



2019 CLM New York Conference
December 5, 2019
New York, NY

Timing is Everything in Claim Handling: Preservation, Spoliation and the Adverse Inference

I. Early Triggers in Preservation Duties What to do when a claim comes in.

Why addressing the preservation of duties at the onset of litigation is critical.

One of the first issues both claim handlers and attorneys must address upon receipt of a claim is the preservation of evidence. Without making critical determination regarding the preservation of evidence the whole litigation can be for lack of a better word, sunk. As discussed further below, failing to properly preserve evidence could lead to spoliation sanctions including but not limited to striking pleadings, summary judgment motion practice and/or adverse inferences at trial.

When is the duty preserve evidence triggered

The time at which the duty to preserve evidence is triggered is nebulous, but common sense generally applies. Specifically the duty can be triggered based on a letter (generally known as a preservation of evidence/spoliation letter) from Plaintiff's counsel. Further if it is a matter where litigation was "reasonably foreseeable," can trigger the duty. For instance if a claim comes in regarding a possible bodily injury on a construction site, where Plaintiff states he fell of a ladder, it would be foreseeable that litigation will occur and the ladder should be preserved for inspection.

There is also caselaw where the duty has been triggered when Defendants retained an expert to report on plaintiff's injury, assigned a claims professional to the case and/or conducted video surveillance of the Plaintiff.

If there is a question of whether the duty to preserve evidence is triggered one should adhere to preserving the subject evidence.

II. Spoliation-Definition and Discussion

Spoliation-Definition

In law, “spoliation” of evidence is the intentional or negligent withholding, hiding, altering, or destroying of evidence relevant to legal proceedings. Black’s Law Dictionary (8th Ed. 2004). Spoliation is broadly understood to encompass both intentional and negligent tampering with any form of potential evidence to the extent it interferes with another party’s ability to present that party’s claim in a civil action. When evidence is lost, destroyed or concealed, it can have significant consequences, which will be discussed below.

The key take away is that “intent” is not required, and a spoliation charge can be leveled against a party who didn’t realize they needed to preserve evidence.

Spoliation-Elements

The general elements necessary to establish spoliation are:

1. The existence of a potential cause of action.
2. A duty to preserve evidence relevant to that potential civil action. (see above)
3. Destruction or alteration of that evidence.
4. Significant impairment in the ability to prove the lawsuit.
5. A relationship between the evidence destruction and the inability to prove the lawsuit.

Once again common sense should apply if a claim comes in and there is a crucial piece of evidence at issue claims handlers and their attorneys should do everything possible to stress to the insureds how critical preserving evidence is.

III. Spoliation Sanctions/Adverse Inference

Spoliation Sanctions.

Over the years, the courts have found numerous sanctions to be appropriate for spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases, granted summary judgment motions, stricken pleadings, issued fines and applied most every other sanction available for the failure to provide discovery.

The factors to be considered when determining the propriety of the spoliator’s conduct would include: (1) the nature of the actor’s conduct, (2) the actor’s motive, (3) the interests of the person with whom the actor’s conduct infers, (4) the interest sought to be advanced by the actor, (5) the social interest in protecting the freedom of action of the actor and the contractual

interest of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relation between the parties. Restatement (2nd) of Torts, §767 (1979).

Courts tend to look at everything when determining whether a spoliation sanction should be charged. However, this demonstrates why evidence preservation is so crucial. In many instances you have what could be a defensible case and now there is a possible spoliation charge out there which claims handlers and attorneys have to evaluate when making a determination regarding settlement value and/or whether a claim should proceed to trial.

As demonstrated failing to properly preserve evidence can completely shift the value of a claim and give Plaintiffs ammunition to drive up the value of claims.

Adverse Inference.

Perhaps the most common remedy which is employed by virtually all jurisdictions is to provide an inference of spoliation or an adverse presumption jury instruction. This allows the jury (jury trial) or Judge (bench trial) to assume that the proof which was either spoiled or altered would have been unfavorable to the non-producing party. This is based on the presumption that the destruction of evidence is evidence of a guilty mind on the part of the non-producing party since the evidence would not have been destroyed if it had been favorable to the non-producing party. An example of the jury instruction presented in such a case based upon willful suppression of evidence would be the following:

You are instructed that there is a presumption that evidence willfully suppressed would be, if produced, adverse to the party suppressing it. This presumption may be rebutted by other competent evidence, but if uncontradicted, the presumption is satisfactory proof of the matter in question.

9 Am.Jur.Pl. and Practice Forms, Evidence §116 (2009).

There is not a defense attorney who wants to be faced with this jury charge at the conclusion of a case. Further, there is not a claims handler who wants to hear from their attorney that the Judge has given the above instruction. As stated over and over, the adverse inference can take an otherwise defensible (or a claim that can be favorably settled) and make it a policy limits case.