SPOLIATION OF EVIDENCE

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I. DEFINITION AND COMMON LAW ORIGINS

A. Spoliation Defined

Spoliation is the destruction, loss, or material alteration of evidence or potential evidence by an act or omission of a party in pending or future litigation. County of Solano v. Delancy, 264 Cal.Rptr. 721 (Ct. App. 1989); Miller v. Montgomery County, 494 A.2d 761, 767 (Md. Ct. Spec. App. 1985). Evidence includes physical objects, documents, or instruments.

B. Common Law Origins and Rationale

1. Origin of Inference That Destroyed Evidence Would Be Harmful to Party that Destroyed It

The doctrine that one who loses evidence should suffer some sanction can trace its origins to the early 18th century. The case most often cited is Armory y. Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (KB 1722). A chimney sweep who found a ring took it to a jeweler for cleaning and appraisal. The ring was returned without the jewel. The Court instructed the jury to "presume the strongest against [the jeweler], and make the value of the best jewels the measure of ... damages."

The Latin phrase omnia praesumuntur contra spoliatorem ("all things are presumed against the wrongdoer") was the early sanction imposed by courts. This negative inference was the primary sanction imposed by courts against plaintiffs or defendants.

2. Rationale for the Inference

While on the First Circuit, then Judge, now Justice, Breyer explained:

> (T]he evidentiary rationale [for the spoliation inference] is nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy the [evidence).

Nation-wide Check Corp. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982).

The inference has both "prophylactic and punitive effects." Id. Destruction amounts to an admission by conduct of the weakness of one's case. State v. Langlet, 283 N.W. 2d 330, 333 (Iowa 1979)(citations omitted).

3. Some Form of Intentional Act or Wilful Conduct Was Required

Prior to application of the negative inference, some form of intentional or deliberate conduct had to be shown or inferred. See, McCormick, Handbook of the Law of Evidence, §273 at 809; 1 Jones on Evidence, 53.90 at 321 and §3.3 at 329 (6th Ed. 1972);

McGuire and Vincent, Admissions Implied From Spoliation, 45 Yale L. Jour. at 232-233; 29 Am. Jur. 2d Evidence §177 (1967); Gorelick, Marzen, and Solum, Destruction of Evidence §2.8 at 40 (1989).

II. MODERN EXPLOSION OF SPOLIATION

A. Increasing Trend of Cases Addressing Various Spoliation Issues Over the Last 25 Years

There has been an ever increasing number of opinions dealing with the alteration, loss, or destruction of evidence during the last 25 years. See e.g., Welsh and Marquardt, Spoliation of Evidence, Trial, Winter 1994, p. 9; Katz and Muscaro, Spoilage of Evidence - Crimes, Sanctions, Inferences and Torts, Tort & Ins. L.J., Vol. XXIX, No. 1, Fall 1993, pp. 51-76. Two contributing factors are the adoption of more liberal discovery rules for exchanging pre-trial evidence and the development of product liability, especially Section 402A, with the increased number of such cases during the last 25 years.

Prior to the development and refinement of product liability in the early 19601s, most tort cases were based on negligence. With the adoption of Section 402A, the emphasis shifted from the conduct of a party to the product itself. obviously, the import of the loss, destruction, or alteration of the product is greatly magnified when the primary, if not exclusive, focus is on the product. In negligence actions where the focus is on conduct, the physical evidence is only a part. A defendant is always protected in one sense when evidence is lost or discarded because the plaintiff must still establish a prima facie case and has the burden of proof. In product liability actions, the loss of evidence strikes at the very heart of the claim because plaintiff must prove the product was manufactured by the defendant and was defective at the time it left defendant's control.

A second factor is the increasing trend away from trial by surprise to full pre-trial disclosure (and with the new amendments to the federal rules voluntary disclosure at that). The Federal Rules of Civil Procedure and discovery rules in most states mandate full exchange of evidence prior to trial. The opportunity to discover missing evidence before trial has been greatly enhanced. The increased scope of discovery also has resulted in an increase in the discovery of relevant documents in complex cases, the loss, destruction, or alteration of which can result in a motion by opposing counsel.

B. Early Sanction of Adverse Inference Has Been Greatly Expanded

Courts now are not afraid to employ harsher sanctions for spoliation of evidence. The sanctions include evidence preclusion, witness preclusion (including experts), striking claims, limiting testimony, and even dismissal or judgment as a matter of law based upon failure of a party to make out a prima facie case or defense due to a lack of a witness or evidence the court has stricken. See e.g., Donohoe v. American Isuzu Motors, Inc., 155 F.R.D. 515, 519 (M.D. Pa. 1994); Sine v. Ford Motor Co., 837 F. Supp. 660 (M.D. Pa. 1993); Graves v. Daly, 526 N.E. 2d 679 (Ill. App. 1988).

III. MODERN REMEDIES FOR SPOLIATION

A. Some States Have Criminal Statutes That Penalize Destruction of Evidence

Although not the focus of civil litigators, attorneys should be aware that many states have criminal statutes that may apply to the intentional destruction of evidence. Although prosecutions are rare, intentional destruction can result in criminal sanctions as well as civil sanctions.

B. Independent Tort of Spoliation Has Gained Limited Approval

California, Alaska, and Ohio were the first to adopt the independent tort of intentional spoliation of evidence. Smith v. Superior Court, 198 Cal.Rptr. 829 (Ct. App. 1984); Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Smith v. Howard Johnson Co., 615 N.E. 2d 1037 (Ohio 1993). The seeds of the tort were first sown, not surprisingly, in California in Williams v. State, 664 P.2d 137 (Cal. 1983).

> The Ohio Supreme Court has set out the elements for the tort:
>
> (1) A cause of action exists in tort for interference with or destruction of evidence;
>
> (2a) The elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of the defendant that litigation exists or is probable, (3) wilful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts;
>
> (2b) Such a claim should be recognized between the parties to
>
> the primary action and against third parties; and
>
> (3) Such a claim may be brought at the same time as the primary action.

Smith v. Howard Johnson Co., 615 N.E. 2d 1037, 1038 (Ohio 1993).

Two states, California and Florida, have recognized the tort of negligent spoliation. Velasco v. Commercial Building Maintenance Co., 215 Cal.Rptr. 504 (Ct. App. 1985); Bondu v. Gurwick, 473 So. 2d 1307 (Fla. App. 1985). The elements set forth in Florida are:

> (1) Existence of a potential civil action;
>
> (2) A legal or contractual duty to preserve evidence that is relevant to the potential civil action;

(3) Destruction of that evidence;

(4) Significant impairment in the ability to prove the lawsuit;

(5) A causal relationship between the evidence's destruction and the inability to prove the lawsuit; and

(6) Damages.

Continental Ins. Co. v. Herman, 576 So. 2d 313, 315 (Fla. App. 1991). A number of other courts have stated, in dicta, that such a tort may be possible under certain facts and an emerging trend seems underway.

C. The Vast Majority of Cases Impose Civil Sanctions

1. Evidentiary Inference is Still Available and Used by Courts

The traditional sanction for spoliation of evidence is the negative inference and courts still use it. Miller v. Montgomery County, 494 A.2d 761 (Md. Ct. Spec. App. 1985). The spoliation inference is now considered a "moderate sanction." Donohoe v. American Isuzu Motors, Inc., 155 F.R.D. 515, 519 (M.D. Pa. 1994).

2. Discovery Sanctions Are Available to the Court

For cases already in litigation, courts have used the sanction power in the Rules of Civil Procedure to sanction parties for violating existing orders or the rules themselves. See e.g., Fed.R.Civ.P. 37; Fed.R.Civ.P. 1 (provides that the rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action").

3. Courts Have Found Inherent Power to Impose Sanctions to Preserve Integrity of the Judicial Process

Even if there is no court order in effect or the evidence was destroyed prior to suit, courts have the inherent power to sanction parties. Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir. 1994).

D. There Appeared to be an Anti-Spoliation Trend Several Years Ago

Two authors refer to the judicial developments in various jurisdictions as an "anti-spoliation trend." Katz and Muscara, supra at 51. In short, the sanctions being imposed appeared harsher and more frequent. In addition, cases involving an alteration of a product by experts or other agents of a party have also resulted in motions and severe sanctions, some of which have led to dismissal or summary judgment.

As an example, in the last several years, several Pennsylvania state and federal courts appeared to adopt a "public policy rule" that a plaintiff in a product liability action "must produce the product for the defendant's inspection." If the plaintiff couldn't do so, even if beyond

his control, the case was dismissed." Schwartz v. Subaru of America, Inc., 851 F. Supp. 191 (E.D. Pa. 1994); Sipe v. Ford Motor Co., 837 F. Supp. 660 (M.D. Pa. 1993); Butler v. Samsonite Furniture Co., 131 Mont. Co. L.R. 348 (Ct. Com. Pleas 1994). These cases are troubling, not because of the result, which may be appropriate in certain circumstances but because of the analysis. If a plaintiff cannot meet its prima facie burden because the evidence has been lost, even if not due to plaintiff's fault, or the product cannot be identified, then summary judgment or dismissal may be appropriate. Formulating a "public policy rule" mandating dismissal when a plaintiff in a product liability action cannot produce the product, without regard to fault, does not seem to balance the competing interests. If a plaintiff can otherwise meet its burden of proof and was not responsible for the lost evidence, why should the claim be dismissed?

E. The Pendulum May be Swinging Back To a Balanced Analysis

Several recent decisions have carefully reviewed the facts of each case in an attempt to craft a fair resolution of the legitimate competing interests. Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir. 1994); Gordner v. Dynetics Corp., 862 F. Supp. 1303 (M.D. Pa. 1994).

In Schmid, the Third Circuit set out three "key considerations" for determining whether a preclusion order for spoliation that results in dismissal because of plaintiff's inability to prove its case is appropriate:

> (1) The degree of fault of the party who altered or destroyed evidence;
>
> (2) The degree of prejudice suffered by the opposing party; and
>
> (3) Whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994).

In Gordner, a federal district court judge carefully analyzed the spoliation issue under Pennsylvania law. The Court noted that the malfunction theory, a circumstantial proof doctrine applicable in certain product liability cases, is available in Pennsylvania even if the product is not. The Court noted that the malfunction theory was directly contrary to a public policy rationale that is not based on the conduct or fault of the party. The Court also noted that the more extreme sanction of preclusion is not appropriate in Pennsylvania when "no conduct on the part of the plaintiff is the cause of the loss of the allegedly defective product." 862 F. Supp. at 1307. The Court sharply criticized the Pennsylvania state and federal courts that had stated the broad "public policy" rule that a plaintiff must produce the product regardless of fault. The Gordner Court noted that all of the cases either had some fault attributable to the plaintiff or plaintiff, because of the lost evidence, could not identify the manufacturer.

Another court has noted that if the defendant has had an opportunity to examine the evidence before it was destroyed, the prejudice to the defendant is greatly reduced. Shultz v. Barko Hydraulics, Inc., 832 F. Supp. 142 (W.D. Pa. 1993).

Finally, if plaintiff is asserting a design defect claim, the loss of the particular product is also not as critical because the defendant can theoretically examine other existing products allegedly containing the same defect. Quaile v. Carol Cable Company, Inc., 1993 W.L. 53563 (E.D. Pa. 1993).

F. Subrogating Insurers Beware

Several cases involving spoliation have involved the subrogating carrier and courts have noted that the insurers have knowledge and experience in product liability litigation which certainly will be a factor in determining the extent of willfulness and prejudice to the opposing party. Allstate Ins. Co. v. Sunbeam Corp., 865 F. Supp. 1267 (N.D. Ill. 1994); aff'd, 53 F.3d 804 (7th Cir. 1995); Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991); Graves v. Daly, 526 N.E. 2d 679 (Ill. App. 1988); Fire Ins. Exchange v. Zenith Radio Corp., 747 P.2d 911 (Nev. 1987).

G. The Unanswered Questions

1. Will Spoliation be Extended to Potentially Exculpatory Evidence Other Than the Allegedly Defective Product?

Almost all of the decisions to date involve loss of the allegedly defective product itself, or parts of it. How much evidence is a party required to save and for how long really has yet to be determined. See, e.g., Graves v. Daly, 526 N.E. 2d 679, 682 (dissenting opinion); Gordner v. Dynetics Corp., 862 F. Supp. 1303, 1309 (M.D. Pa. 1994). Nevertheless, one recent decision has placed subrogating insurance carriers on notice that preserving only the product itself may not be enough. Allstate Ins. Co. v. Sunbeam Corp., 53 F.3d 804, 805 (7th Cir. 1995);

> Allstate failed to preserve evidence, some of which was part of the alleged defective product itself and some of which was evidence which might itself have been, or shed light upon, an alternative cause of the fire. ... Accordingly, as an insurance company who had not yet determined the actual cause of the fire, Allstate had a duty under Illinois law to preserve all evidence of alternate causes thereof. (citations omitted).
>
> (Allstate's] argument that Graves and American Family are distinguishable because in those cases it was the actual product and not other evidence which was destroyed is not persuasive.

2. When Can an Expert Perform Destructive Testing and How Should Testing be Recorded When Other Side is Not Present?

3. What Should a Plaintiff Do if an Expert Has to Perform Destructive Testing to Determine if the Product is Defective?

Several courts have precluded expert tests, testimony, and evidence when the expert for one side altered or destroyed the evidence before the other side had a chance to perform tests or was not present. The Third Circuit in the Schmid opinion noted that, in some cases, the expert had to perform tests in order to determine if the product was defective. Schmid, 13 F.3d at 81.

4. Must a Potential Defendant be Put on Notice Before Suit is Filed and Before the Loss Site is Changed?

In a fire case, for example, does a plaintiff have a duty to notify a potential defendant, even if a determination has not been made to file suit, that the fire scene will be changed?

5. Can a Company, With an Established Document Retention Policy, Destroy Documents According to That Policy Even if There is the Potential for Litigation That May Affect Some of the Documents?

What level of communication will protect a corporate client when documents are routinely destroyed pursuant to a document retention policy when some other department may be in a position to know that certain documents will be relevant in future litigation?

H. Some Practical Tips for the Practitioner And Subrogating Insurers

1. Both Justice Breyer and Judge McClure in Nation-wide Check Cashing and Gordner emphasized the term "common sense" while discussing spoliation. Counsel should conduct himself and advise his client that spoliation is a very serious potential problem in any on-going or potential lawsuit.

2. When in doubt, don't throw it out. If there is any question about the relevancy of a document or physical evidence, it should be preserved until at least opposing counsel or the opposing party can be notified of your intention to dispose of it and give them an opportunity to preserve it themselves.

3. The "burying your head in the sand" or "looking the other way" approaches will not work and may in fact be unethical.

4. Properly tag all physical evidence and ensure a clear and concise chain of custody.

5. Avoid destructive testing of evidence, if possible, prior to notification to adverse parties. If destructive testing must be performed to determine if there is a defect, every means should be made to use non-evasive testing, unaltered samples should be preserved whenever possible, and accurate means of recording what takes place, such as videotape, should be employed. You must be able to document why you did what you did.

6. Subrogating carriers and their counsel must be sensitive in the era of the "anti-spoliation trend" in preserving evidence in anticipation of spoliation motions, whether meritorious or frivolous, because there is increasing authority supporting such motions around the country.

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