SPOLIATION OF EVIDENCE IN OCEAN AND INLAND MARINE CLAIMS

I. INTRODUCTION

Spoliation of evidence has been defined as the destruction or material modification of evidence by an act or omission of a party. When spoliation of evidence has occurred, it can lead to the imposition of various judicial sanctions, including, as an extreme, the outright dismissal of a party's claim, or entry of judgment against the offending party. Interim sanctions can include evidentiary inferences, adverse jury instructions, and preclusion of testimony and evidence.

Generally, courts have identified factors such as the following criteria in determining whether sanctions are appropriate when evidence is alleged to have been spoliated by the plaintiff in a civil action:

1. Whether the evidence was destroyed after it had been inspected by the plaintiff's expert;

2. Whether the plaintiff willingly caused the evidence to be destroyed;

3. Whether the plaintiff had possession and control over the evidence from the date of the incident until the time it was destroyed;

4. Whether the plaintiff knew or should have known that the evidence needed to be preserved;

5. The extent to which the defendant's interests have been irreparably damaged;

6. Whether the severity of the sanction outweighs the alleged prejudice caused by spoliation of critical evidence;

7. Whether the evidence has been lost irrevocably, or can be reconstructed or reproduced through other means;

8. Whether policy considerations come into play, to deter similar abuses in the future;

9. Whether imposition of sanctions would operate unfairly to penalize a party for misconduct on the part of his representatives, including insurance adjusters and counsel.[1]

II. DISCUSSION OF CASE LAW RE: SPOLIATION OF EVIDENCE IN MARINE MATTERS

Courts in ocean and inland marine cases generally apply spoliation law from other contexts, as opposed to fashioning a separate body of spoliation law. Recently, one court expressly refused to decide "whether there is a general maritime law doctrine of spoliation of evidence." Cigna Property & Casualty Ins. Co. v. Bayliner Marine Corp., 1995 WL 125386 (S.D.N.Y.).

Spoliation decisions in this context reflect the same flexibility in fashioning sanctions aimed at erasing prejudice, deterring future spoliation, yet stopping short of imposing ultimate sanctions where lesser ones will do. See, e.g., Knight v. F/T Endurance, 1996 WL 376353, *9 (D. Alaska) (spoliation sanctions can include shifting the burden of proof to the spoliator); Vazquez-Corales, 172 F.R.D. at 13 (dismissal justified when party maliciously destroys evidence); Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995 (adverse inference).

The case of Villanueva Compania Naviera, S.A. v. S.S. Matilde Corrado, 211 F. Supp. 930 (E.D. Va. 1962) is instructive, because it shows not only the range of sanctions which

[1] The author of this paper previously co-authored another published article entitled "Spoliation of Evidence", offering an extensive discussion and analysis of case law on spoliation of evidence, including the following topics: basis for granting a spoliation inference; imposition of civil discovery sanctions; the tort of intentional spoliation of evidence; defenses to discovery sanctions and spoliation penalties. For the sake of brevity, the contents of that article will not be reprinted here, but copies are available upon request.

may be imposed, but also that spoliation can apply equally to documents. In Villanueva, a collision occurred between two vessels. The main issue for determination was which vessel had dragged anchor. There was a sharp dispute concerning where each vessel had been anchored. The federal district court noted that there were many internal conflicts and inconsistencies in the testimony of the master of the defendant vessel. His log book contained "obvious erasures", which the court termed "persuasive." When coupled with the master's denial that the erasures had been made, the court, sitting as the finder of fact, concluded that they "tend to destroy the credibility of the testimony given by the master" and, on this basis, the court concluded that the defendant was the offending vessel.

It is interesting to note that in Villanueva, there also had been erasures in the plaintiff vessel's log book. The court found that they had been "minor", and did not change the record of what had occurred. Thus, the principles to be derived from Villanueva are that imposition of sanctions for spoliation of evidence may depend, in large measure, upon whether the evidence allegedly spoliated was material or not, and the extent to which the case could be determined on the basis of the remaining evidence. Perhaps the most important lesson to be learned from Villanueva is that when spoliation of evidence has occurred, nothing good is to be gained by equivocating about it. Indeed, the Villanueva court was persuaded as much by the denials of erasures in the log book — which the court found clearly had occurred and thus called into question the credibility of all of the master's testimony — as much as by the erasures themselves.

Judicial sanctions for spoliation of evidence have been imposed even against the federal government. In Austerberry v. United States, 169 F.2d 583 (6th Cir. 1948), the United States brought an action in admiralty as the chartered owner of a Coast Guard patrol vessel,

seeking a declaration that it was not liable for damage to other vessels arising out of an explosion on the Coast Guard ship. The theory presented by the damaged ship owners was that the explosion had been caused by gasoline fumes which formed vapors along the flooring of the lower cabin as a result of leaks in the gasoline tank of the Coast Guard vessel. These vapors then were ignited by an electric lantern which a crew member had brought to that area to clean up the ship.

Interestingly, the court applied the circumstantial evidence doctrine of res ipsa loquitur (the thing speaks for itself) reasoning that an extraordinary accident had occurred which ordinarily would not take place if the owner (the United States) having control of the property, had used proper care. The court further noted, however, that the gasoline tank and other equipment of the boat, all of which had been in the possession of the government at the time of trial, had not been produced, notwithstanding that the government's expert testified that he would have been able to offer a more detailed explanation of the explosion if he had seen the tank. The court therefore held:

> Since it was not produced, the presumption is that its production would have constituted evidence unfavorable to the (government), and in such a case, the court is justified in concluding that the proof, if offered, instead of rebutting, would sustain the case against the government.

Id. at 593.

When spoliation of evidence is shown to have taken place, it also effectively can shift the burden of proof on a particular point to the spoliating party. In Knight v. F/T Endurance, 1996 W.L. 376353 (D. Alaska), two vessels had been joined together to permit the transfer of frozen fish. During this cargo transfer, a seaman of the Endurance was injured, and subsequently filed suit. A central issue was whether an "O" ring utilized in the other vessel's

hydraulic cargo winches had been replaced. The court found that there was an insufficient factual basis for concluding that the "O" ring had been replaced, but also commented:

> [It is] alleged that the ... defendants were involved in the spoliation of evidence, which is considered a serious allegation. When spoliation of evidence is claimed, the burden of proof can be shifted to the other side. Sweet v. Sisters of Providence in Washington, 895 E.2d 484, 491 (Alaska 1995). Before the burden of proof can be shifted, however, the Court must first determine whether the absence of the evidence or a tampering with the evidence hindered the claimant's ability to establish a prima facie case.

Id. at 7.

Where the vessel or vehicle involved in the claim is not preserved and made available for inspection by the adverse party, spoliation sanctions are likely to be imposed. In Vazquez-Corales v. Sea Land Service, Inc., 172 F.R.D. 10 (D. Puerto Rico 1997), involving an accident to a tractor trailer, the court held that it would grant the defendant an adverse jury instruction on the spoliation inference, as a result of the plaintiff's failure to have preserved the tractor trailer for inspection by the defendant. The court noted that a litigant has a duty to preserve relevant evidence. The contention was not that the vehicle itself was defective, but that a pin holding the chassis and container together was missing. Despite this, the court concluded that the tractor trailer should have been preserved following the accident and made available for inspection by prospective adverse parties. The court declined to impose the sanction of dismissal, noting that it is a "harsh sanction that the courts are reluctant to impose", and proceeded to apply the following five factors in determining the appropriate sanction: (1) prejudice to the defendant; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good faith or in bad faith; and (5) the potential for abuse.

The court did not find that the plaintiffs had acted in bad faith. Although the court noted that the "sequence of events raises suspicions", it concluded that the evidence was not sufficient to demonstrate that the plaintiffs had sold the truck solely to obstruct access to it. It was on this basis that the court ruled that it would grant an adverse jury instruction, but the court then issued the caveat that if the evidence at trial demonstrated greater prejudice to the defendant than currently revealed on the record, or if the evidence showed that the plaintiffs deliberately had had the truck dismantled to prevent its inspection, the court reserved judgment to impose a more severe sanction, including dismissal. Dismissal, in the form of summary judgment, was granted in Thiele v. Oddy's Auto and Marine, Inc., 906 F. Supp. 158 (W.D.N.Y. 1995), because the moving party (a third-party defendant) never was afforded any opportunity to inspect the boat at issue, which had had a fire in its engine compartment.

III. CONCLUSION

Decisional law concerning spoliation of evidence often is inconsistent and case specific. Nonetheless, prospective litigants are expected to be cognizant of the obligations imposed upon them to identify, collect and preserve relevant physical and documentary evidence. From a litigant's perspective, perhaps the best way to demonstrate due diligence and prudence in performing these obligations is to seek legal counsel and representation early in the investigative process, in order to safeguard its rights and mitigate the likelihood that those rights will be impaired due to the failure, inadvertently or otherwise, to preserve relevant evidence.

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