



## Alerts

### Ninth Circuit Reverses Sanctions for Failure to Consider Willfulness, Fault or Bad Faith

April 11, 2012

*Lawyers for the Profession® Alert*

*R & R Sails, Inc. v. Insurance Company of the State of Pennsylvania*, \_\_\_ F.3d \_\_\_, 2012 WL 933830 (9th Cir. 2012)

#### Brief Summary

The U.S. Court of Appeals for the Ninth Circuit held that the imposition of terminating sanctions under Fed. R. Civ. P. 37(c)(1) requires the court to consider willfulness, fault or bad faith, as well as the availability of lesser sanctions.

#### Complete Summary

This matter involved a dispute between insured and insurer over the extent to which the insured's loss was covered. The insured brought, *inter alia*, a bad faith tort claim against the insurer based on the insurer's denial of coverage. The insured also sought recovery of its attorney's fees reasonably incurred to compel payment of the policy benefits. In California such fees are known as *Brandt* fees.

In its pretrial memorandum, the insured indicated that it would support its *Brandt* fees claim with certain invoices. Over the following months, the insurer sought such invoices to no avail. For not producing the invoices, the U.S. District Court for the Southern District of California ultimately sanctioned the insured under Fed. R. Civ. P. 37(c)(1) by excluding the insured's *Brandt* fees evidence. Rule 37(c)(1) forbids use of information at trial which was not properly disclosed under Fed. R. Civ. P. 26(a), but it also provides for alternative or additional types of sanctions. In this case, the lack of evidence resulting from the sanction led the district court to grant the insurer's motion for judgment as a matter of law.

The Ninth Circuit reversed and remanded, holding that the district court had not made adequate findings to support its sanction. The Ninth Circuit held that the evidence preclusion sanction was particularly harsh because it fully undermined the insured's *Brandt* fee claim as well as the insured's request for punitive damages. In the court's words, the sanction amounted to dismissal of a claim (i. e., a terminating sanction).

The Ninth Circuit held that a sanction that amounts to dismissal requires consideration of willfulness, fault or bad faith, as well as the availability of lesser sanctions. Because the district court failed to undertake such considerations, the Ninth Circuit reversed and remanded.

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## Significance of Opinion

This opinion provides that imposition of a terminating sanction, or a sanction amounting to such, under Fed. R. Civ. P. 37 (c)(1) requires consideration of willfulness, fault or bad faith, as well as the availability of lesser sanctions. The Ninth Circuit previously has made clear that such considerations must accompany terminating sanctions under other sanctions rules. This opinion, for the first time, expressly and directly recognizes the applicability of such considerations under Rule 37(c) (1).

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