2022 Product Liability & Complex Torts Seminar

June 1-3, 2022

THE PROOF IS IN THE PRODUCT:

An Update on The Duty to Preserve Evidence and Modern Trends in the Law of Spoliation

Sarah Elizabeth Spencer
Moderator
CHRISTENSEN & JENSEN, P.C.
Salt Lake City, Utah
sarah.spencer@chrisjen.com

The duty to preserve and not spoliate evidence is a requirement that transcends substantive areas of law and impacts virtually all litigators and clients involved in product liability claims and lawsuits. Spoliation of evidence is a "hot topic" because it is something that must be considered and affirmatively raised in every such case.

To ensure the ability to present necessary evidence at trial, attorneys must know when their clients are subject to a duty to preserve evidence. They must also know the scope of the duty and ensure that their clients take appropriate steps to comply with it. Oftentimes, merely sending a "litigation hold" letter to a client is not enough to compel compliance with the duty to preserve evidence, particularly when dealing with unsophisticated representatives of organizational clients who likely do not understand the case-altering ramifications arising from destruction of key evidence. Attorneys therefore should know the consequences for not preserving evidence, which can be severe, and advise their clients of such consequences using plain language that adequately conveys the seriousness of the directive.

In product liability cases, both sides must be especially mindful of spoliation considerations because the proof is in the product. A plaintiff has a clear duty to preserve the subject product involved in an accident or liability claim. That duty is even more important in cases involving manufacturing defects or other factual circumstances that are unique to one specific product but not the entire product model, meaning that exemplars and design intentions from like products will not tell the full story. Likewise, a defendant is under a duty to preserve evidence (including electronically stored information) regarding the product's design, manufacture, sale, and as applicable, recalls, warranty claims, and other similar incidents/accidents, which is often the kind of evidence that is the focus of discovery disputes in product liability cases.

BASIC LEGAL STANDARD FOR SPOLIATION OF EVIDENCE

Spoliation is defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[1] Many courts have observed that destroying evidence is contrary to the bedrock principles of law. "Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence under established discovery rules."[2]

The spoliation doctrine has broad application in civil cases. General rules are recognized in federal court and by most states, with some nuances among jurisdictions. In federal court, Rule 37 empowers the court to sanction parties for discovery-related misconduct including spoliation of evidence.[3] Before imposing sanctions for spoliation, courts generally require proof that the evidence allegedly destroyed did in fact exist prior to its spoliation.[4]

If it is proved that the relevant evidence existed, sanctions may be available if 1) a party had control of and responsibility to preserve evidence, 2) the party destroyed or lost that evidence with some level of intent, and 3) the opposing party was prejudiced by the lost evidence and now has a more difficult case.[5] As to the third

---

[1] *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).
[2] *Philips Electronics N. Am. Corp. v. BC Technical*, 773 F. Supp. 2d 1149, 1195 (D. Utah 2011) (quoting *Computer Assocs. Int'l Inc. v. Am. Fundward, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990)).
[3] *See* Fed. R. Civ. P. 37(e).
[4] *See e.g. Stephen v. Hanley*, No. 03-CV-6226, 2009 WL 1437613, at 2 (E.D.N.Y. May 20, 2009).
[5] *See e.g. Jones v. Norton*, 809 F.3d 564, 580 (10th Cir. 2015); *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *Holmes v. Amerex*, 180 F.3d 294, 297 (D.C. Cir. 1999); *see also Montana State Univ.-Bozeman v. Montana First Jud. Dist. Court*, 2018 MT 220, ¶ 23, 426 P.3d 541 ("Sanctionable spoliation occurs only upon the breach of a duty to preserve the subject evidence.").

element, the party seeking sanctions generally must establish that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[6] Courts often measure prejudice by the practical importance of the spoliated evidence.[7]

THE DUTY TO PRESERVE EVIDENCE: WHEN DOES IT ARISE?

There is no general duty to preserve evidence. Such a duty arises "when litigation is pending or reasonably foreseeable."[8] The pendency of a lawsuit is not required. The duty to preserve evidence is triggered "even before a lawsuit is filed if a party has notice that future litigation is likely."[9]

Whether a party was on notice of possible litigation and therefore subject to a duty to preserve evidence is judged from an objective standard. If a reasonable person in the same factual circumstances would have foreseen litigation, then a duty to preserve evidence exists.[10]

The reasonable anticipation of litigation may arise from notice of an accident or a claimed injury, receipt of a summons, receipt of a demand letter, receipt a preservation notice, or the filing of an administrative complaint.[11] Courts consider whether a dispute existed about the evidence when it was lost and whether a party previously asked for the evidence while it was in the other party's control.[12]

When a party institutes a litigation hold, that may indicate litigation is foreseeable.[13] Further, retaining specialized experts has been construed as evidence of a duty to preserve evidence.[14] However, the fact that one party begins preparing for litigation does not, standing alone, make litigation foreseeable to the other party, unless the claimant gives notice. Courts have found that litigation was foreseeable when a plaintiff's attorney hired an expert who ultimately altered or destroyed evidence relevant to a potential lawsuit.[15] Courts are less likely to find that litigation was foreseeable if significant time passes between an event that allegedly gave notice of litigation and the actual litigation starting.[16]

---

[6] *See e.g. Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y.2004) (citation omitted).
[7] *Northern Assur. Co. v. Ware*, 145 F.R.D. 281, 282–83 (D. Me. 1993).
[8] *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d. 1311 (Fed. Cir. 2011); *see also, e.g. Fujitsu Ltd. v. Fed. Express*, 247 F.3d 423, 436 (2d Cir. 2001) (duty to preserve arises when the party "has notice that the evidence is relevant to litigation or when [the] party should have known that the evidence may be relevant to future litigation."); *Philips Elecs.*, 773 F. Supp. 2d at 1095 ("The duty to preserve evidence arises as soon as "the party has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.").
[9] *Id.; see also Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991); *Bass-Davis v. Davis,* 134 P.3d 103, 108 (Nev. 2006) (a party is on notice of litigation when a lawsuit is "reasonably foreseeable").
[10] *See Micron Technology*, 645 F.3d at 1320.
[11] *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522 (D. Md. 2010).
[12] *Bull v. United Parcel Service, Inc.*, 665 F.3d 68, 78 (3rd Cir. 2012).
[13] *See Micron Technology*, 645 F.3d at 1322.
[14] *See Boyd v. Travelers Insurance*, 652 N.E.2d 267, 271 (Ill. 1995) (A party may be under a duty to preserve evidence by "assum[ing] a duty by affirmative conduct.")
[15] *See e.g. Graff v. Baja Marine Corp.*, 2007 WL 6900792, at *1 fn.3 (N.D. Ga. 2007) ("Unlike many cases in which a party, himself, inadvertently or intentionally alters or destroys evidence, here, the experts who spoliated evidence were hired by plaintiffs' lawyers. Obviously, the pre-suit presence of lawyers and experts evidences the foreseeability of this litigation.").
[16] *See In re Delta/AirTran Baggage Fee Antitrust Litigation*, 770 F.Supp.2d 1299, 1305 (N.D. Ga. 2011).

Some courts have found a relationship between the date on which a duty to preserve evidence arises and the date on which the work-product doctrine attaches.[17] Parties who wish to assert the work-product doctrine should be mindful of how the asserted date will impact preservation issues. If evidence was disposed of or destroyed *after* the date on which the party claims the work-product protections became applicable, that could create spoliation problems. Consequently, counsel should consider whether the work-product protection is really necessary to the case in light of potential arguments relating to spoliation of evidence that might arise based on such timing.

THE DUTY TO PRESERVE EVIDENCE: WHAT IS REQUIRED TO COMPLY?

In complying with the duty to preserve evidence, "[c]ourts cannot and do not expect that any party can meet a standard of perfection," but courts do "expect that litigants and counsel will take the *necessary steps* to ensure that relevant [evidence] [is] preserved when litigation is reasonably anticipated."[18] What is necessary is judged on a case by case basis depending on the unique facts and circumstances. In addition, "the 'culpable state of mind' element may be satisfied by showing only that 'the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently.'"[19]

Merely sending a "litigation hold" letter, standing alone, is oftentimes "not enough of an active and earnest effort" to fulfill and comply with the "responsibility to diligently and thoroughly ensure that relevant documents [a]re preserved."[20] Such a communication could be "ineffective" because employees might not "read it, receive it, or … remember it"; this means that the party must take "other common sense actions … to preserve evidence."[21] In short, mere "lip service" to the duty to preserve evidence is not enough. Parties must make an earnest effort to show compliance with the duty if and when the issue of destroyed evidence arises in subsequent litigation.

THE DUTY TO PRESERVE EVIDENCE: HOW FAR DOES IT REACH?

An important aspect of complying with the duty to preserve evidence is knowing what evidence to preserve. The duty to preserve evidence is "not … 'selective', saving only the evidence supporting a theory of liability and impeding the examination of another theory."[22] Rather, a party has a duty to preserve "what it knows, or reasonably should know, is relevant in the action, . . . [or] is reasonably likely to be requested during discovery."[23] Therefore, a party must "not destroy unique, relevant evidence that might be useful to an adversary."[24]

Attorneys should be mindful of which representatives of a client are subject to a duty to preserve evidence. The duty applies to representatives within the organization (to employees, officers, directors, members/managers,

---

[17] *Brandner v. Abbott Laboratories, Inc.*, 2011 WL 4853384 (E.D. La., Oct. 13, 2011).

[18] *Philips Elecs. N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149, 1196 (D. Utah 2010) (emphasis added) (*citing Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010)); *see also*, *R.F.M.A.S., Inc. v. So*, 271 F.R.D. 13, 24 (S.D.N.Y. 2010) ("To fulfill this preservation obligation, a litigant must take affirmative steps to prevent inadvertent spoliation.").

[19] *Johnson v. Metro. Gov't of Nashville & Davidson Cnty., Tenn*, 502 F. App'x 523, 532 (6th Cir. 2012) (*quoting Beaven v. United States Dep't of Justice*, 622 F.3d 540, 554 (6th Cir. 2010)).

[20] *Philips Elecs.*, 773 F. Supp. 2d at 1206.

[21] *Id.* at 1204, 1206.

[22] *Benton v. Dlorah, Inc.*, 2007 U.S. Dist. LEXIS 80503, *10 (D. Kan. Oct. 30, 2007).

[23] *Benton, supra* at 11 (quoting *Wm. T. Thompson Co. v. Gen. Nutrition Corp., Inc.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)).

[24] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

etc.) and outside the organization (contractors, consultants, attorneys, etc.) However, the scope of the duty to preserve is not unlimited and does not necessarily apply to all evidence within the control of an organizational client. While each case is analyzed on its specific facts, courts have recognized appropriate limits on the scope of the duty to preserve, particularly in the context of ESI. For example, in *AMC Tech., LLC v. Cisco Sys.*, the court recognized that the duty to preserve extended only to reasonably foreseeable "key players" and did not require preservation of "all documents" for all representatives of the organization.[25] The duty requires a party to "identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation". "It is critical to underscore that the scope of this duty is confined to what is reasonably foreseeable to be relevant to the action".[26]

Litigators also need to remember that the duty to preserve evidence, in some cases, could extend even to third-parties. "[T]he general rule is that there is no duty to preserve possible evidence for another party to aid that other party in some future legal action against a third party."[27] However, courts have held that "either the legal right or the practical ability to obtain" the third party's documents can constitute sufficient control such that a duty to preserve evidence arises.[28] Evaluating a party's legal control is a matter of evidence (such as a cooperative agreement that obligates the non-party to provide documents to the party), evaluating a party's "practical ability" to obtain documents can frequently come down to the court's "common sense" in light of the evidence.[29]

SPOLIATION ISSUES SPECIFIC TO PRODUCT LIABILITY CASES

Courts have held that a plaintiff who fails to preserve the allegedly defective product for inspection by the defendant cannot proceed with litigation, particularly in manufacturing defect cases. "[A]llowing a cause of action to continue without the allegedly defective product is contrary to public policy"; thus, the plaintiff's "failure to produce the product for inspection by the defense will render summary judgment appropriate".[30] Other courts have held that, even where a plaintiff cannot produce the subject product, the plaintiff may nonetheless present circumstantial evidence of defect and causation.[31]

The duty to preserve physical evidence may be implicated when dealing with claims arising from contaminated or damaged products. Manufacturers of pharmaceutical and food products, for example, usually destroy contaminated products to prevent further contamination or accidental re-sale. Manufacturers facing such scenarios should consider and implement a reasoned approach for retaining certain samples of such products for

---

[25] 2013 U.S. Dist. LEXIS 101372, 1-2 (N.D. Cal. July 15, 2013),

[26] *Id*.

[27] *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990); *see also, Encompass Ins. Co. v. AMCO Ins. Co.*, No. CV-19-05198-PHX-DLR, 2020 WL 2395164, at *2, n. 2 (D. Ariz. May 12, 2020) ("…the duty to preserve evidence applies to litigants, not to non-parties").

[28] *See e.g. GenOn Mid-Atlantic v. Stone & Webster*, 282 F.R.D. 346, 355 (S.D.N.Y. 2012) (emphasis in original); *see also In Re NTL Secs. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007).

[29] *Id*.

[30] *DeWeese v. Anchor Hocking Consumer & Indus. Products Group*, 628 A.2d 421, 42-4243 (Pa. Super. Ct. 1993); *see also, Smitley v. Holiday Rambler Corp.*, 707 A.2d 520, 527-28 (Pa. Super. Ct. 1998) (clarifying that the general "spoliation doctrine" applied in *DeWeese* may have limited applicability where the spoliation is not due to plaintiff's acts).

[31] *See Worsham v. A.H. Robins. Co.*, 734 F.2d 676, 683 (11th Cir. 1984); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 265 (8th Cir. Mo. 1993) (dismissing plaintiff's product liability claim against a seat belt manufacturer where the plaintiff preserved only the seat belt retractor mechanism at issue but no other relevant evidence); *Silvestri v. General Motors Corp.*, 271 F.3d 585, 593 (4th Cir. 2001) (physical evidence "is the most eloquent impartial 'witness' to what really occurred") (citations omitted).

use in later litigation. In a food recall case, *Brandner v. Abbott Laboratories, Inc*., for example, the manufacturer overcame spoliation arguments by preserving 100,000 specimens, segregating these materials, and securing from the court early in the litigation an order governing the retention of returned products.[32]

The duty to retain products is particularly crucial in situations where products such as food or pharmaceutical products are recalled for potential manufacturing defect concerns. Manufacturers often routinely destroy such recalled products, but doing so creates risk of spoliation arguments in the future. They should carefully consider whether to retain, and potentially test, samples of recalled products. Doing so poses the risk of generating adverse, unhelpful evidence. Manufacturers and their litigation counsel must weigh the duty to preserve evidence, the possibility of retaining and testing samples which may not be representative or could be compromised while stored during protracted litigation. Depending on the facts of the case, the best strategy could be to focus on the claimant's actual product as opposed to retained or otherwise recalled products.

SPOLIATING THE HUMAN BODY

A modern trend in the law of spoliation in the context of tort and injury cases is to argue that the plaintiff has spoliated evidence by obtaining medical treatment to his or her body *before* the defense has had an opportunity to conduct a physical examination.[33] New York appellate courts, after first approving such a notion, later held that "the condition of one's body is not the type of evidence that is subject to a spoliation analysis".[34] The issue of whether spoliation sanctions can be imposed for a plaintiff's decision to obtain medical treatment remains unsettled in other jurisdictions.

[32] 2011 WL 4853384 (E.D. La., Oct. 13, 2011).
[33] *See e.g. Mangione v. Jacobs*, 37 Misc.3d 711 (N.Y. Sup. Queens County 2012).
[34] *Gilliam v. Uni Holdings*, 201 A.D.3d 83 (1st Dept. 2021).