Spoliation of Evidence

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SPOLIATION OF EVIDENCE

I. INTRODUCTION

Assume a conflict between two parties. It does not matter if the subject matter involves securities fraud, a traffic accident or a building fire. Stripped of its peculiar attributes, the conflict invariably boils down to a disagreement between the parties as to the facts of an event. The disagreement could be over the sequence of events or, possibly, whether the event took place at all. The fact-finder, faced with the inherent weakness of reaching a decision based only on "he said-she said" testimony must turn to the evidence presented by all parties in order to reach an informed decision.

But what happens if one party has destroyed or misplaced discoverable evidence which the opposition needs to prove or defend its position? What if one party's expert has examined discoverable evidence which he/she subsequently discards before it can be examined by the opposition's expert? What if the parties are not in litigation at the time of the destruction of what would later be determined to be discoverable evidence? What if the parties are in litigation, but there is no court order requiring the preservation of certain evidence? These issues potentially involve the spoliation of evidence, which is defined as the tampering with, interference with, loss of, or destruction of evidence or potential evidence that is to be used in an already pending or contemplated litigation.

This paper is intended to cover the various implications of spoliation of evidence. First, the evolution of the spoliation doctrine is explored with particular attention paid to the inferences invoked and sanctions levied by courts in order to render both a correct decision based on the evidence and appropriate punishment and deterrence for the spoliation of evidence. Second, the impact of the concept of spoliation of evidence on the investigation of an insurance claim is explored, including the paramount issue of the duty to preserve evidence in the context of where the parties stand in the claims/litigation process. After examining these concepts and

their application in a number of decisions, a checklist is offered to identify what evidence collection efforts should be taken to strengthen one's ability to prove or defend a particular position, including accurate documentation of the efforts made to preserve evidence. Finally, emerging spoliation issues in the subrogation field are addressed.

II. EVOLUTION OF THE CONCEPT OF SPOLIATION OF EVIDENCE

[a] English Common Law

The concept of spoliation of evidence has its origins in English common law. The facts of a time-honored spoliation decision are instructive. In Armory v. Delamirie,[1] a chimney sweep found a ring with what appeared to be a gemstone mounted in it. He brought the gemstone to a jeweler for an evaluation of the quality of the stone. After inspecting the stone, the jeweler refused to return it to the chimney sweep and later failed to produce the stone at trial. The judge instructed the jury "that unless the defendant did produce the jewel, and shew it not be the finest water, you should presume the strongest against him and make the value of the best jewels the measures of their damages...." The presumption noted by the court is commonly known as the spoliation inference – an evidentiary principle founded upon the legal maxim *omnia praesumuntur contra spoilatorem* (or all things are presumed against a wrongdoer).

[b] The Spoliation Inference

Historically, the spoliation inference has been the vehicle through which courts have censured parties for the spoliation of evidence. The adverse inference arising from spoliation of evidence has three basic functions:

1. to promote accuracy in fact-finding;
2. to compensate victims of evidence destruction; and
3. to punish spoliators.

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[1] 93 Eng. Rep. 664 (K.B. 1722).

The inference permits, but does not require, the fact-finder to determine that non-produced or destroyed evidence would be detrimental to the spoliator's case. The above-stated goals and numerous decisions indicate that for the spoliation inference to be invoked, the actions of the spoliator must be intentional. Mere negligence will generally not invoke the inference, although some courts have held that negligent spoliation may be sufficient to give rise to an adverse inference.

Decisions invoking the spoliation inference generally contain the following five elements:

1. An act of destruction;
2. The destroyed matter must be relevant evidence;
3. An intentional act;
4. Legal proceedings must be pending or reasonably foreseeable at time of destruction; and
5. The inference is applicable only as to offending parties or their agents.

III. CIVIL DISCOVERY SANCTIONS

Civil discovery sanctions for the spoliation of evidence can range from evidence preclusion to the dismissal of an entire case. This flexibility may make civil discovery sanctions the most appropriate penalty for spoliation of evidence.

A court may draw from several sources to support its sanctioning power. They include Federal Rule of Civil Procedure ("FRCP") 37, and its state counterparts which authorize discovery sanctions for a violation of a court order. Additionally, courts have invoked the doctrine of "inherent power" to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.[2]

Sanctions are appropriate when a party destroys discoverable material which the party knew or should have known was relevant to pending, imminent or reasonably foreseeable

[2] See Silverstri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).

litigation.[3] In Silvestri v. General Motors Corp.,[4] Plaintiff alleged the airbag in the 1995 Chevrolet Monte Carlo he was driving did not deploy as warranted when he crashed into a utility pole. Although the car did not belong to the Plaintiff, the car was preserved for three months following the accident before the owner took possession and the car was repaired. During that time, General Motors was not notified of the claim or given access to inspect the evidence. The court found General Motors was "highly prejudiced" and issued the ultimate sanction, dismissing the case entirely.

In Fire Insurance Exchange v. Zenith Radio Corp.,[5] an insurer brought a subrogation action against the manufacturer and retailer of a television for a fire which destroyed the insured's home. The manufacturer and retailer moved for sanctions against the insurer and exclusion of the insurer's expert witness based on the allegation that the insurer discarded the only piece of evidence that its expert had identified as the cause of the fire. These facts are instructive. Fire Insurance Exchange ("FIE") retained a fire cause and origin expert to investigate the fire. He concluded that the fire had started in the television, but "he took no steps to preserve the television set because he felt the remains were insufficient to conduct tests that might determine . . . the cause." Thereafter, the television was discarded.

The court granted Zenith's motion for sanctions, excluded FIE's expert testimony and granted Zenith's motion for summary judgment. In affirming the trial court's decision, the Nevada Supreme Court held that "[w]here a party is on notice of potential litigation, the party is subject to sanctions for actions taken which prejudice the opposing party's discovery efforts."[6]

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[3] See GORELICK, DESTRUCTION OF EVIDENCE, at 88; Fijitsu Ltd. V. Federal Express Corp., 247 F. 3d 423, 436 (2nd Cir. 2001).

[4] Silverstri, 271 F.3d at 583.

[5] 787 P.2d 911 (Nev. 1987).

[6] Id. at 914.

The court further found that the spoliation inference was an insufficient penalty, because "[a]ny adverse presumption which the court might have ordered as a sanction for the spoliation of evidence would have paled next to the testimony of the expert witness."

The Fire Insurance Exchange decision represents a situation in which uninformed insurers may find themselves. It is vital to the success of an enlightened subrogation program that the evidence upon which the insurer will base its case remain available to opposing parties for inspection. A decision to discard the very item which caused the loss and damaged the insured's property should trigger an early warning system; case law requires the offending object to be preserved for inspection by the opposing party in the contemplated subrogation action.

IV. DEFENSES TO DISCOVERY SANCTIONS AND THE SPOLIATION INFERENCE

Courts generally have relied on four affirmative defenses when denying a motion for sanctions or refusing to invoke the spoliation inference. They are:

(1) the victim's behavior;
(2) privilege;
(3) lack of custody or control; and
(4) destruction pursuant to routine document management program.

The last two of these factors warrant examination. In order to combat an allegation that evidence has been improperly destroyed, meticulous attention must be paid to the chain of custody. This is important in establishing how an item went from, for example, the site of a fire to a laboratory and finally to a storage facility. Without a proper chain of custody, it cannot be established that the item was not altered in some fashion.

"Paper kills -- and more paper kills more."[7] The destruction of documents through routine programs is a growing enterprise, and while the above sentiment may be held by

[7] Cleaning House - U.S. Companies Pay Increasing Attention to Destroying Files, WALL ST. J. Sept. 2, 1987 p.1, col. 1. (quote of Judah Best, Esquire).

myriad corporate executives who believe that less is more when it comes to what documents should be retained by a company from year to year, there is a significant difference between the shredding of documents in the normal course of business and the destruction of documents which are relevant to pending, imminent or reasonably foreseeable litigation. Document management programs can serve a useful purpose and courts generally do not sanction destruction of evidence as part of these programs. Retaining all potentially relevant documents to some hypothetical litigation is too expensive and, by routinely destroying documents, companies dispel any suspicions of bad faith. On the other hand, some commentators believe that "routine destruction programs are nothing more than formal systems to destroy documents the parties could not have destroyed in the absence of the program."[8]

V. A PATH THROUGH THE WOODS

For all practical purposes, the issue for the insurance industry and other potential litigants can be whittled down to one question: what do I have to do in order to avoid an allegation that I have caused or allowed evidence to be destroyed which would be relevant to another party's claim or defense? Additionally, what does the law require a party (or non-party) to do when faced with a preservation of evidence situation?

Determining in advance what general duty is owed with respect to the preservation of particular evidence in anticipation of foreseeable litigation is a difficult task. On the one hand, a simple, catch-all rule would be to preserve the entire scene of, for example, a fire or, in the case of documents, every piece of paper produced by a company. Obviously, the simple method is not only impractical, but in almost all instances, unnecessary. However, there is no definitive statement by the courts or commentators regarding what evidence must be preserved. Indeed, the concept of spoliation of evidence can lead to innumerable scenarios. Generally,

[8] See GORELICK, at 275.

however, case law requires all relevant, probative, physical evidence pertaining to the cause of a specific failure - potentially including secondary causes which have already been ruled out - to be preserved. Therefore, the most productive method to analyze how a potential litigant can determine its duty to preserve evidence is by way of a checklist. Certain basic steps must be taken to minimize exposure to an allegation of spoliation of evidence. These include:

(1) Conduct your investigation with an eye towards preserving not only what caused the loss but specific items which did not. If the investigator determines that scenario B rather than scenario A or C caused the loss, be sure that the evidence which proves why scenario A and C are untenable is preserved.

(2) Allow authorities having jurisdiction, and, if practicable, potentially adverse parties, to investigate the scene. Save all physical evidence identified by them as relevant.

(3) Tag all physical evidence at the scene and ensure a clear and concise chain of custody.

(4) Avoid destructive testing of evidence, if possible, prior to notification of adverse parties.

(5) If destructive testing is required to conclude pre-suit investigation, photograph or videotape the testing, and preserve all remains and specimens of the evidence which is tested.

(6) Insure that the investigation is supervised by experienced and qualified claims representatives, investigative consultants and/or legal counsel. Someone must take the necessary steps to identify and preserve all relevant evidence.

VI. A COMPASS FOR LOST WANDERERS THROUGH THE WOODS

The previous section addressed the question of how to determine what to preserve in order to avoid a subsequent accusation that evidence which should have been preserved, was not. However, as many roads are paved with good intentions, so too is that which leads to sanction and censure in the world of evidence preservation. In an instance where some

evidentiary item was destroyed, all may not be lost. The following questions may assist in determining what effect destruction of evidence may have on the claim:

I. Who destroyed evidence?

A. Party or non-party?
B. Agent of party?

It is important to determine first who destroyed the evidence. A party or agent of a party should have a greater awareness of the basis for the contemplated lawsuit and knowledge of what may be discoverable evidence. On the other hand, a non-party most often will not be aware of the litigation, and even if he is, it is probably to a less informed degree.

II. What was destroyed?

A. Admissible relevant evidence?
B. Evidence subject to discovery?

If the item or document destroyed was not relevant, its destruction will not impede the determination of the underlying action.

III. When, in relationship to the litigation process, was the evidence destroyed?

A. Before or after suit was reasonably foreseeable?
B. Before or after notice of suit?
C. Before or after formal commencement of suit?
D. Before or after subpoena or formal discovery request?

The above factors tie into how foreseeable litigation was at the time of the destruction. If an action was pending and discoverable material that would impact the fact-finding process of the court was destroyed, the party responsible for the destruction will have difficulty combatting a spoliation allegation.

IV. Why was evidence destroyed?

A. Bad faith (malicious/intentional)?
B. Accidental?

If the evidence was destroyed in bad faith, the party either will be sanctioned or the inference will be invoked. On the other hand, the accidental destruction of a document or item relevant to a pending action will not necessarily lead to censure. As noted above, in most courts, mere negligent failure to preserve evidence is generally not sufficient to raise the spoliation inference; however, such negligence could result in the imposition of discovery sanctions. One advantage that discovery sanctions have over the spoliation inference is that the "punishment" is more flexible and can be structured to fit the crime.

V. How was evidence destroyed?

A. Pursuant to routine activity?
B. To deprive outside parties from having evidence?

If the evidence was destroyed pursuant to routine activity a party may avoid censure. However, there is tremendous debate over the scope and function of routine corporate document destruction.

VIII. SUBROGATION

Issues involving the spoliation of evidence are common when subrogation possibilities arise after a loss. Liability can attach to three spoliation scenarios which occur in a subrogation context. They are: (1) spoliation by the insurer (i.e. an employee, agent or representative of the insurer); (2) spoliation by the insured; and (3) spoliation by a third party. It is clear that if the spoliation is done at the hands or behest of an employee, agent or representative of the insurer, the insurer has lost or damaged its subrogation opportunity.

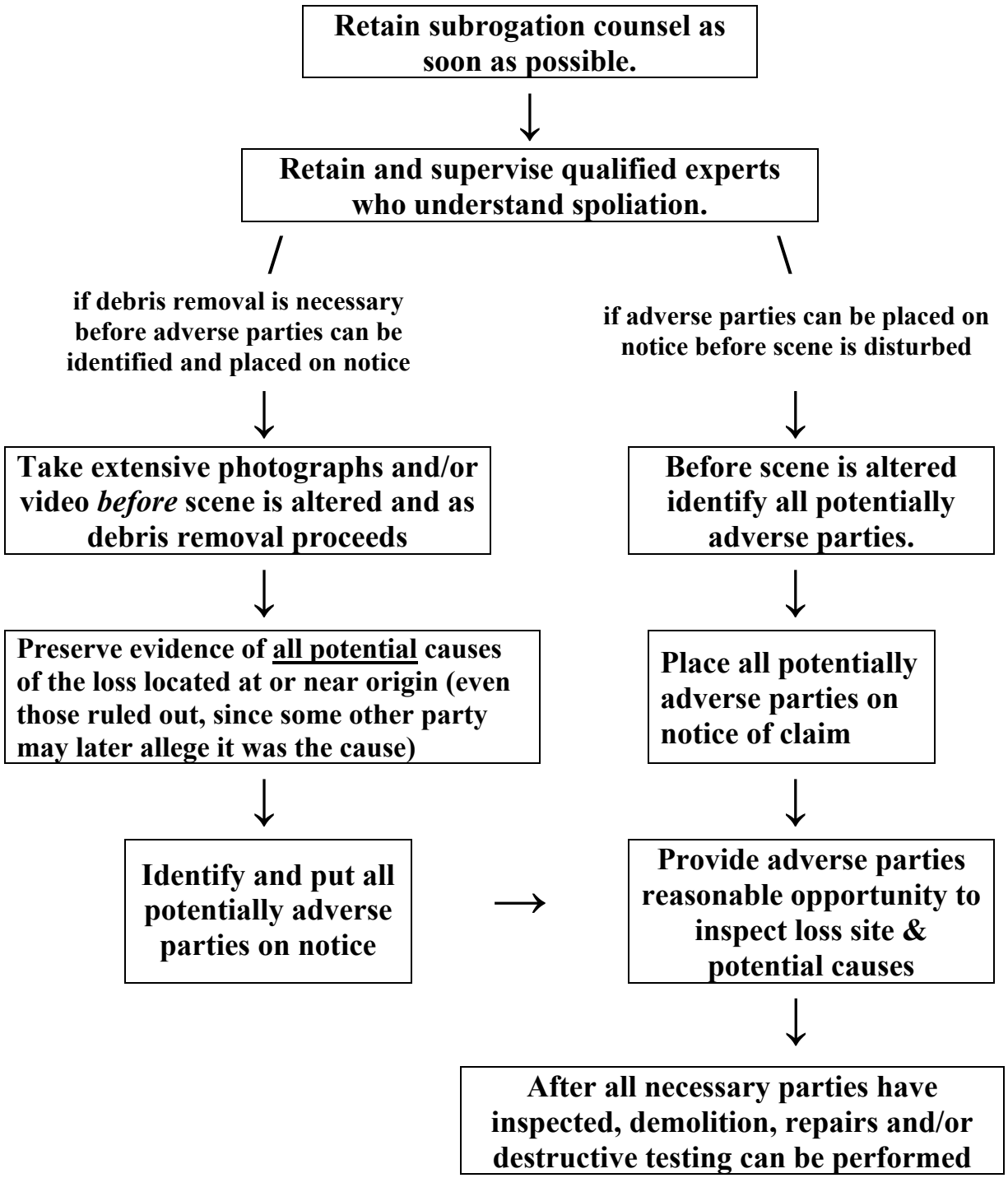
If the insured is the spoliator, the insurer is left with few options. The insurer cannot seek civil discovery sanctions because the subrogation action is against a third party who is not the spoliator. Any adverse inference or discovery sanction effectively will be imposed against the insurer as a real party in interest in the subrogation action. Additionally, the insurer usually does not have a viable action for damages against its insured.

Finally, if a third party is to blame for the destruction of evidence, the insurer has the same right as any other litigant to seek appropriate remedies.

CONCLUSION

Balancing preservation efforts against a corporate policy which rewards the ability to know what to retain and what to discard can be a daunting task. Nevertheless, if insurers, their representatives, agents and insureds are not made aware of the issues arising from the spoliation of evidence, actions taken today can lead to problems in the future. For this reason, seeking legal counsel and representation early in the investigative stage is critical to the process of determining what items or documents require preservation, in order to safeguard a party's rights and privileges to seek redress for legal wrongs.

AVOIDING SPOLIATION



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