

NEWSLETTERS

Spoliation Of Evidence: An Overview Of Factors To Consider On A Construction Project

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If you are involved in the construction industry, it is only a matter of time before you encounter a spoliation issue. Spoliation is a legal term used by courts to describe the failure of a party to preserve potentially relevant evidence. This article describes the factors courts take into consideration when determining whether to sanction a party for spoliation of evidence and the importance of implementing safeguards to ensure that potentially relevant evidence is preserved.

As an initial matter, it is important to understand at what point the obligation to preserve evidence begins. For example, should an owner preserve I-beams, pilings and rebar after a significant roof collapse -- even when no litigation is pending or threatened? Typically, a party is under an obligation to preserve evidence once they reasonably believe that litigation is possible. However, there is no clear-cut standard and determining whether litigation is possible or even probable is challenging. In addition, there may be other reasons to preserve evidence outside the context of litigation including, without limitation, to preserve warranty or insurance claims. Given the divergent approaches taken by courts, it is advisable to err on the side of caution and preserve the evidence until it can be determined whether litigation will ensue. The focus of this article is to provide you with an overview of the factors courts consider when determining whether to sanction a party for spoliation.

There is a broad range of sanctions for failing to preserve evidence. The most common sanction is referred to as an "adverse inference" where the court instructs the jury to make an inference that the destroyed evidence was unfavorable to the party that destroyed the evidence. While the party that destroyed the evidence can still proceed with their claim, from a practical standpoint it will be very difficult for the party to meet its burden of proof. Other more severe sanctions include dismissal of the lawsuit, monetary sanctions, criminal penalties and in some jurisdictions independent tort liability. Perhaps the most exhaustive discussion on spoliation sanctions is found in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (MD Dist. 2010) where the Court wrote extensively on the factors courts consider in determining the appropriate sanction for spoliation of evidence. After surveying court decisions throughout the country, the Victor Stanley Court focused on three principal factors discussed below.

The first factor taken into consideration is whether the party had a duty to preserve the evidence and breached that duty. The duty to preserve evidence "includes an obligation to identify, locate, and maintain,

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information that is relevant to specific, predictable, and identifiable litigation.” *Id.* at 522. In some jurisdictions, the preservation duty extends not only to evidence in the party’s control, but also to evidence in the hands of third parties. *Id.* at 523. For example, in the context of a construction project, an obligation to preserve evidence may be imposed on the general contractor to take proactive steps to ensure that its lower tiered subcontractors retain potentially relevant evidence.

The second factor courts consider is whether a party acted culpably when the evidence was lost or destroyed. This inquiry turns on the party’s mental state regarding any obligation to preserve the evidence and the subsequent destruction thereof. The degree of fault will impact the severity of the sanction, along with the prejudice caused to the opposing party. See *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). However, it should be noted that “[o]nce the duty to preserve attaches, any destruction of [evidence] is, at a minimum, negligent.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003). Accordingly, a culpable state of mind is established by ordinary negligence in most jurisdictions. By contrast, willfulness is the equivalent to intentional, purposeful, or deliberate destruction of evidence. For example, a contractor’s deliberate destruction of I-beams to conceal improper construction techniques would be willful and could result in the most severe sanction of dismissal depending on the prejudice caused to the other party.

The final factor focuses on the relevance of the lost evidence and resulting prejudice to the other party. “In the context of spoliation, lost or destroyed evidence is relevant if a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.” *Victor Stanley*, 269 F.R.D. at 531. In addition, in most cases the absence of the evidence must be prejudicial to the party alleging spoliation of evidence. Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation is precluded from presenting evidence essential to its claim or defense. Prejudice is generally found where a party’s ability to present its case or to defend itself is compromised. See, e.g., *Silvestri*, 271 F.3d at 593-94.

If you find yourself in a situation where a quick decision must be made on whether to preserve or destroy evidence, consider these factors and consult your attorney. Because spoliation sanctions vary from one jurisdiction to the next, it is important that you do not make these decisions in a vacuum. It is also advisable to have well documented procedures in place for the retention of evidence should an issue arise that is outside of your control. Circumstances arise where it is impossible or simply impracticable to preserve evidence due to the need to perform emergency repairs for safety or other reasons. At such times, take pictures, if possible, to document the condition and notify all parties involved. Finally, if litigation is foreseeable, then a litigation hold must be initiated as soon as possible to preserve all relevant documents and evidence. This process should be handled by counsel as IT experts may be necessary to ensure that information is not accidentally deleted or lost.

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