Shore Losers

By Jeffrey A. Lowe

President Bush chastised Democrats for refusing to allow a vote on whether to lift the federal ban on offshore oil drilling before lawmakers departed for their summer recess.

"To reduce pressure on prices, we need to increase the supply of oil, especially oil produced here at home," Bush said in his weekly radio address. It was the fourth time in a week that he called for Congress to end the drilling restrictions off both coasts. Many of the drilling moratoriums have been in place since 1981 out of concern for the environment.

Drilling for oil and natural gas off our shores will mean daily air and water pollution problems, and a constant risk of oil spills.

Despite the federal government's 27-year-old ban on offshore drilling, Republican presidential candidate Jon McCain supports lifting the ban in order to give states the option to drill, and cited as a reason alleviating the pressure on consumers facing high gas prices.

Although Democrats in both houses oppose lifting the moratorium on oil drilling, there are compromise bills being discussed.

Sen. Ben Nelson, D-Neb., is bucking his party's leadership by supporting new drilling. He said he and the other senators advocating the deal are "people who are seriously concerned about the issue who want to find solutions that are most likely to involve compromise."

Rep. John Peterson, R-Penn., told the Christian Science Monitor that "energy legislation should be the top priority for Congress" and said he hopes Congress can yield a comprehensive plan in the next session. "Leaders are going to have a hard time refusing to address this issue. This is the issue of the year. This is the issue of the decade."

Yet drilling off our sensitive coasts would do little to lower prices or make us more energy independent, but it would threaten our beaches with pollution and potential oil spills and destroy billion dollar tourism and fishing industries.

In fact, Amy Myers Jaffe, an oil expert at Rice University, told the New York Times, "All the partisan ideas that are being offered fall short of producing the huge amount of barrels of oil we need. There is no guarantee to drilling, but it could make a contribution eventually the same way alternative energy and conservatism may help."

The fact remains that offshore oil drilling causes a significant amount of air pollution. Each offshore oil platform generates approximately 214,000 pounds of air pollutants each year, according to the national Oceanographic and Atmospheric Administration.

An average exploration well for oil or natural gas generates some 50 tons of nitrogen oxides, 13 tons of carbon monoxide, 6 tons of sulfur dioxide and 5 tons of organic hydrocarbons. These pollutants are the precursors to smog and acid rain, and contribute to global warming.

Oil is extremely toxic to a wide variety of marine species, and current cleanup methods are incapable of moving more than a small fraction of the oil spilled in marine waters. According to the National Research Council, offshore drilling platforms and pipelines spilled 1.8 million gallons of oil in U.S. waters from 1990-1999 in 224 reported accidents, an average of almost 500 gallons a day.

Drilling for oil and natural gas off our beaches will mean daily air and water pollution problems, and a constant risk of oil spills. There are many cleaner, faster and cheaper ways to help America break its oil addiction. Reducing the energy we use in our homes, offices and cars using technologies that are already available will move us closer to energy independence than destroying our fragile coasts with offshore oil drilling.

However, a majority of Americans, 57 percent, support opening up new offshore oil drilling locations, according to a recent Gallup poll.

Sara Banaszak, senior economist at the American Petroleum Institute, said in an interview with CNN that the nation's economy will continue to rely on fossil fuels for the foreseeable future.

Banaszak went on to say that, "Under any model of the nation's future energy policy, we will still need more oil and gas over the next 30 years. Offshore drilling can help meet and will boost domestic economic activity." Banaszak also said that opening up the country's coastlines to oil exploration has the potential for an "immediate impact" on oil prices.

This unsupported position is contradicted by the federal Department of Energy, which has taken the position that offshore oil drilling would not have a significant impact on domestic oil production or prices before the year 2030.

Offshore oil drilling for new sites off our coastline would not even begin until 2012 because offshore leasing is a cumbersome process and there are not enough rigs, workers or refineries to handle more oil exploration.

Most of the offshore oil in the United States, almost 10 billion barrels, if found, would be burned up in less than two years at the current level of consumption.

UC Berkeley energy researcher Severin Bernstein is told CBS News that, "Offshore oil drilling would have a pretty modest effect even if it did start flowing."

Therefore, the amount of oil actually found from offshore oil drilling is unknown.

Drilling for oil and natural gas off our shores will mean daily air and water pollution problems, and a constant risk of oil spills.

From whales to sea turtles to fish and birds, oil and gas drilling off our nation's coasts would damage the waters and habitats of these treasured species. Offshore oil drilling that is being advocated by the Bush administration and the petroleum oligarchy must be opposed in order to safeguard our environment from an administration that puts profits above people and the environment.

As Homer wrote in "The Iliad," "The ocean is the source of all life."

Jeffrey A. Lowe is the former chair of the Los Angeles County Bar Association criminal law section.

Ignoring Federal Rule 37(c) Can Cause an Uphill Legal Battle

By Rex S. Heinke and Katharine J. Galston

A litigant's failure to comply with a district court's pretrial disclosure schedule can lead to very harsh consequences. Missing a deadline can effectively end the case as a result of the sanctioning power of Federal Rule of Civil Procedure 37(c). Rule 37(c) mandates the preclusion of evidence not properly disclosed in discovery and means that litigants must take extreme care to comply strictly with all pretrial disclosure requirements.

Rule 37(c) was amended in 1993, broadening the sanctioning powers of district courts and giving teeth to Rule 26's pretrial disclosure and supplementation requirements. Rule 37(c)(1) provides, in relevant part: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

The 9th Circuit has recognized that Rule 37(c)'s preclusion remedy is "self-executing" and "automatic." *Yeti By Molly Ltd v. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th Cir. 2001). Unlike remedies for other discovery violations, Rule 37(c) sanctions do not depend on a party first filing a motion to compel. Therefore, instead of requiring a party to first meet and confer regarding a discovery violation, then file a motion to compel, then receive an order compelling compliance, then bring a motion for sanctions when the opposing party fails to comply, and then hope that the district court awards some type of sanctions, Rule 37(c) mandates severe sanctions "automatically" and in the first instance. Further, there is no requirement of willfulness, bad faith or fault on the part of the party who fails to comply with the rules and deadlines. The rule's sanctions are, thus, intentionally and admittedly harsh to force parties to comply with pretrial disclosure deadlines and requirements.

Recently, while defending a grant of summary judgment in favor of our clients on appeal, we witnessed just how important Rule 37(c) is. In our case — *Drnek v. Variable Annuity Life Insurance Co.*, 05-16623 (Dec. 21, 2007) — the 9th Circuit, in an unpublished order, held that the district court acted within its discretion in striking the plaintiffs' experts (including their only damages expert) as a sanction for the plaintiffs' failure to comply with the pretrial disclosure deadlines in a federal securities class action. The 9th Circuit affirmed summary judgment in favor of the defendants because, without the precluded expert testimony, the plaintiffs could not prove their claims.

The district court, in its pretrial scheduling order, had set cut-offs for fact and expert discovery, as well as mandated that all parties disclose the names of witnesses, designate experts and provide expert reports by specified dates. The parties later stipulated to extend the discovery cut-off by 45 days, which the court approved. Under the stipulation, all other deadlines were to "remain the same."

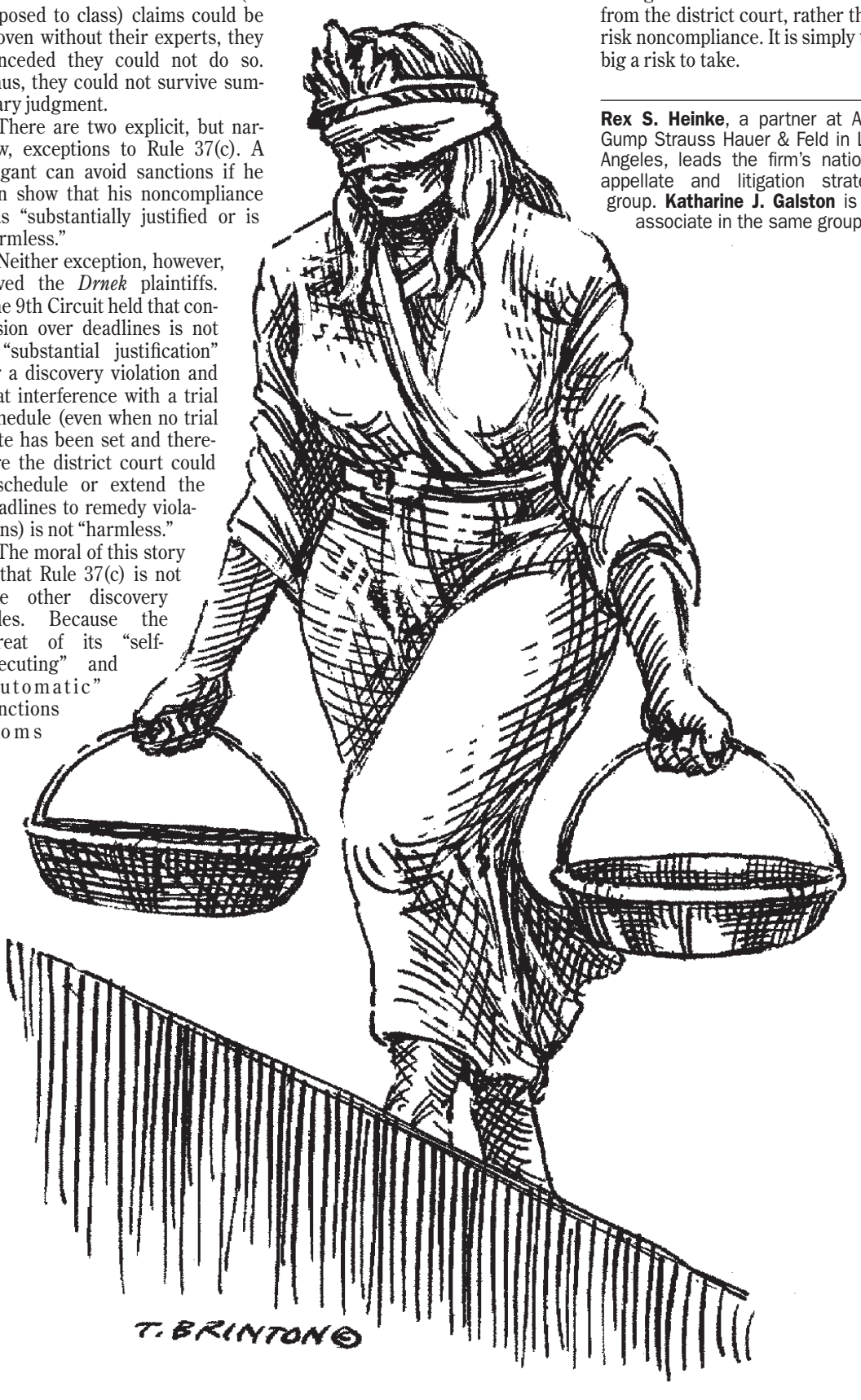
The plaintiffs, however, neither designated their experts nor submitted their witness lists by the deadlines set in the court's original scheduling order. Nor did they seek any extension of the deadlines from the court. Only after the fact did the plaintiffs claim the stipulation had extended not only the discovery cut-off but the other pretrial dates as well. The district court disagreed, concluding that only the discovery cut-off had been moved. The 9th Circuit upheld the district court's interpretation of the order as within its discretion.

As our case demonstrates, sanctions under Rule 37(c) can devastate a litigant's claims or defenses. Courts have upheld Rule 37(c) sanctions even when a litigant's entire cause of action or defense has been precluded. In *Drnek*, for example, after striking the plaintiffs' experts and witness list under Rule 37(c), the district court vacated its prior order certifying the class and granted defendants partial summary judgment on the plaintiffs' claims for "class-wide" damages because they could not raise a genuine issue of fact without their experts. Although the district court invited the plaintiffs to demonstrate that their individual (as opposed to class) claims could be proven without their experts, they conceded they could not do so. Thus, they could not survive summary judgment.

There are two explicit, but narrow, exceptions to Rule 37(c). A litigant can avoid sanctions if he can show that his noncompliance was "substantially justified or is harmless."

Neither exception, however, saved the *Drnek* plaintiffs. The 9th Circuit held that confusion over deadlines is not a "substantial justification" for a discovery violation and that interference with a trial schedule (even when no trial date has been set and therefore the district court could reschedule or extend the deadlines to remedy violations) is not "harmless."

The moral of this story is that Rule 37(c) is not like other discovery rules. Because the threat of its "self-executing" and "automatic" sanctions looms large, a party must clarify any uncertainty as to its disclosure obligations as soon as possible in the district court and then strictly comply. Further, because a district court's determination that its order has been violated is afforded significant deference on appeal (even when it effectively precludes an entire cause of action or defense), a litigant faces an uphill battle in seeking to have its interpretation of a scheduling order vindicated on appeal. Thus, if there is any room for competing interpretations of a scheduling order, it is imperative to seek guidance in the first instance from the district court, rather than risk noncompliance. It is simply too big a risk to take.



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