SPOLIATOR BEWARE:
DESTRUCTION OF EVIDENCE HAS ITS PRICE

by
Alan H. Collier
Felix Avila

At the core of every product liability action are the questions of whether the subject product was defective, and whether that defect caused or contributed to plaintiff's injuries. The answers to these fundamental and dispositive questions are often found through direct examination and testing of the allegedly offending product. Although the issues of defect and causation can be resolved in other ways, examination and testing of the product often represent the most direct, cost effective and objective ways of determining manufacturer liability. When the party with custody and control over the offending product (whether plaintiff, defendant or a third party) loses, discards, destroys, or alters all or part of that product, the opposing party can be severely prejudiced in the pursuit or defense of its case.

A. What is Spoliation?

The term "spoliation" encompasses the loss, destruction or material alteration of a writing, record or physical object, be it negligent or intentional. When spoliation occurs in products liability litigation, parties find themselves in the untenable position of trying to secure evidence to prove or disprove product defect, while being forever deprived the opportunity of inspecting and testing the item which is at the core of the case. Spoliation of evidence has become increasingly recognized by the courts in the United States, and various remedies have been advanced in order to curtail its deleterious impact upon civil litigation.

B. Remedies for Spoliation

The following remedies currently exist under United States law as sources of "compensation" for the victims of spoliation: 1) State Criminal Sanctions; 2) Independent Causes of Action; 3) Civil Discovery Sanctions; and 4) Adverse Inferences.

1. State Criminal Sanctions.

Some states have enacted statutes which penalize parties for the willful destruction of evidence. For example, Texas Penal Code section 37.09(a)(1) states that any person who "alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence" in an investigation or official proceeding is guilty of a class A misdemeanor.

Another example is found in California Penal Code section 135 which provides that "[e]very person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from

being produced, is guilty of a misdemeanor."

Whether or not the criminalization of the act of spoliation will have any significant impact on deterring its occurrence is subject to debate. Commentators have noted, however, that "there are no reported cases of any criminal convictions for the spoliation of evidence in civil litigation."[1] Nonetheless, the threat of criminal prosecution should be a concern to potential spoliators.

2. Independent Causes of Action.

Some jurisdictions recognize the act of spoliation as giving rise to a separate tort, independent of the underlying cause of action. In these jurisdictions, the victim of spoliation may sue the spoliator, be it plaintiff, defendant or a third party (including an offending attorney), for monetary damages, and, in some instances, may recover punitive damages as well. In California, a state at the forefront of developing the spoliation cause of action, a distinction has been drawn between the intentional versus negligent destruction of evidence.

The seminal case recognizing the tort of "intentional" spoliation of evidence is *Smith v. Superior Court*.[2] In *Smith*, plaintiff was severely injured when the car she was driving was struck by a wheel and tire which had become detached from another car. The car losing its wheel and tire was immediately towed to a car dealership for repair. Thereafter, the car dealership "destroyed, lost or transferred" the physical evidence making it impossible for plaintiff to inspect and test those parts in order to determine the cause of the wheel assembly failure.[3]

The plaintiff in *Smith* alleged that the car dealership had intentionally and maliciously disposed of the evidence. Plaintiff sued the car dealership for destruction of the physical evidence she needed to obtain compensation for her physical and emotional injuries.

Although the court was troubled by the uncertainty of damages associated with this type of claim (since there was no guarantee that plaintiff would have been victorious in her lawsuit anyway), it overcame this obstacle by analogizing the claim to one for intentional interference with a prospective business advantage. The court concluded that "a prospective civil action in a product liability case is a valuable `probable expectancy' that the court must protect from the kind of interference alleged."[4] And with that, the tort of intentional spoliation of evidence was

---

[1]Scott S. Katz and Anne Marie Muscaro, *Spoilage of Evidence -Crimes, Sanctions, Inferences, and Torts*, Tort and Insurance Law Journal, Volume XXIX, Number 1, (Fall 1993) at 54.

[2]151 Cal.App.3d 491 (1984).

[3]Smith at 494.

[4]Smith at 502.

born. Since this tort is relatively new, its parameters are not completely known. "For example, there could be an issue whether an action would lie for the intentional destruction of matter, which itself is not evidence, but if known, could lead to the discovery of admissible evidence. . . . Additionally, there is no case law at this time indicating whether damages can be recovered for `loss of settlement value.' [Thus far] the cases have [only] dealt with plaintiff's opportunity to establish liability at a trial.[5]

California has set forth the elements of a claim for intentional spoliation of evidence in the California State Judicially Approved Jury Instructions (BAJI), Instruction 7.95 as follows:

1. Plaintiff [cross-complainant] possessed a [potential defense to a] claim for damages [against] [by] defendant, cross-defendant, or third party;

2. Defendant [cross-defendant] knew of the existence of this [defense to a] claim for damages [against] [by] itself; third party;

3. Defendant [cross-defendant] knew of the existence of writing , record, physical object, etc. and was aware that it might constitute evidence in [pending] [or] [potential] civil litigation involving plaintiff [cross-complainant];

4. Defendant [cross-defendant] engaged in acts or conduct intended to cause the destruction, damage, loss or concealment of the writing, record, physical object, etc.;

5. Defendant's [cross-defendant's] acts or conduct caused the destruction, damage, loss or concealment of the potential evidence; and

6. As a result, plaintiff [cross-complainant] sustained damage, namely plaintiff's [cross-complainant's] opportunity to prove its [claim] [defense] was interfered with substantially.

BAJI instruction 7.95 is not intended to be all inclusive, and is expected to be modified as the tort evolves.

California first recognized an action for "negligent" spoliation of evidence in *Velasco v. Commercial Bldg. Maintenance Co.*.[6] In *Velasco*, plaintiffs were injured when a bottle exploded in their hands. Plaintiffs took the remains of the bottle to an attorney who placed the fragments in a bag on top of his desk. Plaintiffs alleged that the agents of the owners of the building in which plaintiffs' attorney worked, "negligently . . . destroyed or disposed of the aforesaid

[5]California State Judicially Approved Jury Instructions (BAJI), Comment to Instruction 7.95 page 396.

[6]169 Cal.App.3d 874 (1985).

remnants of the exploded bottle" while cleaning the office.[7]

Relying on *Smith*, the court analogized the tort of negligent spoliation with the tort of negligent interference with a prospective business advantage, and another tort was born. Similar to the intentional variety of this tort, negligent spoliation of evidence is still evolving.

The elements of a claim for the negligent spoilation of evidence are found in BAJI Instruction 7.96 as follows:

1. Plaintiff [or cross-complainant] possessed a [potential defense to a] claim for damages [against] [by] defendant, cross-defendant or a third party;

2. Defendant [cross-defendant] knew or reasonably should have known of this [potential defense to a] claim for damages [against] [by] itself, third party;

3. Defendant [cross-defendant] knew or reasonably should have known of the existence of writing, record physical object, etc. and knew or reasonably should have known that it might constitute evidence in [pending] [or] [potential] litigation involving plaintiff [or other persons];

4. Defendant [cross-defendant] knew or reasonably should have known that is [he] [she] [it] did not act with reasonable care to preserve the writing, record, physical object, etc., the potential evidence could be destroyed, damaged, lost or concealed;

5. Defendant [cross-defendant] failed to act with reasonable care;

6. Defendant's [cross-defendant's] failure to act with reasonable care, caused the destruction, damage to, loss or concealment of such evidence;

7. As a result, plaintiff [cross-complainant] sustained damage, namely, plaintiff's [cross-complainant's] opportunity to prove its [claim] [defense] was interfered with substantially.

Recoverable damages for spoliation are defined under BAJI Instruction 7.97 as including the following:

1. "Any economic loss resulting from the spoliation of evidence, namely, (1) the difference between what plaintiff [cross-complainant] [received] [was found subject to liability for] [paid] by way of [verdict] [settlement] and the sum of money it is reasonably probable plaintiff [cross-complainant] would have [received] [been found subject to liability for] [been paid in settlement] had the potential evidence not been destroyed, etc., and (2) any out-of-pocket expenses

[7] Velasco at 876.

paid or incurred, which would not otherwise have been paid or incurred had there been no spoliation[.][;and]

[2. Any mental or emotional distress not otherwise compensated by way of economic loss.]"

In addition to damages set forth above, a party might seek punitive damages under a claim of "intentional" spoliation, so long as the statutory requirements for recovery of such damages have been met. The threat of punitive damages is yet another reason all parties should be on guard against spoliation.

3. Civil Discovery Sanctions.

In California and other jurisdictions, courts have recognized a wide range of remedies for the loss or destruction of evidence, including imposition of discovery sanctions. Usually, there exists a wide range of discovery sanctions available to a court including 1) issue sanctions; 2) evidence sanctions; and 3) terminating (or "doomsday") sanctions.

Where an issue sanction is imposed the court may order that designated facts be taken as established in favor of the party adversely affected by the spoliation; or the court may prohibit the offending party from supporting or opposing designated claims or defenses.[8]

For example, in *Sylla-Sawdon v. Uniroyal Goodrich-Tire Co.*,[9] the left rear tire on a car blew out, resulting in an accident. The tire which failed was preserved following the accident. Attorneys for plaintiff inspected the car at a salvage yard but took no steps to acquire and preserve the remaining tires. Sales invoices showed that two of the tires were purchased in June 1988, while the other two were purchased in July 1987. Uniroyal sought to establish that the tire which failed was one of the older ones. As a sanction for the plaintiffs failure to preserve the undamaged tires as evidence, the court instructed the jury that the damaged tire was, in fact, one of the older tires.

Where an evidence sanction is imposed the court may prohibit the offending party from introducing designated matters into evidence.[10]

For example, in *Puritan Ins. Co. v. Superior Court*,[11] plaintiff sought damages for defendant's alleged defective repair of a drive shaft. Plaintiff failed to comply with a court order to compel production of the failed shaft, because the shaft had been lost by plaintiff's expert

---

[8]*See*, California Code of Civil Procedure §2023(b)(2).

[9]47 F.3d 277 (8th Cir. 1995) .

[10]*See*, California Code of Civil Procedure §2023(b)(3).

[11]171 Cal.App.3d 877 (1985).

witness. The trial court granted defendant's motion for sanctions and prohibited plaintiff from introducing into evidence photographs which had been taken of the shaft and any testimony derived therefrom. The court of appeal later directed the trial court to vacate its sanction order insofar as it prohibited plaintiff's introduction of photographs taken of the failed shaft and expert testimony interpreting the photos themselves, but upheld the sanction prohibiting any testimony regarding the inspection of the part itself.

Finally, where a terminating or "doomsday" sanction is imposed, the court may strike the offending party's pleadings altogether or parts thereof and/or render a default judgment against the offending party.[12]

For example, in *Allstate Insurance Co. v. Sunbeam Corp.*,[13] Allstate, as subrogee of an insured whose house was destroyed by fire, brought suit in products liability against Sunbeam, the manufacturer of a gas grill which allegedly caused the fire. After examination of the fire scene, Allstate disposed of parts of the gas grill and the remains of a spare propane tank. Sunbeam moved for dismissal as a sanction for spoliation. Applying Illinois law, the Seventh Circuit affirmed the district court's order of dismissal while noting Allstate's failure to preserve all evidence of alternate causes of the fire and concluding that Allstate's acts prejudiced Sunbeam's effort's to present its defense that the fire was caused by some source other than its grill.

4. Adverse Inferences.

The classic common law remedy for spoliation of evidence is the adverse inference, which is a discretionary jury inference against the spoliator. A long line of California cases supports the drawing of an adverse inference for failure to produce critical evidence which would have presumptively supported a party's position. These cases include: *Shapiro v. Equitable Life Assur. Soc.*[14] (party's failure to produce two knowledgeable employees and a file with relevant information as basis for inference that the evidence was unfavorable to that party); *Hagy v. Allied Chemical and Dye Corporation.* [15] (party's failure to produce logs recording chemical concentrations in a case involving injuries arising from exposure to the chemicals recorded in the log gave rise to inference that the information was unfavorable to that party); *Handley v. Guasco* [16] (party's destruction of contract in case where issue was whether the contact had been signed gave rise to inference that the truth which would have conclusively appeared from the production of such evidence would have operated against the despoiler); and *Thor v. Bosca* [17] (party's failure

[12]*See,* California Code of Civil Procedure §2023(b)(4).

[13]53 F.3d 804 (7th Cir. 1995) .

[14]76 Cal.App.2d 75 (1946).

[15]122 Cal.App.2d 361 (1953).

[16]165 Cal.App.2d 703 (1958).

to produce original medical records gives rise to strong inference of consciousness of guilt).

When such an inference is put in place by a court, the jury is instructed that it may infer that the discarded evidence was detrimental to the spoliator's case and beneficial to the other side. If used appropriately, this remedy could prove case dispositive.

C. The Impact of Spoliation on Aviation Product Manufacturers

With the sudden emergence of remedies for spoliation which could prove to be case dispositive, manufacturers must be on guard against affecting the outcome of an otherwise defensible lawsuit by opening themselves up to allegations of spoliation. On the other hand, product defendants and their counsel must also take full advantage of the current state of the law and pursue spoliation remedies when they feel their defense has been affected by a careless or unethical plaintiff or co-defendant.

1. Protecting Against Plaintiff/Co-Defendant Spoliation.

By the time a product manufacturer gets notice of a claim of defect against its product, it is usually through the commencement of a lawsuit or service of a complaint long after the time of the accident. However, under the current state of the law, it is imperative that the product defendant and its counsel get together at an early stage in order to determine the state of the product, with which the manufacturer may not have had contact for a significant period of time.

Early on, preferably at the time the answer to the complaint is filed, a number of pleadings and notices should be served to protect against or secure a claim for spoliation, should it arise. Counsel for the product defendant should serve the following discovery:

(a) Interrogatories asking the exact location of the subject product; who has custody/control over the subject product; the manner in which the product is being stored; and what testing or inspection has been done of the product and by whom.

(b) Requests for Production requesting immediate inspection of the product, together with all photographs taken by the party and its consultants.

(c) Notice to Preserve Evidence should be served on all parties stating that no destructive testing shall be done on the product without the consent of all involved parties.

While the foregoing discovery will give product defendants early notice of a spoliation problem regarding their product, as well as secure their rights to a claim of remedy, product defendants and their counsel should also be wary of the destruction, loss or alteration of other

---

[17] 38 Cal.App.3d 558 (1974).

evidence which might have proved their product safe. For example, it is not uncommon for a plaintiff or co-defendant with control over the wreckage of an aircraft, or other aviation related product, to safely maintain the allegedly offending part, but throw out the rest (e.g., save the engine and propeller assembly, but discard the airframe). Such conduct constitutes spoliation which may detrimentally affect a manufacturer's ability to prove alternate theories of causation. When handled appropriately, a cross or counter claim for spoliation, or motion for discovery sanction, can aid in the ultimate disposition of a case.

2. Protection Against Allegations of Spoliation.

Gone is the day when an aviation product manufacturer could carry a product back to its plant after an accident and tear it down without regard to that action's impact on litigation years down the road. Conversely, a manufacturer should not be chilled into failing to fully investigate a potentially defective product, particularly when that product is the target of a National Transportation Safety Board (NTSB), Federal Aviation Administration (FAA) or Judge Advocate General (JAG) investigation.

In order to avoid allegations which could negatively affect the defense effort, the following should be considered by product defendants:

(a) No destructive testing should be performed prior to litigation unless absolutely necessary for safety, or when instruction or authority from a governmental agency has been obtained first. Product manufacturers should be mindful that what constitutes "destructive" testing is broader than it used to be. Today, even the unscrewing of a component part can raise allegations that the condition of the product has been forever altered.

(b) If inspection testing is done, photographs and/or video should be taken of the condition of the product before, during and after the inspection or test. Even if spoliation is alleged, the photographs and video can serve as evidence of what was found.

(c) Know what your employees are doing. Many times unwary risk managers or in-house counsel will send an engineer to inspect an accident scene, and the engineer will either spoliate on scene or bring a product back to the plant and spoliate it there. Product manufacturers should ensure that those persons involved in accident investigations understand the potential for spoliation.

(d) If you know who the plaintiff and co-defendants are, notify them of any inspection or testing to be done on a product, and give all parties full opportunity to be present at the inspection or testing.

(e) Do not throw anything out without prior proper notification to all parties. Even the most seemingly insignificant piece of a product that is discarded can lead to allegations of spoliation.

(f) Have a safe room. When products, or their component parts, are brought back to a manufacturer's facilities, the parts should be stored in a secured room which is protected from the elements, if possible. Removal of any parts should be catalogued and access to the secured room should be controlled by a risk manager or in-house attorney. A safe room with documented tracing of the product's location from the moment of its arrival at the manufacturer's facility can prove to be a solid defense to allegations of wrongdoing. Where a safe room is not possible, as with large products or a large quantity of products, a secure fenced area with weather protection should be sufficient to ward off serious spoliation allegations.

D. Conclusion

Spoliation is far from a passing fancy. It has become a serious part of all present day products liability litigation and must be taken seriously. Spoliation has increasingly become more than the esoteric theory it once was, and is now a codified crime or tort in many jurisdictions. As long as manufacturers and their counsel, both in-house and retained, understand the constant threat of spoliation and take necessary precautions to protect against its occurrence, spoliation can be avoided. Nevertheless, if spoliation by a plaintiff, co-defendant or third party takes place, it can sometimes be utilized offensively in products cases, rather than being a thorn in the side of the defense effort.