

The Extreme Consequence of Discovery Abuse: Terminating Sanctions

by

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In your first year of law school you are taught that the main purpose of discovery is to streamline the litigation process. Your first legal job teaches you that an attorney's definition of "streamline" is much different than the layman's. It is not unique to encounter parties who withhold information or stall responses, even if the only benefit is to handicap the opposition. But what is the real consequence of gamesmanship? The common answer of course is monetary sanctions. Some attorneys may have encountered issue sanctions for more egregious discovery violations. The recent matter of *Liberty Mutual Fire Insurance Company v. LCL Administrators* (2008) WL 2350656 (Cal.App.3d) gives a rare glimpse into the most extreme consequence: terminating sanctions. Terminating sanctions will strike out entire pleadings or parts of pleadings, dismiss an action or party, or render a judgment by default against the party abusing the discovery process. See Civil Code § 2023.30.

The *Liberty* case began with what the court characterized as an "ordinary" breach of contract action filed by Liberty Mutual Fire Insurance Company ("Liberty") to recover unpaid insurance premiums from LCL Administrators ("LCL"). LCL filed an answer and cross-complaint alleging that Liberty mishandled the claims. LCL's answer generally denied the allegations and raised a total of twenty-eight affirmative defenses. *Liberty* (Cal.App.3d) at 1.

After Liberty served its first set of interrogatories, LCL began a series of continuous stonewalling moves, giving "vacuous, meaningless responses". *Id.* Initially, LCL was granted two extensions of time to respond to Liberty's interrogatories. When LCL finally did conjure up an answer, the responses were less than informative. LCL's response to an interrogatory requesting all facts on which it based its denials and affirmative defenses serves as an example:

The statutory denials are based upon the authorization of the Code of Civil Procedure, and a belief that the contracts of insurance were improperly implemented and interpreted by Plaintiff [Liberty]; as [Liberty] provides responses to discovery, [LCL] will be able to detail specific areas of breach.

Id. at 2.

Unsatisfied, Liberty responded to this initial answer with a meet and confer letter, which LCL ignored. Finding the response "inadequate and evasive", the trial court then granted a motion to compel adequate answers and imposed monetary sanctions. LCL again was given an extension to provide responses. LCL's revised response to the same interrogatory is as follows:

The statutory denials are based upon the authorization of the Code of Civil Procedure (§ 431.30 [subd.] (d)), and a belief that the contracts of insurance were improperly implemented and interpreted by Plaintiff [Liberty]; as [Liberty] provides responses to discovery, [LCL] will be able to detail the specific areas of breach.

Id.

Not pleased with the lack of revision, Liberty continued to send meet and confer letters to LCL which went unanswered. Liberty responded to LCL's silence by requesting monetary and issue sanctions. The court granted the monetary sanctions, but denied the issue sanctions allowing LCL a final opportunity to provide straightforward answers. LCL took this slap on the wrist and provided additional information: a listing of all policy numbers at issue. LCL also asserted that to more completely answer the question would require it to "make a compilation or summary of information contained in [Liberty's] writings regarding the worker's compensation claims"; LCL opined that Liberty could make its own "compilation or summary" and achieve satisfactory results. *Id.* at 3.

Following the theme, Liberty responded by sending a meet and confer letter, which shockingly LCL did answer assuring a third supplemental response would be provided. A surprise to no one at this point, LCL never did serve the promised third supplemental response. *Id.*

The path of discovery for LCL's cross-complaint followed a similar route as the answer. Liberty first sought the factual basis and supporting documents for LCL's allegations. The court granted LCL two extensions of time, yet they never responded. Prior to a hearing on a motion to compel response, LCL finally replied pinning all blame on Liberty. The response declared that Liberty had not allowed LCL to inspect the documents that would support its claim. The court granted Liberty's motion to compel response, which was disregarded as LCL again failed to serve responses. Liberty then brought and was granted a second motion to compel. LCL did not oppose those motion, but again claimed it had been restricted in its ability to answer and that Liberty possessed all of the necessary documents. *Id.* at 4.

Liberty finally brought motions seeking issue or terminating sanctions to strike LCL's response and cross-complaint. At a hearing on the motion, LCL finally became more active in asserting their allegations and defenses. Testimony by two experts was provided, stating the nature of LCL's claim was Liberty's unconscionable upcharging by rounding to the highest dollar instead of nearest dollar for billing purposes. LCL further asserted that Liberty breached the necessary standard of care for claims handling by not having office safeguards in place. *Id.* at 3. Despite the testimony by the expert witnesses, the court granted Liberty's motion for terminating sanctions, pointing to LCL's history of noncompliance and abuse of the discovery process. The court firmly rejected LCL's claim that Liberty, not LCL, had the necessary information to provide responses, noting that "after [16] months of litigation, LCL should have some factual basis for its [28] affirmative defenses and its general denials". Once the answer was stricken and the cross-complaint dismissed, Liberty obtained a default judgment for \$512,518 in unpaid premiums, plus interest and costs. *Id.* at 4. LCL's motions for reconsideration and new trial were rejected as the court found that LCL's arguments were "no more convincing now than they were before". *Id.* at 5.

Undoubtably, LCL was caught off guard by the terminating sanctions. On appeal, LCL asserted that its final responses were "greatly more detailed" than its original. Labeling the answers as "worthless", the appellate court noted that LCL's actions were willful displays of a lack of cooperation. The court highlighted LCL's "obfuscation and game playing" by commenting on the fact that LCL propounded no discovery of its own until faced with a motion for terminating sanctions and repeatedly ignored Liberty's meet and confer letters. *Id.* at 7. In addition, LCL argued that its discovery violations did not prejudice Liberty's ability to go to trial. However, an unconvinced

appellate court pointed out that “a party cannot intelligently defend itself against affirmative defenses or damage claims when the other side’s discovery responses consist of legal double-talk and provide no useful information.” *Id.* at 8.

For practicing attorneys, LCL’s most notable argument was the excessive nature of terminating sanctions. LCL contended that the orders solely punished and did not further the objects of discovery. *Id.* at 8. Rejecting this argument as well, the court of appeals pointed to the Code of Civil Procedure. Code of Civil Procedure Section 2030.290 outlines that “the court shall impose a monetary sanction” for misuse of discovery and that “the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction or a terminating sanction.” *Id.* at 5. Imposing a terminating sanction when prior efforts yield no results is well within the discretion of the trial court judge. *Id.* at 8.

Given the continued stall tactics and willful failure to comply with discovery, it is no surprise that LCL was hit with terminating sanctions. While judges may be reluctant to impose the ultimate penalty, attorneys should be aware that terminating sanctions are codified and have been issued. The *Liberty* case serves as a reminder to attorneys that courts recognize an ultimate purpose behind discovery and continuing, intentional misuse may hurt more than just the wallet.