Avoiding the Spoliation Trap — Tips for the Litigator

by Scott C. Ford

At the outset of every new litigation matter, the trial lawyer should counsel the client on the obligation to preserve evidence and the possible consequences for failing to do so. Moreover, the trial lawyer should examine whether any spoliation of evidence might have already occurred prior to the engagement. This article will examine the basic principles of the law of spoliation of evidence, the possible consequences for failing to preserve evidence, and some tips for avoiding the spoliation trap.

Spoliation and the Duty to Preserve Evidence

Spoliation includes the intentional or negligent destruction, loss or alteration of material evidence.[1]

Federal and state case law both provide that the duty to preserve material evidence arises not only during litigation, but before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.[2] The duty extends to documents, whether in hard copy or electronic form, and things relevant and material to the litigation. Spoliation is often raised in products liability cases, but more and more is being raised in other litigation matters, particularly given the increased presence of electronic evidence.

The possible consequences for failing to preserve evidence may diverge slightly depending upon whether Virginia or federal law applies. When spoliation occurs in the course of pending federal litigation, federal law applies. However, when the spoliation occurs prior to federal litigation, a federal court exercising diversity jurisdiction will apply applicable state law.[3] When federal law applies the district court will apply spoliation decisions of the regional circuit.[4]

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Virginia Cases

There are fewer Virginia than federal cases which address spoliation. Virginia courts, unlike others, have not recognized the independent tort of spoliation.[5] Virginia remedies for spoliation of material evidence include the dismissal of the action or the offering of an adverse inference instruction (i.e., an instruction that the missing evidence would have been unfavorable to the party that spoiled the evidence).[6] Virginia courts also require both a showing of bad faith by the litigant or his or her counsel and prejudice to the opposing party before granting the drastic relief of dismissal for spoliation.[7]

Gentry v. Toyota Motor Corporation remains the most recent Supreme Court of Virginia decision addressing spoliation.[8] In this closely divided 1996 decision, the Court reversed the trial court's dismissal of the complaint based upon spoliation of evidence.[9] The plaintiff in *Gentry* alleged that her Toyota pickup suddenly accelerated, causing her to crash.[10] The plaintiff's expert—without permission from the plaintiff or her attorney—used a hacksaw to remove the engine component which he identified as the cause of the crash.[11] The plaintiff then asked for a continuance, which was granted.[12] At trial, the plaintiff used another expert to advance a new theory of liability for the accident which was unaffected by the previous expert's destruction of evidence.[13] The trial court dismissed the case as a sanction for the earlier destruction.[14] The Supreme Court reversed the trial court, finding that the trial court abused its discretion in dismissing the action since neither the plaintiff nor her

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attorney acted in bad faith (the expert had acted on his own without the consent or knowledge of the litigant or her counsel) and the expert's act did not prejudice the defendant (given the new theory advanced by the new expert).[15]

Fourth Circuit Cases

The federal courts have noted that they possess broad discretion in electing an appropriate sanction for spoliation.[16] Sanctions may include dismissal, entry of summary judgment, offering of an adverse inference instruction, or exclusion of evidence. A showing of some degree of fault is required to impose sanctions.[17] The federal courts have described that the purpose of imposing a sanction for spoliation is to level the evidentiary playing field and to sanction improper conduct.[18]

It has been observed that spoliation is not a substantive claim or defense but a "rule of evidence," to be "administered at the discretion of the trial court."[19] Accordingly, the decision of the district court will stand unless it is found to be an abuse of discretion.[20]

Whether and what sanctions are appropriate depends upon a variety of factors, including without limitation, the spoliator's state of mind, bad faith, the kinds of evidence destroyed, and the consequences of the destruction to the adversary's case.[21] The federal courts have noted that the ultimate sanction of dismissal should be avoided if a lesser sanction will level the playing field and sanction improper conduct.[22] In *Silvestri v. Gen. Motors. Corp.*, the Fourth Circuit noted:

> [T]o justify the harsh sanction of dismissal, the district court must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.[23]

Although the drastic remedy of excluding evidence or granting a summary dismissal due to spoliation requires that bad faith be proven, bad faith is not required in order to warrant an adverse inference instruction in the federal courts.[24] However, an adverse inference will not be offered unless there is a showing that: "(1) the party 'knew the evidence was relevant to some issue at trial'; and (2) the party's 'willful conduct resulted in its loss or destruction.'"[25] The federal courts have noted that the adverse inference "stems from the 'common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to be threatened by [that evidence] than a party in the same position who does not destroy the [evidence].'"[26]

Tips for the Litigator

Some tips related to the issue of spoliation include:

- Advise the new litigation client of the duty to preserve relevant evidence and the consequences for failing to do so. The client should be advised orally and in writing, preferably in the initial engagement letter.

- Clients with document retention/destruction policies should be advised that they must impose a document hold (electronic and hard copies) on relevant evidence once litigation is anticipated.

- Send a writing advising opposing counsel of his or her obligation, and that of the client, to preserve relevant evidence. This reminder may be helpful in securing appropriate remedies should spoliation subsequently occur.

- Advise clients to image computer hard drives that may contain relevant data once litigation is anticipated. This is helpful in deflecting later claims that electronic evidence was altered or removed.

Tips Specific to Product Cases

- Promptly provide the opportunity for inspection by the opposing party of the allegedly defective product, preferably before removing or tampering with the product and the surrounding scene in any way.
- Do not engage in any destructive testing of the product absent agreement with the other side as to the protocol for doing so.
- Properly store the allegedly defective product to avoid spoliation.
- Thoroughly photograph the product and the surrounding scene immediately after the occurrence of injury or loss. Also, record and photograph any pertinent measurements.
- Place all manufacturers and retailers (and their respective insurers, if applicable) on notice of potential claims and offer an opportunity to inspect the allegedly defective product.

In sum, counseling clients on their obligation to preserve evidence and potential consequences for failing to do so is vital. Otherwise, your clients may face sanctions, up to and including dismissal of their cause of action.

[1] Wolfe v. Va. Birth-Related Neurological Injury Comp. Program, 40 Va. App. 565, 581, 580 S.E.2d 467, 475 (2003).

[2] Id.; Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001).

[3] Ward v. Texas Steak Ltd., No. 7:03cv00596, 2004 U.S. Dist. LEXIS 10575, at *7 (W.D. Va. May 27, 2004).

[4] Rambus, Inc. v. Infineon Techs., 222 F.R.D. 280, 287 (E.D. Va. 2004).

[5] Austin v. Consolidation Coal Co., 256 Va. 78, 83, 501 S.E.2d 161, 163 (1998) (declining to recognize a third-party action in tort for spoliation of evidence based upon the facts presented in a matter of first impression in the context of a certified question of law from the federal court in West Virginia).

[6] Wolfe, 40 Va. App. 565, 580, 580 S.E.2d 467, 475 (2003). See also Blue Diamond Coal Co. v. Aistrop, 183 Va. 23, 29, 31 S.E.2d 297, 299 (1944); Neece v. Neece, 104 Va. 343, 348, 51 S.E. 739, 741 (1905).

[7] Gentry v. Toyota Motor Corp., 252 Va. 30, 34, 471 S.E.2d 485, 488 (1996). See also Benitez v. Ford Motor Co., 69 Va. Cir. 323, 326-27 (Fairfax 2005); Wade v. Fleetwood Homes of North Carolina, Inc., 66 Va. Cir. 472, 473 (Nelson 2001).

[8] 252 Va. 30, 471 S.E.2d 485.

[9] Id. at 34, 471 S.E.2d at 488.

[10] Id. at 31, 471 S.E.2d at 486.

[11] Id. at 32, 471 S.E.2d at 486.

[12] Id. at 32-33, 471 S.E.2d at 487.

[13] Id.

[14] Id. at 33, 471 S.E.2d at 488.

[15] Id. at 34, 471 S.E.2d at 488.

[16] Silvestri, 271 F.3d at 590. Trigon Ins. Co. v. United States, 204 F.R.D. 277, 285 (2001).

[17] Silvestri, 271 F.3d at 590.

[18] Id.

[19] Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155 (4th Cir. 1995).

[20] Cole v. Keller Indus., Inc., 132 F.3d 1044, 1047 (4th Cir. 1998).

[21] Rambus, 222 F.R.D. at 299.

[22] Silvestri, 271 F.3d at 590.

[23] Id. at 593. See also Stallings v. Bil-Jax, Inc., 243 F.R.D. 248 (E.D.Va. 2007) (discussing sanction of dismissal as inappropriate where plaintiff returned allegedly defective scaffold to operator and operator had no ability to identify or produce scaffold; evidence was provided to insurer prior to return of scaffold that notice was provided to operator's insurer that an injury occurred, that the scaffold was defective, and that the plaintiff told the operator that he had been hurt).

[24] Kribbs v. Wal-Mart, No. 4:05cv159, 2006 U.S. Dist. LEXIS 43453 at *30 (E.D.Va. June 27, 2006) (rejecting customer's spoliation of evidence claim, holding that there was no evidence that the store destroyed evidence when it eventually remodeled because it believed that all evidence had been obtained by way of photograph). See also Woods v. Wal-Mart, No. 3:05CV048, 2005 U.S. Dist. LEXIS 45404 at *13 (E.D.Va. Oct. 11, 2005) (holding that absent evidence of bad faith conduct dismissal was inappropriate).

[25] Kribbs, 2006 U.S. Dist. LEXIS 43453 at *30 (quoting Vodusek, 71 F.3d at 156).

[26] Anderson v. Nat'l R.R. Passenger Corp., 866 F. Supp. 937, 945 (E.D. Va. 1994) (quoting Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.