

## **THE DANGERS OF EVIDENCE DISPOSAL**

**by Matthew W. Peaire**

There comes a time at the end of every case involving retained evidence when the file handler, whether that be the adjuster, lawyer or third party claim handler, receives an evidence disposal form. Many times it is second nature to simply sign these forms and fax or email them back to the party storing the evidence. However, before doing so, thought needs to be given to any party that might have an interest in that evidence before it is disposed of, especially the insured. Otherwise, you may have just traded in a subrogation claim for the defense of a claim based on spoliation of evidence.

Over the past decade and beyond, claims for spoliation of evidence have become more and more common. While the original textbook definition of spoliation only related to the intentional destruction of evidence, spoliation has now become much broader and can arise when evidence is simply lost, discarded, altered, or cannot be produced.<sup>1</sup> Some courts have ruled that spoliation of evidence is an independent tort and can be a stand alone cause of action. This issue was addressed in *Continental Insurance Company v. Herman*.<sup>2</sup> In *Continental*, the court identified the following elements needed to meet the standard for a third party spoliation of evidence claim: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve the evidence; (3) destruction or disposal of that evidence; (4) a significant impairment in the claimant's ability to prove its lawsuit; and (5) damages.

By way of example, let's say that a homeowner's insurance company receives notice of a fire thought by the local fire marshal to have started from the insured's vehicle. The home and its contents are insured by ABC Insurance Company ("ABC"), and the vehicle is insured by XYZ Insurance Company ("XYZ"). ABC sends out a fire investigator who, after placing the manufacturer of the car on notice, jointly inspects the vehicle with the manufacturer's expert. XYZ sends only an adjuster to the inspection, and after getting permission from both the homeowners' attorney representing the homeowners for their injuries as a result of the fire and the XYZ adjuster, the investigator for ABC's expert secures the vehicle and takes it in to evidence. Once the claim is adjusted, ABC sends a subrogation demand to the automobile manufacturer. During negotiations, the manufacturer advises the ABC adjuster that once the claim is final, it intends to seek indemnity/contribution from the manufacturer of the component that caused the fire. The ten page release prepared by the manufacturer's attorney states that upon receipt of the settlement funds, the vehicle will be released to the manufacturer. Six months after the claim is settled a new ABC adjuster who inherited the original adjuster's files receives an invoice from the expert for continued storage. Since the claim is now closed, and there is nothing in the file addressing the evidence, he immediately calls the expert and says that no additional expenses should be incurred and the evidence should be discarded. Three months later, within a span of two weeks, the new adjuster receives three letters inquiring as to the location of the evidence. One from an adjuster on behalf

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<sup>1</sup> *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 580 S.E. 2d 467 (2003).

<sup>2</sup> *Continental Ins. Co. v. Herman*, 576 So.2d 313 (Fla. 3d DCA 1991).

of XYZ, one from an attorney representing the insureds for their personal injury claim, and one from the manufacturer who is now seeking indemnity/contribution from the component manufacturer.

As you can see, the adjuster for ABC, in some states, may be guilty of spoliation of evidence. The damages associated with the act of disposing of the evidence could be many times over the value of the settlement (the personal injury claims + XYZ's spoliation claim + the value of the settlement with the manufacturer). This could have been avoided at the time of the settlement by simply sending a certified letter advising each of the three parties with an interest in the evidence that it intends to discard same. Some language that would hopefully defeat any spoliation claim later down the road could be as follows:

*Dear Interested Party:*

*As you may recall, as part of its investigation of the above referenced fire, ABC Insurance Company removed and took into evidence the following items from the above referenced insured's home:*

*1997 Ford F-150  
A.O. Smith hot water heater  
Garage Electrical Panel*

*ABC Insurance Company no longer has a need for these items and intends to have them disposed. Should you wish to take possession of these items, please contact the undersigned within 30 days of the date of this letter. Should we not hear from you prior to the expiration of the 30 day time frame, the evidence will be disposed and will no longer be available.*

The letter should be sent by a traceable method, such as certified, fax and/or email. If the settlement with the third party was confidential, we recommend not including in the letter that the "claim has been settled, and thus ABC Insurance Company no longer needs the evidence." Such language may violate a broadly read confidentiality agreement in a release.

It is obvious that careful consideration needs to be given with regard to the disposal of evidence following an investigation. This pertains not only to "recoverable" claims, but any claims in which evidence has been preserved. Just because the insurer does not believe a claim exists does not mean that another party injured by the event does not feel that it may have a claim. If you have knowledge that another party may have been damaged by the loss (even if it is just by way of a deductible), or simply has an interest in the evidence, be sure to give them an opportunity to take possession of the evidence before it is discarded. Make this part of your closing file procedure, and you will hopefully avoid that "sinking feel in your stomach" following receipt of a letter inquiring as to the location of evidence that was previously discarded.