

Pretrial Practice & Discovery

American Bar Association Litigation Section

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Extreme Discovery Misconduct May Result in Extreme Consequences

A reminder to attorneys to take their discovery obligations seriously and not let things get out of hand.

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While I haven't polled all ABA members, I think it's safe to assume that obtaining default judgment during discovery isn't a regular case-winning strategy of most litigators. And while Rule 37 of the Federal Rules of Civil Procedure does include default as a potential remedy for a party's failure to cooperate during discovery, it is undoubtedly an extreme measure. Where a party is engaged in extreme or egregious discovery misconduct, however, default judgment may be a court's last-resort remedy.

In spring 2021, for example, a Tennessee court entered a default judgment against the pharmaceutical company Endo after determining that Endo and its counsel engaged in a "coordinated strategy" to interfere with the administration of justice. *Staubus v. Purdue Pharma L.P.*, No. C-41916 (Tenn. Cir. Ct. Apr. 6, 2021). As detailed in the court's April 6, 2021, order granting the default judgment, counsel for Endo made numerous false statements during court proceedings throughout the pendency of the matter, and improperly withheld thousands of documents during discovery. Documents that *were* provided by Endo, in some cases, contradicted testimony of Endo's own executives. Upon entry of the default, the judge acknowledged the harshness of the penalty, but stated that anything less than default in the circumstances at hand "would make a mockery of the attorneys who play by the rules and the legal system."

A recent opinion out of the Southern District of Alabama reveals that courts may take the dramatic step of entering a default judgment for discovery misconduct in *any* variety of matters. *Hornady, et al., v. Outokumpu*, No. 1:18-00317 (S.D. Ala. Nov. 18, 2021). In *Hornady*, a Fair Labor Standards Act (FLSA) collective action, the plaintiffs sought damages for the defendant's alleged failure to properly pay regular wages, overtime wages, and bonuses. The defendant, a stainless-steel manufacturer, repeatedly refused to produce complete and accurate time and wage records, and misrepresented material facts in connection with the refusal, making trial in the matter impossible.

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Any attorney with a wage-and-hour class action on their roster knows just how cumbersome discovery in these suits can be. The allegations upon which these suits rest are intrinsically tied to employees' time and wage records, which are often kept and managed by third-party providers. Despite this fact, employers are subject to a statutory duty to maintain proper time and wage records, even if they are not the regular custodians of that data. Needless to say, even with the most professional and ethical attorneys involved, third-party discovery to obtain these records isn't always smooth sailing.

Wage-and-hour attorneys need not fear that difficulty obtaining third-party records will automatically doom them to default, however. Default judgment can only be imposed after a finding of bad faith. For example, the *Hornady* court referred to the defendant's misconduct as a "continuing obstinate refusal to produce its time and pay records." In fact, prior to entering default judgment, the parties participated in 11 discovery conferences (largely focusing on the defendant's failure to produce accurate and complete time and wage records), and the defendant was subject to a total of 12 orders requiring production of the subject records. The defendant blamed its deficiencies on the plaintiff's "unreasonable requests" and/or a lack of cooperation by the relevant third-party payroll processor. Seeing through this excuse, however, the court found that the defendant's misconduct painted "[a] clear picture of willful and prejudicial discovery abuse, requiring imposition of the strictest of sanctions[.]" All in all, these extreme cases are a reminder to attorneys to take their discovery obligations seriously and not let things get out of hand, or face a default-ending.

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