

Daily Dicta: Repeat After Me: It's a Bad Idea to Commit Discovery Fraud

“A party who knowingly distorts or conceals the truth undermines the integrity of the process and maligns justice itself,” wrote Senior U.S. District Judge Karon Owen Bowdre in Alabama.

By Jenna Greene
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Is it just me, or when a court issues terminating sanctions, do you think of Linda Hamilton's line at the end of “The Terminator” when she squashes the Arnold Schwarzenegger robot: “You're terminated, f***er.”

Just me? Hmmm, maybe. In any event, I've got a new entry in my (unofficial) terminating sanctions hall of fame—another case involving diabetes test strips.

More than 30 million Americans have Type 1 or Type 2 diabetes. The small plastic strips that many of them use daily to measure their blood sugar are a multi-billion dollar market—one that seems to attract more than its share of sketchy litigation behavior.

Last year, I wrote about a case involving Abbott Laboratories, which won default judgment in an anti-counterfeiting action against a wholesaler that allegedly repackaged Abbott's lower-priced international diabetes test strips and passed them off as the pricier U.S. version.

In March, a federal judge in the Eastern District of New York found that the wholesaler, H&H, committed fraud on the court by willfully withholding documents in discovery.

But those guys sound like choir boys compared to the misconduct allegations against defendants in a

new diabetes test strip blowup—a suit by Roche Diagnostics Corp. in the Northern District of Alabama. Like Abbott, the healthcare giant is represented by a team from Patterson Belknap Webb & Tyler led by Geoffrey Potter.



Geoffrey Potter

According to Roche, the defendants falsified test strip invoices in response to the court's discovery order, spoliated evidence by hiding and/or destroying thousands of boxes of test strips; lied about the existence of inventory that Roche later independently discovered; and surreptitiously transferred \$15 million in assets within days after Roche filed the suit.

Wait, there's more.

The defendants also allegedly violated court orders by failing to disclose businesses, assets and accounts; filed bad faith motions; sent bad-faith and false statements to third-party financial institutions to delay discovery; made up fake companies to create false documents produced in discovery; harassed a witness

with a frivolous restraining order; and lied to the court about the purposes of financial accounts.

The response by Senior U.S. District Judge Karon Owen Bowdre? You had me at falsifying test strip invoices.

“The court need not proceed any further than Roche’s first allegation—that ‘Defendants’ document production contains numerous demonstrable forgeries that have never been corrected, explained, or even acknowledged,” wrote Bowdre, who was appointed to the bench by President George W. Bush. “This allegation alone, demonstrated by clear and convincing evidence, is more than enough to require case-ending sanctions.”

However, she didn’t sanction all the defendants—a network of about 36 pharmacies and related entities located primarily in Alabama and Mississippi—because the allegations were not specific enough against most of them.

But she did rule against individual defendants Phil Minga and Konie Minga, who allegedly control the enterprise, and their alleged companies, Priority Healthcare and Medpoint Advantage LLC.

According to Roche’s amended complaint, the Priority Care enterprise “bills insurance companies multiple millions of dollars annually for blood-glucose test strips that have different product codes, different price structures, and different eligibilities for insurance reimbursement than the products patients actually receive.”

As a result, Roche says it paid out at least \$30 million in fraudulent rebates to insurance companies and pharmacy benefit managers.

The company’s suit against the Priority Care enterprise asserts common law and statutory fraud, conspiracy to commit fraud, negligent misrepresentation, unjust enrichment and RICO violations.

Defense counsel Bruce Rogers of Bainbridge Mims Rogers & Smith in Birmingham, Alabama did not immediately respond to a request for comment.



Woman holding glucometer and strips.

His firm appears to be the fourth set of lawyers for the defendants since the case was filed in September of 2018—but the Patterson team took pains not to blame opposing counsel for any alleged misconduct.

“To be absolutely clear: Roche does not contend that defendants’ prior counsel had any involvement in their fraud on the court and it does not expect defendants’ newest counsel to do so either,” Potter wrote in Roche’s motion for sanctions. “Defendants themselves, not their counsel, are solely responsible for their litigation misconduct.”

Bowdre in issuing default judgment offered some lofty sentiments on truth, justice and the American way.

“The American judicial system depends on the integrity of the participants, who seek the truth through the adversarial but good-faith presentation of arguments and evidence,” she wrote. “A party who knowingly distorts or conceals the truth undermines the integrity of the process and maligns justice itself.”

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