Game Theory Looks at Florida’s Three Strikes Law

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Laws in which some finite instances of unacceptable behavior trigger extreme punishment are growing in popularity. In the criminal law field, we have laws in California and Washington that basically throw away the key on three-peat felons. See Ewing v. California, 538 U.S. 11, 15 (2003) (discussing prevalence of such laws and finding California version not to violate eighth amendment). And now in the civil law arena, we have Florida’s “Three Strikes” law that bars medical licensure of persons found by a court, agency or arbitrator to have committed three or more incidents of medical malpractice. See Fl. Const. art. X, § 20 (available at http://election.dos.state.fl.us/initiatives/fulltext/35169-8.htm).

Much as analogies to baseball often have their value in legal analysis, see, e.g., Charles Yablon, On The Contribution of Baseball To American Legal Theory, 104 Yale L.J. 227 (1994), and apparent public appeal, use of three strikes laws in civil litigation betrays an unfamiliarity with the basics of game theory. Here’s why. In an ordinary civil lawsuit in the United States, the downside to the defendant is some rough approximation of the damages suffered by the plaintiff. To be sure, there are complications such as the potential for punitive damages in some instances, the limitations on recovery created by the defendant’s finite wealth, and the frequent existence of liability insurance, but the basic paradigm is one of compensation for injury. Settlements of such lawsuits operate in the shadow of such a rule.

In a lawsuit against a defendant with two strikes, however, the damages suffered by the plaintiff no longer represent the potential downside to the defendant. The new downside is the net present value of the activity foreclosed by the third strike, which could be significantly greater than the damages suffered by the plaintiff. This is so because that value is what the defendant actually stands to lose in a successful lawsuit. And a plaintiff aware of the high threat facing the defendant can seek to appropriate a significant portion of that value in settlement. This point has not been lost on the Florida bar. See Siobhan, Morrissey, Doctors Fear Three-Strikes Law: Florida Amendment Could Make Med-Mal Settlements a Law Practice Niche, available at http://www.abanet.org/journal/ereport/nov12strikes.html.

All of this might not appear particularly troubling. After all, the “overcompensation” of a plaintiff who sues an offender who already has two strikes may be seen as a modest side effect of putting the bad actor out of business. But this is where game theory comes in and, in particular, the problem of “unraveling.” See Douglas G. Baird, et al., Game Theory and the Law 88-136 (1994). Consider the position of defendants with a successful practice but with just one strike. If they fail to settle any new lawsuit, there is the risk of having two strikes against them. The existence of two strikes, however, as their malpractice insurer will be sure to understand, means that they are vulnerable to having a
huge settlement extracted from them in any subsequent lawsuit. Thus, the plaintiff represented by sophisticated counsel will be able to extract a large settlement not just in the lawsuit against the defendant with two strikes but against the defendant with one strike.

Even if the plight of defendants with just one strike does not tug at our heart, consider now the problems faced defendants with a successful practice but with no strikes against them: the very models of a modern major practitioner. In a three strike jurisdiction, the plaintiff and the defendant know that if the defendant get one strike, the defendant is vulnerable in any lawsuit seeking a second strike, because the existence of two strikes renders the defendant vulnerable to a huge settlement demand in any lawsuit seeking a third strike. But this means that even the defendant with no strikes against him must take that significant possibility into account in any lawsuit seeking a first strike. Thus, even a defendant with no adverse litigation history must now take seriously into account the potentially significant value of his income stream in assessing settlement demands made against him. Damages have become decoupled from damage.

Of course the analysis is more complicated. The defendant with no strikes is in a better bargaining position than the defendant with one strike who is in turn in a better bargaining position than the defendant with two strikes. And the perceived merit of future lawsuits against the defendant matters too. The defendant who believes in the accuracy of the civil justice system and who rightly believes they will never commit something the law judges to be malpractice has little to fear from three strikes laws. Those less trusting, less competent or more dependent for their livelihood on the suspicious, however, need be fearful indeed. (This class may be large because medical malpractice insurers, on whose good graces most doctors depend, are seldom seen as particularly incautious.) Hence, appealing as three strikes provisions might seem, advising great caution against their extension to civil lawsuits would not be a foul tip.