

## **The Only Thing We Have To Fear Is Spoliation Itself ... and Sanctions: How Spoliation Can Erode, or Even Destroy, the Potential for Recovery**

*Carin D. Brock & Jessica M. Skarin  
Butler Pappas Weihmuller Katz Craig LLP*

Successful subrogation recoveries generally start with proper documentation and preservation of the relevant evidence. For this reason, every effort should be made to involve a subrogation professional at the earliest possible moment following a loss. However, early involvement is not always plausible. Additionally, at times, the circumstances surrounding the loss simply do not allow for the desired preservation of evidence. When the relevant evidence is not sufficiently documented or preserved, a claim for recovery is likely to be met with a spoliation defense.

Spoliation occurs when relevant evidence is discarded, destroyed, altered, or concealed. Over the years, Courts have developed varying degrees of remedies for the spoliation of relevant evidence. Depending on the appropriate remedy, a spoliation defense may significantly limit, or even preclude a claimant from recovering. Accordingly, the evaluation of any subrogation claim should include a consideration of the potential impact of a defense based on spoliation.

### **Applicable Authority**

Courts have an “inherent authority” to issue sanctions for pre-litigation spoliation, whether intentional or unintentional, when the spoliation of evidence interferes with the fair and just adjudication of the pending claims.<sup>1</sup> When the parties do not have equal access to evidence due to spoliation, nor an equal opportunity to develop their respective positions, a court may be inhibited from accurately determining the facts. As such, a court may exercise its inherent authority to preserve the integrity of the judicial system. In so doing, the underlying purpose behind the sanctions may be to punish improper conduct, or, in the case of unintentional spoliation, simply level the evidentiary playing field.<sup>2</sup>

In addition to a court’s inherent authority, the applicable rules of discovery generally provide courts with the broad discretion to impose a variety of sanctions against a party that fails to properly handle evidence during the pendency of a lawsuit. Notably, in light of the wide latitude given to trial courts to remedy issues involving spoliation, any sanctions imposed generally cannot be reversed on appeal absent a showing of an abuse of discretion. Therefore, it is unlikely the imposition of a sanction will be overturned, and it is even more imperative that a possible spoliation defense be given due consideration when initially evaluating recovery potential.

### **Types of Sanctions that May Apply**

Most courts impose a duty to retain relevant evidence once litigation is “reasonably foreseeable.” However, each court defines “reasonably foreseeable” differently. Therefore,

---

<sup>1</sup> See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 135-36 (2d Cir.1998).

<sup>2</sup> *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995).

the point at which the mishandling of evidence becomes sanctionable can vary. Additionally, some courts require there to be a willful or malicious intent to the destruction of evidence before certain sanctions can be imposed. When faced with a possible spoliation defense, it is important to look at the rules of the local jurisdiction to see which types of sanctions may be applicable, and how the defense may impact the subrogation claim.

Significantly, in a minority of jurisdictions, the spoliation of evidence itself is actionable as an independent tort if the spoliation is willful. In those jurisdictions, not only can improper preservation of evidence prevent recovery, but it may also subject the subrogated carrier to damages. A subrogated carrier may have to pay reasonable damages if a defendant can establish that litigation was probable, but the subrogated carrier or its insured nonetheless willfully destroyed evidence, which later caused a disruption of the other party's case. However, the majority of jurisdictions do not recognize the independent tort of spoliation, and instead opt to remedy spoliation through the use of sanctions against the violating party.

A variety of sanctions are available to the trial court. A court may choose to impose monetary sanctions against the violating party in the form of attorneys' fees, fines, or other punitive damages awards. A court may also implement an adverse jury inference. If such an inference is utilized, the jury is instructed that during deliberations, the jury is permitted to assume that the unavailable evidence would have been unfavorable to the spoliator. An even more severe sanction could include the exclusion of the evidence altogether, or the exclusion of any expert testimony based upon evidence not made available to the other party. In extreme cases, courts may also dismiss a subrogated carrier's claim altogether.

### **Factors Considered in Determining Sanctions**

Although a review of the spoliation rules of the local jurisdiction is helpful to better understand the impact of a spoliation defense, it is still quite often difficult to predict what type of sanction, if any, will be imposed. This is because there is no rigid test for determining the appropriate sanction. Instead, the choice of sanctions is guided by the concept of proportionality between the offense and the sanction.

When considering proportionality, courts balance several factors, the most important of which are the culpability of the spoliating party, and the prejudice to the non-offending party. With this in mind, the impact of a spoliation defense on a subrogation claim may be small if the alleged mishandling of evidence was accidental. Similarly, a drastic sanction, such as an outright dismissal can likely be avoided if the inability to examine the spoliated evidence has very little impact on the non-offending party's defense.

In addition to culpability and prejudice, additional factors often considered by courts include:

- the degree of interference with the judicial process;
- whether the information derived from the lost evidence can be recreated by other means;
- whether there was a definitive obligation to preserve the evidence;
- the practical relevance or importance of the evidence;

- whether sanctions will unfairly punish a party for someone else’s misconduct; and
- the potential for abuse if future spoliation is not deterred.

After consideration of all the relevant factors, courts generally select the least onerous sanction that is appropriate for the circumstances.<sup>3</sup>

Although culpability is an important factor in fashioning an appropriate sanction, intentional misconduct or bad faith is not a prerequisite to the imposition of sanctions. A subrogated carrier can be sanctioned even in situations where the mishandling of evidence was accidental. For example, in *Fire Insurance Exch. v. Zenith Radio Corp.*,<sup>4</sup> the carrier pursued a subrogation action against a manufacturer and retailer of a television for damages caused by a fire that destroyed the insured’s home. The manufacturer and retailer moved for sanctions and the exclusion of the carrier’s expert, because the television set had been discarded by the carrier’s expert. The carrier’s expert had concluded that the fire started in the television, but failed to preserve the television, because he felt the remains were insufficient to conduct any test that would affirmatively show the specific cause. Although the expert’s actions were arguably innocent, after a review of the circumstances, the Nevada court granted the pending motion for sanctions and excluded the carrier’s expert testimony. This ultimately led to summary judgment against the subrogated carrier.

Additionally, in *Indemnity Insurance Co. of North America v. Liebert Corp.*,<sup>5</sup> the subrogated carrier sought recovery against a manufacturer for damages resulting from a fire caused by defective air conditioning units. Over the course of the investigation, some of the air conditioner parts were destroyed or lost by the carrier. The court found that the carrier did not act in bad faith in losing the parts, but did act negligently. The court addressed imposing the sanction of dismissal, and determined such a harsh sanction was not appropriate. However, because of the spoliation, the defendants were entitled to all otherwise privileged documents relating to expert inspections of the unit, as well as other materials created in anticipation of the litigation that would have been protected absent the claim of spoliation. The court explained that such measures were aimed at overcoming any “residual prejudice” to the defendants.

### **Lessening the Impact of a Spoliation Defense**

Given the potentially significant impact a spoliation defense can have on a subrogation claim, the best practice is to take steps to avoid spoliation altogether. This is best done by involving a subrogation professional at the outset to identify what evidence may be relevant, and the appropriate steps for properly documenting or preserving the evidence.

Notably, while a spoliation defense is most often raised when physical evidence is mishandled, the defense can also apply to the preservation of documents. Documents outside the carrier’s claim file are often needed to support liability, or establish damages to the requisite level of certainty. As such, in order to prevent a spoliation claim based on the

---

<sup>3</sup> *Patton v. Newmar Corp.*, 520 N.W.2d 4, 8 (Minn. Ct. App. 1994).

<sup>4</sup> 747 P.2d 911 (Nev. 1987).

<sup>5</sup> 96 Civ. 6675 (DC) 1998 WL 363834 (S.D.N.Y. June 29, 1998).

destruction of documents, it is important to issue a “litigation hold” letter to the insured as soon as litigation is contemplated asking the insured to preserve all relevant documents.

In the event evidence cannot be preserved, it is important that the evidence be thoroughly documented, and that potential adverse parties are promptly notified that potentially relevant evidence will not be saved. For example, in many situations the loss site must be quickly cleared so that repairs can begin, and additional damages in the form of business income or additional living expenses are not incurred. If the potential adverse parties have been identified, a subrogation professional can help minimize the impact of a spoliation defense by working with the insured and the adjuster to identify the last possible date that the scene will be held. The potential adverse parties can then be notified in writing that any inspection must take place before that date. In subsequent litigation, the written notices can be used to refute a spoliation defense, and also demonstrate that every reasonable effort was taken to balance the preservation of evidence with the requirement to mitigate damages.

It is important to remember that the duty placed on a plaintiff requires only that the plaintiff act reasonably to preserve the relevant evidence. Thus, even if evidence is not preserved, a subrogation professional can work to document the situation, so that it can later be argued that preservation of the evidence was not reasonable given the circumstances. For example, in situations where the preservation of a loss site is unreasonably expensive or unsafe, documentation of such facts may assist with refuting a claim of spoliation. Additionally, when the preservation of evidence is unduly disruptive to the insured’s business, a court may be unwilling to impose harsh sanctions. Be sure to timely document these types of circumstances.

Even in cases where it is arguably not reasonable to preserve the relevant evidence, the threat of a spoliation defense still looms. To further protect against such a defense, a subrogation professional should take steps to ensure that the evidence is thoroughly photographed or videotaped prior to being altered or discarded. It is important to note that photographs taken by the insured or an adjuster are not always sufficient documentation. When the expense is warranted, it may be prudent to retain an expert to photograph the scene, so that no potentially relevant evidence is overlooked. A common example of the need for outside expertise is a fire loss where the area of origin is thoroughly documented, but no photographs are taken of the nearby breaker boxes or transformers. A multitude of photographs may ultimately prove to be unhelpful if they are not of sufficient forensic quality to allow a defendant’s expert to evaluate the loss.

In sum, each loss is different and involves a unique set of facts. If the evidence cannot be preserved, early involvement by a subrogation professional can help to sufficiently document the evidence as well as the circumstances surrounding the alleged spoliation. This will help to place the subrogated carrier in the best possible position when arguing that the handling of the evidence was reasonable, and that sanctions are not warranted.