodyear in the position it would have been in years ago had it made apt disclosure.

Even severe punishment of Goodyear in the individual *Haeger* case does not expunge the problems reflected in the Supreme Court's *Haeger* decision and by the *Haeger* saga. If Goodyear is forced to pay \$2.7 million (the total amount of counsel fees) rather than \$772,000 (the portion of counsel fees the trial court deemed sufficiently closely linked to the document secretion), it will be because of waiver, not because of a sufficiently vigorous law of discovery abuse. If Goodyear had not waived, it could have, per the Supreme Court's opinion, limited its punishment to something quite palatable relative to potential gains it sought. Perhaps even a \$2.7 million sanction lets Goodyear off too easily. Consequently, even in the aftermath of the trial court's decision on remand, *Haeger* continues to reveal a litigation system with insufficient deterrence of restrictive discovery abuse and shows that a litigant avoiding waiver can engage in the problematic restrictive discovery abuse exhibited by Goodyear and limit its penalty to only those opposing counsel fees closely linked to the discovery abuse, even if the misconduct adversely affected plaintiff's overall recovery. Goodyear may ultimately lose the *Haeger* battle but litigants tempted to conceal information with only minimal consequences have won the doctrinal war.

More important, however, than the trial court's finding of waiver, is its finding through the application of basic agency law that Goodyear is vicariously liable for the misconduct of its counsel. If future courts follow this approach and direct most of the sting of sanctions for discovery abuse (restrictive and expansive) toward clients, this will better reflect the modern world of law practice in

guidance on the limits of counsel fees as a sanction in that it provides a roadmap of sorts for courts wanting to use counsel fees as sanctions. But it is unlikely that there existed a problem of over-sanctioning in this regard. The occasional seven-figure fee-shifting makes the legal newspapers, but there is little or no evidence that this is common, significant in total amount, or creates problems of judicial administration.

Under these circumstances, it remains hard to justify the Court's embrace of Goodyear's cert petition and tale of woe. One is hard pressed to imagine the Court granting review to consider whether a Court's award of fees to a litigant victimized by discovery abuse was too low. In fact, there appears never to have been such a case in the modern Supreme Court. Instead, the Supreme Court grants review when it is worried that sanctions against commercial entities are too high.

This perhaps results only from the asymmetry of litigation generally where repeat players have considerable advantage over consumer one-shot players. But the mischievous pro-defendant narratives of expansive discovery abuse and excessive sanctions undoubtedly played a role. So did the parallel concern about excessive discovery from the decades-long dominance of the prevailing narrative.

Haeger, even if correct, reflects more problem than solution. The Court and civil rule-makers could liberate themselves from the tyranny of this prevailing mythology and strengthen the ability of trial courts to impose substantial not-strictly-compensatory sanctions for blatant discovery abuse that are effective even after litigation has ended. Anything less perpetuates the bad incentives that led to the atrocious behavior of Goodyear and its counsel in *Haeger*.

In the absence of improving the incentives for discovery compliance and punishing restrictive discovery violations as much as expansive discovery violations, litigants who are already highly incentivized to win are further incentivized to cheat. Losing may not have quite reached "sin" status among the nation's commercial giants, but Goodyear's behavior suggests something similar, something reflective of the economic forces that tempt litigants to disobey the rules.¹²³ The judicial system should adequately counteract these tendencies rather than pandering to them.

which the aggressiveness of important clients is a source of abuse at least as much as any failings of counsel. But to the extent the sanctions of restrictive discovery abuse remain limited to fee-shifting tied to the specific expenses imposed by the abuse, the *Goodyear* decision foments a regime of underdeterrence even if justice is actually done in the Goodyear case.

123. In addition, lawyers and laypersons may have greater incentives to cheat due to sociological factors such as a cultural climate encouraging a "win at all costs" attitude. See Steve Almond, *Trump's Blood Sport Politics*, THE N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/02/opinion/trumps-blood-sport-politics.html> [<http://perma.cc/JLG3-LMKX>].

Cases like *Haeger* and constrained views of policing restrictive discovery take the wrong path and unduly tolerate, and effectively encourage, the “sacrament” of cheating.