



## Active Use of Spoliation as a Defense

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Even if Life isn't fair, judges should endeavor, when the opportunity presents itself and it is legitimately within our means to do so, to assure that law is. This means that all parties to any litigation should compete on a level playing field unless inclines are placed on the field based on some recognized legal theory and even then the incline should be only as steep as justified by the legal theory authorizing it.

*Torres v. Matsushita Electric Corp.*,  
762 So.2d 1014, 1018 (Fla.App. 2000)

Manufacturers have a variety of weapons in their arsenal for defense of product liability lawsuits. Most of these weapons focus on undermining one or more of the elements of the case as to which the plaintiff has the burden of proof. The defense of spoliation, however, indirectly focuses on one of these elements—causation. While a defendant pursuing a spoliation sanction may seek to impugn plaintiff's ability to prove causation based upon missing, altered, or destroyed evidence, a defendant will frequently argue that the missing, altered, or destroyed evidence prejudices the defendant's ability to *disprove* causation. That is, without this evidence, a theory alternative to that put forth by the plaintiff cannot be proven due to the willful or negligent handling of evidence on the part of plaintiff, his or her representatives, or any variety of non-parties.

This article addresses the ability of product liability defendants to demonstrate that sanctions are justified where their ability to demonstrate a theory of causation differing from plaintiffs has been undermined by the spoliation of relevant evidence.

In the typical case, the plaintiff and the defendant have access to the same evidence, and, based upon that evidence, the parties prepare their arguments. Each side examines the product, documentary and testimonial discovery is completed, and experts prepare their reports. But what of the situation where the access to evidence is unequal? By definition, the plaintiff will have had access to the product when the subject incident occurred, and will oftentimes be in the best position to obtain access in aid of a lawsuit thereafter. Courts around the country have increasingly recognized the need for the defendant manufacturer as well to have access to the product in aid of its investigation and defense. That access should be unfettered by post-accident alteration, loss, or destruction of that evidence. Decisions in recent years indicate a trend toward the imposition of sanctions where the defendant makes clear the impact of plaintiff's spoliation upon its ability to defend causation. Where imposed, such sanctions may have a substantial impact on the plaintiff's case.

Spoilation of evidence is “the destruction, or the significant and meaningful alteration of a document or instrument.” *Black’s Law Dictionary*. When evidence is spoiled, a court has the authority to impose a sanction. *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994). Such sanctions can include: (1) an adverse inference to be drawn against the spoliator; (2) dismissal with prejudice; or (3) suppression of evidence.

#### Spoilation in the Manufacturing Defect Context

In *Schmid v. Milwaukee Electric Tool Corp.*, *supra*, and other similarly reasoned cases, courts have held that the prejudice suffered by a defendant allegedly responsible for a manufacturing defect is generally more severe than in a case based upon an alleged defect in design. The rationale is fairly simple. When the allegation is that the one particular item/unit that caused the injury was allegedly defectively made, and that unit has been forever lost, the defendant is unable to test the plaintiff’s theory. Thus, the defendant cannot defend the manufacture of the unit in question.

The unfortunate corollary, from the standpoint of a defendant manufacturer, is that courts throughout the United States are drawing a distinction between actions alleging a design defect and actions alleging a manufacturing defect. Courts have been less inclined to dismiss actions, preclude evidence, and/or employ a negative inference jury instruction in design defect cases than in those concerning a manufacturing defect.

When the alleged defect is in the design, the court need only look at the design documents and model samples that were followed in the manufacture of perhaps millions of separate units; it need not look at the specific unit at issue in the accident. For instance, a defect in the design of an electric saw was alleged in *Schmid*. The plaintiff’s expert disassembled the saw (although he did not destroy it). The defendant claimed prejudice because it could not examine the saw in its original state. The court disagreed, however, holding that the defendant was not prejudiced because it could simply examine another saw of the same model. In *Walters v. General Motors Corp.*, 209 F.Supp.2d 481, 491 (W.D.Pa. 2002), the plaintiff alleged that an airbag malfunctioned when it failed to deploy; the court employed similar reasoning. The vehicle had been disposed of, and thus, could not be tested. Relying upon *O’Donnell v. Big Yank, Inc.*, 696 A.2d 846 (Pa.Super. 1997), the *Walters* court noted that the prejudice to a defendant in a manufacturing defect case “generally is much more severe” than in one based upon design defect.

Cases decided in the state and federal courts in Pennsylvania are replete with references to the severe prejudice resulting from spoliation in the manufacturing defect context. In addition to the three mentioned in the preceding paragraph, see *Tenaglia v. Proctor & Gamble, Inc.*, 737 A.2d 306 (Pa.Super. 1999) (cardboard box); *Smith v. American Honda Motor Co.*, 846 F.Supp. 1217 (M.D.Pa. 1994) (seat belt); *Martin v. Volkswagen of America, Inc.*, 1989 Westlaw 81296 (E.D.Pa.) (malfunction theory asserted but motor vehicle disposed of). See also, *Stender v. Vincent*, 92 Haw. 355, 992 P.2d 50 (2000), wherein the court noted that the need for the actual product and the prejudice caused by its loss is “significantly” reduced in a case alleging a common design defect as opposed to a particular manufacturing defect. See *Schroeder v. Commonwealth*, 551 Pa. 243, 710 A.2d 23 (1998).

Although the court reached the same result in *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23 (1st Cir. 1998), the First Circuit recognized the potential for prejudice relating to causation in the design defect context. In *Collazo-Santiago*, which concerned an airbag alleged to have caused second degree burns to the plaintiff driver’s face, the court explained (*id.* at 29):

Clearly, if a product was manufactured defectively, its defect is likely to be particular to the individual product. Consequently, a party's examination of that product may be critical to ascertaining, among other things, the presence of the defect. In design defect cases, however, a party's examination of the individual product at issue may be of lesser importance as the design defect alleged can be seen in other samples of the product. Nevertheless, examination of the individual product in question may still be of significant import in certain design defect cases where, for example, the question whether the alleged defect or some other factor caused a particular injury is at issue.

### Spoliation in the Design Defect Context

In recent years, defendants have chipped away at the manufacturing defect versus design defect distinction, i.e., that spoliation allegations are relatively less important when the defect is in the design of the product. In analyzing the arguments utilized and the courts' resulting decisions, a pattern emerges: the spoliation defense has successfully been utilized in the design defect context where courts have understood that plaintiff's spoliation has compromised the defendant's ability to defend causation.

Defendants have successfully argued that their ability to prove alternative causation theories has been compromised by spoliation. Some of these alternative causation theories relate to: (1) product misuse; (2) post-manufacture alteration; (3) repair and maintenance history; (4) post-accident repairs or alterations; and (5) age, wear, and tear. Defendants may also be prejudiced in attempting to disprove product identification and/or the actual existence of a causally related design defect.

Until relatively recently, courts generally followed the *Schmid* court's rationale, and recognized the manufacturing defect versus design defect distinction. Two exceptions, however, were Minnesota and New York. Decisions reached by courts in those states are indicative of how the spoliation defense can be effectively utilized in design defect litigation.

In *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995), the Supreme Court of Minnesota recognized the prejudice that destruction of evidence works upon a manufacturer attempting to defend its product against allegations of design defect. Plaintiffs alleged that their motor home's dual fuel system was defectively designed, resulting in a fire. Prior to the incident, the motor home had undergone two major repairs. Right after the fire, it was placed in an Arizona salvage yard; while there, a fire investigator (retained by the plaintiff) examined the motor home and removed several unidentified components, all of which were subsequently lost.

The Supreme Court of Minnesota reviewed the appellate court's reversal of the trial court's grant of defendant's summary judgment motion. The court noted that the defendant had been deprived of an opportunity to examine the vehicle and that the potential impact of two major repairs upon the vehicle and the happening of the accident could never be known. 538 N.W.2d at 118. The court distinguished *Schmid* on that basis. *Id.* at 119. As such, the fruits of plaintiff's expert's investigation were properly excluded, rendering plaintiff unable to prove a *prima facie* case.

In *Squitieri v. City of New York*, 248 A.D.2d 201, 669 N.Y.S.2d 589 (1998), the court held that dismissal of the city's third party complaint sounding in defective design was warranted as a sanction for negligent spoliation of the subject street sweeper. A plaintiff had sued the city

for negligent maintenance and repair of a sweeper whose cab filled with carbon monoxide. The city in turn impleaded the manufacturer. The court held that there was “extreme” prejudice to the manufacturer because it was precluded from countering the design defect claim with evidence that the proximate cause was misuse, alteration, or poor maintenance of the sweeper. 669 N.Y.S.2d at 591.

Likewise, in *Andersen v. Schwartz*, 179 Misc.2d 1001, 687 N.Y.S.2d 232 (1999), General Motors moved for summary judgment based on spoliation of evidence in a design defect action. At the time of the initial court-ordered inspection, GM was not a party. However, the plaintiff had contemplated instituting an action against the manufacturer, and failed to give it notice of the inspection. GM argued that as a result, it could not in connection with its defense prove that misuse, alteration, or poor maintenance of the subject GMC Jimmy, owned by the co-defendant, was the cause of the subject accident. 687 N.Y.S.2d at 234. The trial court agreed and dismissed the action. See also, *Cabasso v. Goldberg*, 288 A.D.2d 116, 733 N.Y.S.2d 47 (2001), in which the court affirmed the trial court’s striking of defendant’s pleading based upon the dismantling of the subject U-Haul trailer’s braking mechanism. The court commented that examination of the subject truck’s condition, maintenance, and repair were germane to plaintiff’s design defect claim.

Courts increasingly are recognizing the prejudice suffered by defendants when they cannot see the product and develop an argument to disprove the plaintiff’s causation theory. In *Torres v. Matsushita Electric Corp.*, 762 So.2d 1014 (Fla.App. 2000), the court addressed the issue of prejudice when the product’s age cannot be learned. The plaintiff suffered injuries from a fire involving a vacuum cleaner she had used for six years. After the incident, she took photographs of the vacuum and delivered it to an expert. The expert in turn delivered it to plaintiff’s counsel, who negligently threw it out. The appellate court sustained the lower court’s dismissal of the action based on spoliation of the product, despite the fact that the plaintiff’s action alleged a design and/or manufacturing defect. In doing so, the court noted that the act of spoliation denied the manufacturer the opportunity to determine the product’s actual age, its length of service, the severity of its use, its state of repair, and whether it was subject to any abnormal operation. 762 So.2d at 1017. The crux of the court’s opinion, in other words, stemmed from causation. It reasoned (*id.*):

[W]hy did the vacuum not burst into flame the first time it was plugged in? If the design defect was such that it would cause a fire only after a certain amount of wear, then reference to the particular vacuum is essential in order to show that such wear occurred—otherwise, no proximate cause. And even if a design defect *might* have caused the fire after appreciable wear, there are other possible explanations not chargeable to defendant which might also have caused the fire—improper repair, failure to maintain the vacuum, maltreatment of the vacuum (electrical wires frayed and exposed), substitution of parties, etc. Thus, in a design defect case in which the design defect is alleged to be only a potential problem, such as the one herein, reference to the particular vacuum is essential.

The court also noted that absent an inspection, defendant could not confirm product identification. *Id.* at 1016.

Prior to decisions such as *Torres*, courts frequently declined to find prejudice where hard evidence of another causal factor was lacking. These courts generally found that the defendant’s

arguments of prejudice were speculative. Ironically, it is the very spoliation of evidence that rendered defendants in those cases unable to put forth the non-speculative evidence required. In *Torres* and like-minded decisions, there was no specific evidence linked to, for example, the vacuum's maintenance history that pointed to an alternative theory of causation. The point was that any such evidence that may have existed had been destroyed, to the defendant's detriment.

In *Iwanaga v. Daihatsu America, Inc.*, 2001 Westlaw 1910564 (W.D.Tex. 2001), the court excluded evidence obtained by plaintiff's expert as a result of investigation and testing of the subject driver's seat after the seat had been removed from the vehicle. Plaintiff failed to record on videotape the seat's removal, and the court noted the lack of objective proof concerning the seat's chain of custody post-removal. *Id.* at \*2. As such, the court ruled, it would be prejudicial to permit any testimony by the plaintiff's expert relating to "impact markings, scratches or abrasions discovered underneath the seat and on the cross member which housed the hydraulic jack." *Id.* It would be impossible to determine whether such markings, scratches, or abrasions were indicative of a defect that caused the injury in question, or whether the defect resulted from handling of the seat after it had been removed outside of the defendant's presence.

Courts have also in recent years addressed prejudice with regard to the defendant's ability to prove misuse as the proximate causal factor. In *Quaglietta v. Nissan Motor Co.*, 2000 Westlaw 1306791(D.N.J.), *aff'd*, 281 F.3d 223 (3d Cir. 2002) (table), the plaintiff was injured in a two-car vehicular accident; he sued the driver of the other vehicle and Nissan, his truck's manufacturer. The plaintiff alleged a design defect in the Nissan truck, claiming that its seat belt which he had been wearing failed. He sold the truck for salvage five months after the accident, but before litigation commenced. The only retained evidence were photographs of the damaged truck the plaintiff took prior to the salvage sale.

In excluding the plaintiff's evidence regarding the condition of the vehicle post-accident, the *Quaglietta* court noted that although Nissan had not yet been sued when plaintiff sold the truck, an eyewitness testified at a deposition that plaintiff told him at the scene that the seatbelt had been fastened but "let go." This was consistent with plaintiff's comments at a hospital emergency room, where he was treated. Thus, as early as the date of the accident, the plaintiff was aware of a potential claim against Nissan, establishing his duty to preserve evidence, i.e., the truck. The court reasoned (*id.* at \*3):

By discarding the truck plaintiff obviously took away all possibility for defendant to inspect the truck and prepare a proper defense, including developing evidence as to whether plaintiff was actually wearing his seatbelt.

The facts of *Stender v. Vincent, supra*, arose out of an automobile accident in which the plaintiffs were sitting in their Ford Tempo, which was parked. They alleged that the seat back of the Tempo was defectively designed, causing severe injuries. 992 P.2d at 53. The Tempo was inspected by an investigator hired by the plaintiff; the inspector took photographs of the car. It was then scrapped, well before litigation commenced. *Id.* The lower court sanctioned plaintiff by allowing an adverse inference jury instruction. *Id.* at 55. The Supreme Court of Hawaii, *inter alia*, reversed the appellate court's holding that the trial court erred in providing the instruction. *Id.* at 57. In doing so, the court rejected the plaintiff's argument that Ford suffered no prejudice from the Tempo's loss because the action alleged a design defect as opposed to manufacturing defect. Specifically, the court held that the action raised "complex questions" of causation that Ford could not investigate due to the spoliation, such as the fact that Ford could not pursue its theory that the seat was reclined at the moment of impact. *Id.* at 60.

In *Chapman v. Bernard's Inc.*, 167 F.Supp.2d 406 (D.Mass. 2001), the court noted the practical reality that manufacturing defect and design defect cases differ from one another. It also noted that in design defect litigation, exemplar testing may not provide relief to the aggrieved defendant. In *Chapman*, a 15-month-old boy died after he became wedged between the side rail and mattress of a daybed allegedly purchased at the defendant's store. Shortly after the toddler's death, emotional relatives destroyed the day bed. An exemplar was later purchased by the plaintiffs. The court refused to grant the defendant summary judgment based upon spoliation but noted the "strong possibility" that the defendant store would be entitled to a negative inference jury instruction at trial. *Id.* at 414. The court held: "It is clear that Bernard's has suffered substantial prejudice." *Id.* It noted that in addition to difficulty in disputing product identification, the defendant would encounter difficulty in attempting to disprove causation. Defendant would be unable to examine the interrelationship of the daybed's components, show that the daybed had been abused, or reconstruct the accident. *Id.*

In *Bridgestone/Firestone North American Tire, L.L.C. v. Campbell*, 258 Ga.App. 767, 574 S.E.2d 923 (2002), *cert. denied*, 2003 Ga.LEXIS 215, plaintiff Campbell alleged that he lost control of a Pathfinder sports utility vehicle after a rear tire came apart. He alleged that the Pathfinder had been negligently designed and manufactured, which made the vehicle prone to rollovers. After initially deciding not to pursue legal action, Campbell instructed his engineer to dispose of the tires, which were not the SUV's original tires. The Court of Appeals of Georgia held that this spoliation prejudiced defendants in an incurable manner and excluded the testimony of witnesses who inspected the vehicle and tires prior to the spoliation. 574 S.E.2d at 926. Regarding the plaintiff's claim sounding in design defect, the court agreed with defendant Nissan that the destruction of the evidence rendered a full defense impossible because it prevented defendants from examining whether there had been any alterations that modified the Pathfinder's design. *Id.*

In *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), the court recognized the legitimate need of a defendant to examine a product in its post-accident condition to determine causation. While intoxicated, plaintiff crashed his landlady's husband's Chevrolet Monte Carlo into a utility pole. He claimed enhanced injury because the car's airbag failed to deploy. While hospitalized, plaintiff retained counsel who, in turn, had two experts inspect the vehicle. It remained in its post-accident condition for two to three months. The plaintiff's experts advised counsel that the vehicle should be preserved and that they believed a viable defect claim could be made based upon the airbag having failed to deploy.

General Motors was not advised of the *Silvestri* accident until three years later when suit was filed. By that time, of course, the Monte Carlo had long since been repaired and defendant's inspection was of limited value. In fact, defendant located the vehicle and its expert examined it. Based upon that inspection, he concluded that the information he obtained based upon the post-repair inspection was insufficient. 271 F.3d at 588. Noting the severity of the dismissal sanction, the Fourth Circuit nonetheless upheld the district court's dismissal of plaintiff's complaint based upon the fact that the destruction of the evidence was "highly prejudicial." The court reasoned that plaintiff's spoliation:

. . . denied General Motors access to the only evidence from which it could develop its defenses adequately. First, by not having access to the vehicle, General Motors could not develop a "crush" model to prove that the airbag properly failed to deploy. In order to establish this model, General Motors needed crush

measurements taken at several places on the automobile. These measurements would reveal not only the speed at impact, but also the direction of forces imposed on the car. This information would lead to an ability to determine whether the airbag device acted as designed and therefore was critical to the central issue in the case.

*Id.* at 594. Additionally, the spoliation prevented the defendant from determining the disputed cause of how plaintiff injured his head—from impact with the vehicle’s steering wheel, impact with its windshield or, rather, from wood that entered the passenger compartment when the vehicle struck a fence.

Although the foregoing cases establish a trend in finding prejudice to the benefit of defendant manufacturers in the design defect context where spoliation has occurred, some courts, particularly in Pennsylvania, have seemingly declined to follow suit. In *Kerrigan v. Maxon Industries, Inc.*, 223 F.Supp.2d 626 (E.D.Pa. 2002), plaintiff allegedly sustained injuries while he was transporting cement on the back of a truck when the barrel portion of the cement mixer inadvertently rose and struck a bridge overpass. The plaintiff claimed that the cement mixer was defectively designed because it lacked a warning or safety device to alert the driver to the fact that the agitator was rising while the truck was being driven. *Id.* at 630. The valve system in question was missing, and the question of whether it had been spoliated by the plaintiff was unresolved. *Id.* at 643.

The defendants in *Kerrigan* sought to preclude the plaintiff’s expert from proffering a videotape that he made of an exemplar agitator. The court rejected this argument because the agitator’s design was “common to all products of the same model,” and held that the prejudice to defendants was “slim at best.” *Id.* at 642. Displaying its apparent unwillingness to accept a causation-based argument of prejudice at face value, the court stated that in design defect cases “one need only examine other samples from the same product line in order to determine whether the alleged defect exists...and was capable of causing the injury alleged.” *Id.* at 642. Notably, the court did not address the issues of potential post-manufacture alterations, repair or maintenance.

In *Lekkas v. Mitsubishi Motors Corp.*, 2002 Westlaw 31163722, 2002 U.S.Dist.LEXIS 18390 (N.D.Ill.), the plaintiffs alleged that a fatal automobile accident occurred due to the defective design of a Mitsubishi Montero; they claimed that the vehicle’s roof was not crashworthy and that the car was prone to rollovers. Plaintiff’s automobile insurance company destroyed the vehicle a few months following the accident but before the lawsuit was filed.

Regarding the crashworthy claim in *Lekkas*, Mitsubishi argued that it was unduly prejudiced because the amount, type, cause, and location of the roof crush was not measured or documented, and circumstantial evidence of the post-accident condition of the roof was minimal to non-existent. *Id.* at \*7. Regarding the rollover claim, the defendant argued that it was prejudiced because an inspection could have shown an after-market alteration, prior misuse, improper tire inflation, driver error, and other unknown causes. *Id.* at \*6.

Applying Illinois law, the federal district court agreed with the defendants as to the crashworthy allegation because Mitsubishi was effectively foreclosed from defending itself. *Id.* at \*7. Because **plaintiff** was as result barred from offering evidence or testimony related to this allegation, the court dismissed the cause of action related to crashworthiness. *Id.* at \*10. However, the district court held that Mitsubishi was not unduly prejudiced with regard to plaintiff’s defective design claim as to the Montero’s tendency to roll over because plaintiff’s specific claims, namely, that the vehicle rolled over due to its high center of gravity and

suspension system, could be tested by the parties. The court further noted that there was other ample evidence to prove/refute the claims, including party depositions, the police report, witness testimony, and vehicle photographs. Likewise, the court noted that the Montero was only one year old when the accident occurred, so the vehicle's service records would answer questions regarding any after-market alterations and repairs. *Id.* at \*7. It is significant to note that the court did not analyze the prejudice caused by defendant's preclusion from measuring and analyzing crash data as did the Fourth Circuit in *Silvestri v. General Motors, supra*. **Nor did the court analyze whether defendant may be entitled to a jury charge as to spoliation.**

A recent distinguishable case is *Derosier v. Cooper Tire & Rubber Co.*, 819 So.2d 143 (Fla.App. 2002), which concerned a tire blowout. Police photographs showed separated tread, but the tread was never recovered by either the plaintiff or the defendant. The trial court granted the defendant's summary judgment motion on spoliation grounds. It accepted the argument that the defendant was hamstrung in its ability to prove that the blowout was caused by misuse as opposed to a defect.

In reversing the lower court's decision in *Derosier*, the Florida Court of Appeal considered the affidavit of defendant's expert which stated that without the missing tread, no expert could conclude that the tire was defective. Furthermore, based on his examination of the portion of the tire that remained, the expert could conclude that the tire failed due to misuse in that it had been driven flat for a considerable distance. 819 So.2d at 144. Based on the affidavit, it was thus clear that defendant was not "so prejudiced by the loss of the tire tread as to preclude them from defending against the products liability claim." *Id.* at 145. The court also considered that neither party was responsible for the spoliation in question.

**Similar to the rationale in *Derosier*, the New York Appellate Division, Second Department in *Klein v. Ford Motor Co.*, 2003 WL 732988 (2d Dept. 2003) reversed the trial court's ruling granting defendant's motion to dismiss in an action arising out of a sports utility rollover. The court held there was no prejudice where a Ford engineer had inspected the SUV and took approximately 300 photographs of it prior to its inadvertent destruction by a non-party storage facility in violation of a court order. Notably, the Appellate Division, Second Department stated that its decision was without prejudice to the defendant moving for the imposition of a lesser sanction at trial upon a showing of prejudice thus, recognizing the potential for negative impact upon the defense.**

Defendants must also be aware of the fact that courts will seek to impose the least draconian sanction to level the playing field. In *Valentine v. Mercedes-Benz Credit Corp.*, 1999 Westlaw 787657, 1999 U.S. Dist. LEXIS 15378 (S.D.N.Y.), the plaintiff was injured while operating a Freightliner tractor. Prior to his loss of control of the vehicle, plaintiff heard a popping sound, which he had heard before the accident date and had complained of. An adjuster from plaintiff's insurance carrier, interested in pursuing a subrogation action, in conjunction with representatives of the truck's manufacturer examined the truck, and concluded that its Spring U bolts may have been over-torqued. The adjuster sent a memorandum to the plaintiff's insurer advising, among other things, that the evidence should be preserved for further examination by an expert. *Id.* at \*2, \*3. Rather than dismiss the plaintiff's subsequent personal injury lawsuit as defendant's sought, the court imposed the less severe sanction of precluding plaintiff from presenting evidence based on the examination of the spoliated parts. *Id.* at \*5. The court held it would instruct the jury of the unavailability of the parts due to plaintiff's conduct, but would also instruct against any adverse inference. *Id.* at \*5. From its comments, it



appears the court was content to leave arguments as to causation to the party's experts based upon the non-excluded evidence, and simply allow the jury to decide.

### Litigation Tactics

Defense counsel and their clients should consider the following tactics in actively pursuing spoliation as a defense

- **Early Inspection.** Upon learning that a product has been involved in an accident, make efforts to learn the product's whereabouts, and undertake an inspection. While early access may be utilized as a sword by the plaintiff to argue against a spoliation sanction later on, it likewise demonstrates the seriousness with which the defendant values this evidence. As in *Valentine v. Mercedes-Benz, supra*, the simple fact that an inspection has already been conducted will not necessarily result in a finding of no prejudice and therefore no spoliation sanction.

- **Early Notification.** As soon as possible after the accident, notify the plaintiff or his or her lawyer to retain the product and refrain from making any alterations or repairs of any sort. Advise them that as to any portions of the product that are repaired or replaced, original components should be retained. This will establish early-on in the eyes of the court the defendant's need for the subject evidence and the prejudice worked upon defendant if it is spoliated.

- **Participate in Post-Accident Inspections.** It is evident from the case law that the factual scenario that leads to spoliation often involves experts. In the course of the plaintiff's expert's investigation, the expert will often alter the product and, in some cases, remove the product or parts thereof. The result is that the product is irreparably altered, changed, or lost. When making initial contact with plaintiff or plaintiff's counsel, be sure to advise of your desire to participate in all such inspections and be sure to utilize a camera and video recorder.

- **Records.** Notify the plaintiff (if not yet represented) or his or her lawyer that records related to the maintenance, **repair, and** alteration of the product must be retained. If not in their possession, investigate these documents' whereabouts, and obtain copies of them. Alternatively, consider pre-accident discovery. Records can tell the tale of what happened to the product: they can support the conclusion either that the plaintiff's actions were not prejudicial to the defendant's case, or they can make clear that prejudice has occurred.

- **Confirm Product Identification.** Take all necessary steps to confirm that the product involved in the accident is your client's. As demonstrated by *Chapman v. Bernard's, supra*, and *Torres v. Matsushita Electric Corp., supra*, the destruction of a product will not necessarily discourage the plaintiff from seeking to identify your client as the manufacturer or distributor of the product. Oftentimes, the thinnest of evidence will be permitted to be placed before a jury on this issue, notwithstanding that the product has been destroyed and a sales receipt or other documentary proof of product identification is lacking. Utilize police, fire, and ambulance reports and such personnel as well as internal databases to identify end-users.

- **Once the Lawsuit is Filed.** Serve a formal notice on the plaintiff or his or her lawyer that evidence must be preserved. Once served, plaintiff's counsel will be in no position to assert that defendant never advised that the evidence in question was material, and if destroyed, that defendant would be prejudiced. Serve the notice immediately with your appearance in the case so as to bring this issue to plaintiff's counsel's attention as early as possible. While the law imposes a duty upon the plaintiff to retain evidence, a notice from defense counsel drives this point home and leaves little room for interpreting what defendant views as necessary evidence.

In cases where the defendant was not aware of the incident before suit was filed, the notice defense counsel served early-on is the starting point of any motion based on spoliation.

- **Chain of Custody.** Interrogatories are a useful tool in collecting this information. Identify each and every link in the chain—who possessed the product and/or its component parts from the time of the accident to the present. Seek information relating to what each individual who possessed the product did with it or its component parts while it was in his or her possession. Determine the conditions under which the unit was stored, i.e., was it outside and unprotected from rain, snow, ice, etc., or was it stored in a damp basement. This will aid in determining whether the marks on the product of use or misuse, or the product's condition overall condition, can be attributed to its state before the accident, or whether they resulted from the accident, or whether they resulted from spoliation. See *Iwanaga v. Daihatsu, supra*.

- **Attempt to Obtain the Product.** Products involved in accidents are often in the possession of persons not involved in the litigation. Where practical, attempt to take possession of the product to ensure it is available to aid in establishing your client's substantive defenses. This was mentioned in the Fourth Circuit's discussion of what efforts defendant made to avoid prejudice based upon spoliation in *Silvestri v. General Motors, supra*. Document your efforts.

- **Depositions.** Depositions of parties and non-parties will enable the defense to gather more information on issues such as chain of custody, post-accident repair, and the whereabouts of component parts. Subpoena non-parties who may be able to shed some light on these issues.

- **Insist on Videotape.** Discovering the cause of product failure frequently involves disassembly or destruction of one or more parts of the product. Be sure to make a videotape recording of any such disassembly or destruction. Also, ensure that the defense receives notice of any such disassembly or testing by other parties, and that these procedures are also recorded on videotape.

- **Use Experts.** Consult your in-house and/or independent experts to determine specific data related to the subject product required to properly analyze a design defect claim. This information will provide significant guidance as to how to establish that prejudice has occurred.

## Conclusion

As stated by Judge Harris of the Florida Court of Appeals in his concurrence in *Torres v. Matsushita* (at the beginning of this article) the key point to get across to the trial court when pursuing a spoliation defense is fairness—that is, the lack of fairness worked upon the defendant due to spoliation of material evidence. The lack of a level playing field is clear when the plaintiff's theory is based upon manufacturing defect, and the particular unit is no longer available for examination or testing. When manufacturing defect is at issue, plaintiff is claiming that one and only one of the subject product was defective. The defect then was unique to that particular unit. Once that product is gone or altered, there is nothing left for the defendant to test or examine. The prejudice is clear and easily demonstrated.

In contrast to claims based on allegations of manufacturing defect, design defect cases do present opportunities for a solid defense that the court will accept. The challenge is substantial. The defendant must make clear to the court that without the ability to examine and test what the plaintiff had the ability to examine and test, the playing field is no longer level. The fundamental unfairness must be demonstrated, and the court made to realize that only dismissal or re-leveling of the playing field in some meaningful way will permit the fair administration of justice.

The proper groundwork for this argument must be laid as early as possible. The greater the prejudice the defendant can demonstrate, the stronger the sanction imposed against the

spoliator is likely to be. From the judicial decisions discussed above, it is clear that where the plaintiff has acted willfully, courts are more likely to impose a harsher sanction, although several courts have noted that whether the destruction of evidence at issue is willful or negligent, the prejudice upon the defendant is typically identical. Thus, the sanction should not differ.

The reality, however, is that obtaining a spoliation sanction may be an uphill battle. This is so whenever one party is attempting to show entitlement to a remedy based upon prejudice. Thus, while the spoliation sanction is a powerful one, the means by which to establish the propriety of its imposition are often identical to the means one should employ to avoid spoliation becoming an issue in the first place. That is, to demonstrate prejudice, defendants must take all reasonable steps to obtain and retain evidence once they learn a product is involved in an accident.

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