RECENT DEVELOPMENTS IN SPOLIATION OF EVIDENCE LAW

Presented and Prepared by:
Sara A. Ingram
singram@heyloyster.com
Edwardsville, Illinois • 618.656.4646

Prepared with the Assistance of:
Kendra A. Wolters
kwolters@heyloyster.com
Edwardsville, Illinois • 618.656.4646

Heyl, Royster, Voelker & Allen
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I. INTRODUCTION: WHAT IS SPOILATION OF EVIDENCE? ............................................................... J-3

II. CLARIFYING CLAIMS FOR SPOILATION IN ILLINOIS: NEGLIGENCE SUIT OR DISCOVERY SANCTIONS? ................................................................................................................... J-3

   A. When Can a Party Bring an Independent Cause of Action for Spoliation?.............. J-4
      1. Negligent Spoliation ...................................................................................................... J-4
      2. Intentional Spoliation .................................................................................................... J-5
   B. When Can a Party Pursue Discovery Sanctions Under Rule 219(c)? .......... J-5
   C. Spoliation in Illinois: Further Clarification. ................................................................. J-7
   D. Going Beyond the General Rule: When is a Duty to Preserve Evidence Triggered? .................................................................................................................. J-9

III. MAINTAINING A STRONG DEFENSE: KEYS TO PREVENTING SPOILATION OF EVIDENCE......................................................................................................... J-10

   A. When Does the Duty to Preserve Evidence Arise? ......................................................... J-10
   B. Who Has an Obligation to Preserve Evidence? ............................................................. J-11
   C. What Happens if Evidence is Not Preserved? .............................................................. J-11
      1. Damages....................................................................................................................... J-11
      2. Sanctions .................................................................................................................... J-11

IV. PRACTICAL TIPS TO AVOID SPOILATION ................................................................................. J-11

V. CONCLUSION ................................................................................................................................... J-12

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
RECENT DEVELOPMENTS IN SPOLIATION OF EVIDENCE LAW

I. INTRODUCTION: WHAT IS SPOLIATION OF EVIDENCE?

Spoliation of evidence is the loss, destruction, alteration or concealment of evidence. Spoliation can occur through intentional acts or by inadvertence or negligence. Spoliation can occur even when parties act in good faith. The loss suffered in spoliation cases is the party's interest in the ability to bring or defend against a lawsuit. In a spoliation situation, often one litigant is left in a position of unfair advantage due to the missing evidence.

II. CLARIFYING CLAIMS FOR SPOLIATION IN ILLINOIS: NEGLIGENCE SUIT OR DISCOVERY SANCTIONS?

Over the last two decades, Illinois courts have developed a body of case law discussing the issues relevant to spoliation of evidence. While Illinois does not recognize spoliation as an independent tort, it provides relief under general negligence law and through the pursuit of discovery sanctions. Courts have established that when key evidence is destroyed before a suit is filed, a party has two separate and distinct remedies: a negligence claim for spoliation of evidence or a motion for sanctions under Illinois Supreme Court Rule 219(c). *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387, 830 N.E.2d 645 (1st Dist. 2005).

In what has become known as the Illinois Supreme Court’s “watershed pronouncement” regarding negligent spoliation of evidence, the Court established a two-prong analysis for evaluating a negligence claim for spoliation of evidence. *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 195, 652 N.E.2d 267 (1995). Alternatively, the court has also addressed the availability of discovery sanctions under Illinois Supreme Court Rule 219(c) for failure to preserve evidence. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 692 N.E.2d 286 (1998).

Initially, lower courts were conflicted by the *Boyd* and *Shimanovsky* decisions, as the *Boyd* decision held there was generally no duty to preserve evidence while the *Shimanovsky* decision held that a potential litigant owes a duty to take reasonable steps to preserve the integrity of relevant, material evidence. In December 2004, the supreme court clarified its earlier decisions by providing that the *Boyd* and *Shimanovsky* decisions provide separate and distinct remedies. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 821 N.E.2d 227 (2004). The *Dardeen* court made clear that a duty to preserve evidence under *Shimanovsky* is inapposite to a claim for relief for negligence brought under *Boyd*. In 2012, the Illinois Supreme Court addressed the issue of spoliation again to further clarify when a duty to preserve evidence arises. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270.
A. When Can a Party Bring an Independent Cause of Action for Spoliation?

Spoliation includes the non-preservation of evidence as well as the destruction or significant alteration of evidence. Although other jurisdictions have recognized an independent tort for spoliation of evidence, Illinois law provides that such claims should be brought under general negligence principles, or by seeking discovery sanctions under Supreme Court Rule 219(c).

1. Negligent Spoliation

The general rule in Illinois is that there is no duty to preserve evidence. Boyd v. Travelers Ins. Co., 166 Ill. 2d 188, 195, 652 N.E.2d 267 (1995). However, a plaintiff may establish an exception to the general “no-duty” rule where he can satisfy a two-prong test. Under the first prong, or the “relationship” prong of the test, the plaintiff must show that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant. Boyd, 166 Ill. 2d at 195. Under the second prong, or the “foreseeability,” prong of the test, plaintiff must show that the duty extends to the specific evidence at issue by showing that “a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.” Id.

Traditionally, Illinois courts did not recognize a separate cause of action for spoliation of evidence. It was not until 1995 that the Illinois Supreme Court established that a claim for spoliation of evidence can be brought under existing negligence law. Boyd, 166 Ill. 2d 188. In Boyd, plaintiff, Tommy Boyd, was injured when the propane catalytic heater he was using while working inside a van owned by his employer exploded. Plaintiff soon filed a workers’ compensation lawsuit against his employer. Travelers Insurance was his employer’s workers’ compensation insurer. Two days after the explosion, a Travelers’ claims adjuster and another Travelers’ employee visited the Boyd residence and took possession of the heater. The Travelers’ representatives told Ms. Boyd Travelers needed the heater to investigate the workers’ compensation claim and determine the cause of the explosion. The heater was subsequently placed in a closet at a Travelers office, and when Plaintiffs requested that the heater be returned Travelers was unable to locate it.

In addition to filing suit against Coleman, the manufacturer of the heater, plaintiffs brought a suit against Travelers alleging negligent and willful and wanton spoliation of evidence. Plaintiffs alleged they were injured by the loss of the heater because they were not able to obtain an expert’s opinion as to whether the heater was defective or dangerously designed, and therefore, the loss of the heater had prejudiced their ability to pursue a product liability claim against Coleman. The trial court granted Travelers’ motion to dismiss the spoliation allegations on the basis that even though Illinois would recognize an independent cause of action for spoliation “given the right facts,” the Boyd’s claims were “premature unless and until they lost the underlying suit” against Coleman. Id. at 192. The supreme court disagreed, finding that, like a majority of other jurisdictions, Illinois does not recognize an independent cause of action for spoliation. The court reasoned that “[c]ourts have long afforded redress for the destruction of evidence and, in our opinion, traditional remedies adequately address the problem presented in
this case.” *Id.* at 194. While the court found plaintiffs could state a claim for spoliation under existing negligence law, it reserved the issue of whether intentional spoliation was actionable under Illinois law. Thus, in order to plead a cause of action for spoliation of evidence, plaintiffs had to prove: (1) the existence of a duty owed by the defendant to plaintiff; (2) a breach of that duty; (3) an injury proximately caused by the breach; and (4) damages resulting from the breach. *Id.* at 194-195.

The supreme court found there is generally no duty to preserve evidence; however, a duty to preserve may arise through an agreement, contract, statute, affirmative conduct or another special circumstance. *Id.* at 195. In any of the foregoing instances, a defendant owes plaintiff a duty of due care to preserve evidence if a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action. *Id.* In analyzing the issue of duty, the court found that Travelers voluntarily assumed a duty to preserve the heater when they visited the Boyd’s home and took possession of the heater, telling the Boyds that Travelers needed the heater to investigate the cause of the explosion and to evaluate the workers’ compensation claim. In short, Travelers, a sophisticated insurer, knew that the heater was evidence relevant to the litigation when they took possession of the heater just two days after the explosion.

With respect to the element of causation, the supreme court rejected Travelers’ position that the Boyds were required to lose the underlying lawsuit before they could pursue a cause of action against it for spoliation of evidence. The court held plaintiffs simply need to allege sufficient facts to establish that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying suit. *Id.* at 197.

2. **Intentional Spoliation**

Illinois has not expressly recognized the tort of intentional spoliation of evidence. In fact, courts have used the supreme court’s decision in *Boyd*, in which it declined to recognize an independent tort of spoliation, as a bar to such claims. While several other states do recognize claims for intentional spoliation, the elements vary from state to state due to each states’ public policy considerations. Generally, the elements of intentional spoliation of evidence are: (1) pending or probable litigation; (2) defendant’s knowledge of the existence or likelihood of litigation; (3) an intentional act to destroy evidence and undermine the plaintiff’s case; (4) disruption of the plaintiff’s case in fact; and (5) damages proximately caused by the act of spoliation. For further discussion, see 10 Ill. Prac. Civil Discovery § 25:11 (2012).

**B. When Can a Party Pursue Discovery Sanctions Under Rule 219(c)?**

As an alternative to bringing an independent case for negligent spoliation of evidence, Illinois courts have permitted a party to pursue discovery sanctions for the spoliation of evidence within a pending lawsuit.
In *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 692 N.E.2d 286 (1998), a products liability action was commenced against General Motors claiming that its power-steering mechanism was defective causing plaintiff to lose control of her car and crash on July 7, 1985. Prior to filing suit, plaintiffs retained a mechanical engineer to investigate whether the automobile possessed a defect which may have caused the crash. The expert’s investigation included examining the automobile’s power-steering mechanism, which required removing the mechanism and disassembling it. During the expert’s investigation, grooves were discovered in one of the power-steering components and another expert was retained to investigate whether the grooves were a result of the crash or whether they indicated a possible defect in the mechanism. The expert sectioned some of the components and performed various tests on the sectioned pieces in order to determine the cause of the grooves. As a result of these tests, the expert concluded that the grooves were not damaged from the crash, but rather were the result of long-term wear. Three years after plaintiffs filed suit, General Motors’ experts first viewed the automobile and its parts while the evidence was still in plaintiffs’ possession. GM’s experts opined that the plaintiffs’ automobile contained no defect or unreasonably dangerous condition which caused or contributed to the crash. In addition, the experts concluded that the sectioning of the power-steering components by plaintiffs’ expert deprived GM of the opportunity to show the jury further evidence of the proper manufacture and operation of the mechanism.

Plaintiffs filed a motion in *limine*, seeking to bar GM from cross-examining plaintiffs’ experts regarding their methods of testing the power-steering components. In response, GM filed a motion to dismiss the case or, in the alternative, bar any evidence of the condition of the power-steering mechanism pursuant to Supreme Court Rule 219(c), as a sanction for the destruction of the power-steering components without notice.

The circuit court denied plaintiffs’ motion in *limine* and granted GM’s motion to dismiss plaintiffs’ complaint with prejudice. On appeal, the appellate court found the lower court did not err in imposing a sanction on plaintiffs for the destructive testing of the power-steering components; however, the circuit court did abuse its discretion by dismissing plaintiffs’ case without first considering the degree of prejudice suffered by defendant. *Shimanovsky*, 181 Ill. 2d at 118.

GM appealed and the supreme court reviewed the case. The court reviewed Illinois Supreme Court Rule 219(c), which authorizes a trial court to impose a sanction, including dismissal of the cause of action, upon any party who unreasonably refuses to comply with any provisions of the court’s discovery rules or any order entered pursuant to these rules. Ill. Sup. Ct. R. 219; *id.* at 120. The court noted that some Illinois courts had held that it is unreasonable noncompliance, and thus sanctionable, for a party to fail to produce relevant evidence because it was destroyed prior to the filing of a lawsuit and, thus, before any protective order can be entered by the court. *Id.* at 123. The offending party’s conduct must be deliberate or contumacious, or evidence an unwarranted disregard of the court’s authority. Thus, the question in most Rule 219(c) cases is whether destruction of evidence is sanctionable. *Id.*
The court found that plaintiffs’ destructive testing interfered with the defendant’s right to formulate its defense to the products liability cause of action by preventing the necessary testing. As such, under the specific circumstances of this case, the court could not say that the trial court abused its discretion in determining that plaintiffs’ actions were an unreasonable noncompliance with discovery rules. \textit{Id.} at 123.

\textbf{C. Spoliation in Illinois: Further Clarification.}

In 2004, the Illinois Supreme Court revisited the issue of spoliation in \textit{Dardeen v. Kuehling}, 213 Ill. 2d 329, 821 N.E.2d 227 (2004). In \textit{Dardeen}, plaintiff fell in a hole in the sidewalk while delivering newspapers at defendant’s residence. After being notified of Dardeen’s accident, defendant Kuehling called her agent at State Farm to report the accident and ask whether some bricks in the sidewalk could be removed to prevent any further injuries. The agent said yes and the homeowner proceeded to remove the bricks to fix the hole.

Plaintiff filed a premises liability complaint against Kuehling which included a claim for negligent spoliation against Kuehling and State Farm. The trial court granted defendants’ motion for summary judgment, the appellate court reversed and the Illinois Supreme Court heard the case.

The Court in \textit{Dardeen} held that the plaintiff failed to establish the first required element of his claim. Dardeen alleged that the duty to preserve evidence arose from the insurance contract between State Farm and the homeowner. However, the court clarified its use of the term “agreement” by explaining that the agreement mentioned in the \textit{Boyd} test had to be between the parties to the spoliation claim, i.e., plaintiff Dardeen and State Farm. It was clear that the insurance agreement between homeowner and State Farm did not provide for a duty to preserve evidence relative to Dardeen. \textit{Dardeen}, 213 Ill. 3d at 337-338.

The court further reasoned that Dardeen never contacted the defendant to ask it to preserve evidence. Dardeen never requested evidence from State Farm, nor did he ever request that State Farm preserve the sidewalk or even document its condition. Additionally, unlike \textit{Boyd}, State Farm never possessed the evidence at issue and, thus, never segregated it for the plaintiff’s benefit. \textit{Id.} at 338. State Farm argued, and the court agreed, that “no Illinois court has held that a mere opportunity to exercise control over the evidence at issue is sufficient to meet the relationship prong.” \textit{Id.} at 339. Without evidence of possession or control by State Farm of the sidewalk, the court found State Farm owed no duty to Dardeen to preserve it. \textit{Id.}

More recently the issues of sanctions was discussed in \textit{Adams v. Bath & Body Works, Inc.}, 358 Ill. App. 3d 387, 830 N.E.2d 645 (1st Dist. 2005). Plaintiff Adams, a tenant whose wife died in a house fire, brought a products liability action against the manufacturer and distributor of a candle, the alleged cause of fire, and a Smoke Detector Act claim against the property owner, Ms. Kubasak. The manufacturer and distributor of the candle filed a third-party action against the property owner’s insurer, State Farm, for negligent spoliation of evidence.
Although neither state nor city fire inspectors were able to pin down the cause of the fire in Kubasak's residence, they were able to determine that the fire began near a couch located in the living room. During the investigation, plaintiff's counsel removed two lamps from the residence that were suspected by government fire investigators to be the potential cause of the fire. Later, plaintiff's own investigator opined that the fire was caused by a candle located on a table in the living room. In the meantime, Kubasak hired a fire restoration company to clean up debris. Unbeknownst to plaintiff, the fire restoration company removed and destroyed an end table, the couch, and some carpeting among other items that belonged to plaintiff.

State Farm hired an expert to investigate the cause of the fire. During the expert's deposition, he testified that after ruling out the home's wiring, appliances, and fixtures, he believed one possible cause of the fire was a candle placed on the end table. His belief was based on the fact that the area in which these items were located contained the heaviest “char or burn marks,” as well as plaintiff's statement to fire inspectors that he blew out a candle on the end table before going to bed on the night of the fire. Because the end table, couch, and carpet had been destroyed, however, there was no physical evidence that would either support or refute plaintiff's statement as to the candle's location in the residence. Further, plaintiff did not learn of the expert's opinion until long after the end table, couch and carpet had been destroyed.

The circuit court granted a motion filed by the candle manufacturer and distributor dismissing plaintiff's claims as a discovery sanction pursuant to Supreme Court Rule 219(c) for failing to preserve evidence. On appeal, plaintiff contended that the circuit court abused its discretion in dismissing his complaint as a discovery sanction because he did not know the table was relevant evidence nor was he responsible for its destruction. Defendants argued plaintiff should have known the items might be relevant in determining the cause of the fire, and therefore; plaintiff breached his duty under Boyd and Shimanovsky to preserve the evidence.

The appellate court discussed the potential conflict between the supreme court's decisions in Boyd and Shimanovsky and the recent treatment of those decisions in Dardeen.

The court, citing Dardeen, reversed the lower court stating that when key evidence is destroyed prior to the time a suit is filed, a party has two separate forms of relief available: a negligence claim for spoliation of evidence or a motion for sanctions under Rule 219(c). Adams, 358 Ill. App. 3d at 393-394.

The lesson to be taken from this is that the two remedies, i.e., a claim for negligent spoliation of evidence in Boyd and dismissal as a sanction under Rule 219(c) in Shimanovsky, are separate and distinct. Dardeen, 213 Ill. 2d at 339-40.

In other words, Shimanovsky and Boyd present a party confronted with the loss or destruction of relevant, material evidence at the hands of an opponent with "two roads diverged in a wood." He may either (1) seek dismissal of his opponent's complaint under Rule 219(c) or (2) bring a claim for negligent spoliation of evidence. The mode of relief most appropriate will depend upon the opponent’s
culpability in the destruction of the evidence. The former requires conduct that is “deliberate [or] contumacious or [evidences an] unwarranted disregard of the court’s authority” and should be employed only “as a last resort and after all the court’s other enforcement powers have failed to advance the litigation.” . . . The latter requires mere negligence, the failure to foresee “that the [destroyed] evidence was material to a potential civil action.” . . . Because [the candle manufacturer and distributor] chose to take the Rule 219(c) road, any reliance upon Boyd or its progeny to support the circuit court’s sanction is inappropriate. (citations omitted)

Adams, 358 Ill. App. 3d at 393-94. The appellate court reversed the lower court’s sanction, holding that first, plaintiff did not engage in any “knowing and willful defiance of the discovery rules or the trial court’s authority.” Id. at 396, citing Shimanovsky, 181 Ill. 2d at 129. The destruction of the end table, couch and carpet occurred long before plaintiff filed his lawsuit. Second, the carpet belonged to Kubasak, and it is questionable whether he could have compelled her to preserve it. Third, even if he could have preserved this evidence, plaintiff had no knowledge that it might have been relevant and material. Finally, and perhaps most importantly, plaintiff played no role in, nor had any notice of, the destruction of the evidence which defendants claim was essential to their defense. Id.

D. Going Beyond the General Rule: When is a Duty to Preserve Evidence Triggered?

Just last year, the Illinois Supreme Court provided further clarification to the duty exception with respect to the voluntary undertaking and special circumstance exceptions. Martin v. Keeley & Sons, Inc., 2012 IL 113270. In Martin, plaintiffs were working on a project involving the reconstruction of a bridge as employees of the project’s general contractor, defendant Keeley. While plaintiffs were installing a handrail on the bridge, a concrete I-beam used to support the bridge deck collapsed, causing plaintiffs to fall into the creek below. Plaintiffs received injuries as a result of the fall. Site inspections were performed by the Illinois Department of Transportation (“IDOT”) and the Occupational Safety and Health Administration (“OSHA”) on the day of the accident. The day after the accident, Keeley destroyed the I-beam by breaking it up with a hammer in order to remove the beam from the creek to prevent erosion and to recover the “embeds,” embedded steel plates inside the beam, so that they could be used in the manufacture of a replacement beam. Plaintiffs filed suit against their employer, Keeley, as well as the manufacturer of the I-beam, Egyptian Concrete Company and the designer of the bearing assembly that supported the I-beam, Allen Henderson & Associates, Inc. Plaintiffs’ claims against Keeley were for negligent spoliation of evidence. Subsequently, Egyptian and Henderson brought counterclaims against Keeley, which also included claims for negligent spoliation of evidence. The question of fact surrounding the negligence claims was whether the beam rolled over before it broke. Neither plaintiffs nor Keeley’s co-defendants had an opportunity to inspect the beam before it was destroyed. Martin, 2012 IL 113270 at ¶ 1-21.
The trial court granted Keeley’s motion for summary judgment and found that Keeley had no duty to preserve the I-beam for the benefit of the other parties. Id. at ¶ 20. On appeal, the appellate court reversed the trial court’s grant of summary judgment and remanded the case for further proceedings. The appellate court found that “by preserving the I-beam for its own purposes, Keeley voluntarily undertook a duty to exercise due care to preserve the beam for the benefit of other potential litigants.” Id. at ¶ 21. The Illinois Supreme Court granted review to address whether Keeley owed a duty to preserve the I-beam for the other parties. Plaintiffs and counter-defendants argued that Keeley voluntarily undertook a duty to preserve the I-beam for its own purposes thus satisfying the first prong of the Boyd analysis or, alternatively, Keeley’s exclusive possession and control of the evidence, its status as plaintiffs’ employer and its status as a potential litigant gave rise to a “special circumstance” in which Keeley had a duty to preserve the evidence. Id. at ¶ 28.

The court found there was no voluntary undertaking by Keeley to preserve the evidence for future litigation that would give rise to a duty to preserve the I-beam for other parties. A voluntary undertaking requires showing of affirmative conduct by the party evidencing its intent to voluntarily assume a duty to preserve evidence. Id. at ¶ 31. The court noted that Keeley never performed any testing of the beam nor did it move the beam from the place where it had fallen. Although Keeley allowed IDOT and OSHA to inspect the beam, this was not sufficient to give rise to a duty to preserve the beam for other parties. The court recognized that a “voluntary undertaking requires some affirmative acknowledgement or recognition of the duty by the party who undertakes the duty. Id. at ¶ 36.

The court also found that plaintiffs and co-defendants had failed to establish special circumstances that would give rise to a duty to preserve the I-beam. Citing its prior decisions, the court held that Keeley’s mere possession and control of the I-beam was insufficient to create a special circumstance exception to the general “no duty” rule absent some other evidence such as a request by another party to preserve the evidence and/or the defendants’ segregation of the evidence for the plaintiff’s benefit. Moreover, the court also rejected the argument that an employer-employee relationship was sufficient to establish a duty to preserve evidence.

III. MAINTAINING A STRONG DEFENSE: KEYS TO PREVENTING SPOILIATION OF EVIDENCE.

A. When Does the Duty to Preserve Evidence Arise?

Determining whether a duty to preserve evidence exists is a fact-sensitive analysis and defense counsel should be consulted whenever possible. Although, there generally is no duty to preserve evidence in Illinois, a duty may arise through agreement, contract, statute, special circumstance or affirmative conduct. Once a duty to preserve is established, the duty extends to any evidence that a reasonable person would foresee as being material to the potential civil action. With respect to the “special circumstance” exception, courts have found that in order to give rise to a “special circumstance” in which a party has a duty to preserve evidence, there must be some
affirmative conduct undertaken to preserve evidence for use in future litigation. Mere possession and control of the evidence may not be enough to establish a duty. However, when a party has knowledge of documents, photographs, or tangible evidence related to an accident and takes possession and/or control of those items for the purpose of litigation, it affirmatively assumes the duty to protect that evidence from harm for the benefit of other parties. Once the party is in control of the items, it must exercise ordinary care to prevent loss, damage, alteration or destruction of the evidence.

B. Who Has an Obligation to Preserve Evidence?

The duty to preserve evidence extends beyond the agent, adjuster or claims representative assigned to a given case. The duty to preserve also applies to any consultants, experts, insureds or any other individuals acting under the supervision or direction of the insurer. Therefore, claims professionals must take adequate care to properly supervise the actions of such individuals and be vigilant in preventing loss destruction or alteration of evidence.

C. What Happens if Evidence is Not Preserved?

1. Damages

In a negligent spoliation claim, the actual damage to plaintiff is the loss of the ability to succeed on the underlying action. The *Boyd* case suggests that when evidence is spoiled, the insurer may be liable for actual damages, or the actual harm suffered by the plaintiff as a result of the destruction of evidence. Because the actual loss to the plaintiff in a spoliation case is the inability to succeed in the underlying action, the actual damages may include those complained of in the underlying suit. Therefore, it is crucial that steps are taken to properly preserve evidence when a duty to do so has arisen.

2. Sanctions

Apart from monetary damages, another potential remedy for a spoliation claim is the imposition of sanctions against the defendant. The court may elect to use its supervisory powers to impose sanctions such as striking pleadings, barring expert testimony, excluding other relevant evidence, giving adverse jury instructions which permit the jury to presume that the unavailable evidence was harmful to the party responsible for the spoliation or, in rare circumstances, dismissing the suit.

IV. PRACTICAL TIPS TO AVOID SPOILATION

Claims professionals should take steps to ensure evidence is properly preserved following an incident to avoid the risk of spoliation. Failing to take steps to avoid the loss, destruction, alteration or concealment of evidence may subject the insurer and the insured to severe sanctions if the other party can prove it has suffered some prejudice.
1. Before suit is filed, claims professionals should ensure that steps are taken to preserve evidence that may be relevant to the potential suit. It is important to preserve the evidence in its entirety, not just the parts that may appear relevant to the insured, carrier or expert. The claims professional should also remember that in some circumstances, it might be impossible or impracticable to preserve the evidence in its found state. In that situation, it is critical to document why the evidence could not be preserved.

2. If the claims professional is aware of potential evidence before suit is filed, he should attempt to obtain an agreement from the possessor of the evidence that the evidence will be preserved and that no destructive testing will occur without notice. In some circumstances, the claims professional may want to have the evidence inspected by an expert. If, after notice, a product which is not inspected is subsequently lost, a court may determine that, although some sanction is necessary, failure to inspect the product might not warrant dismissal of the case.

3. Creation of an evidence locker or evidence room will help to avoid spoliation. Evidence can be identified, marked and located in a manner that prevents loss or destruction of the evidence. In the event evidence is too large to be stored in a locker or room, it is import to document your file regarding the location and condition of the evidence. You should also attempt to confirm in writing that the possessor of the evidence will agree to preserve it and will refrain from taking any action that will alter the evidence.

4. When appropriate, the claims professional should work with defense counsel to evaluate whether a protective order requiring preservation of the evidence is warranted. A protective order can prevent any party from engaging in destructive testing without notice or agreement of the other parties. A protective order can be obtained even before suit is filed.

5. Claims professionals should notify experts that destructive testing should not be performed without prior approval. If testing is contemplated, the carrier needs to determine the type of test that will be performed and whether it will alter or destroy the evidence. If the test if going to be destructive, the carrier may want to seek an order from the court permitting such testing.

V. CONCLUSION

Spoliation can be easily prevented through careful and diligent investigation and monitoring. It is critical that claims professionals be mindful of the ongoing need to preserve evidence that may be relevant to future or pending litigation. Quite frequently, the insured may not understand the importance of preserving evidence following an accident which may lead to loss, destruction or alteration of the evidence, albeit unintentional. Evidence that may be relevant to future litigation must be protected whenever possible and, if collected, be preserved and any changes to the evidence well documented. Consultation with defense counsel throughout the
investigation process is advised. When careful and thorough planning for the preservation of evidence is followed, the likelihood of a claim for spoliation of evidence can be minimized.
A native of St. Joseph, Illinois, Sara began her career at Heyl Royster as a law clerk in the Urbana office. While in law school, Sara served as a Taylor Mattis Fellow and was a student member of the American College of Legal Medicine. Sara also served as a legal intern for the legal department at Carle Foundation Hospital in Urbana, Illinois. While with Carle, Sara was involved with physician credentialing, quality assurance, risk management, corporate compliance and hospital administration issues. Sara joined the firm in 2006 in the Edwardsville office as an associate.

Sara practices in the area of general tort litigation, with a particular interest in the defense of asbestos claims, healthcare matters, and professional liability cases. Sara assists in the preparation of the defense of numerous asbestos personal injury suits, including the preparation of significant motions and briefs. In addition, Sara also defends the firm’s clients at depositions of plaintiffs and co-workers in both Illinois and Missouri.

**Professional Associations**
- Madison County Bar Association
- Illinois State Bar Association
- The Missouri Bar
- American Bar Association
- American College of Legal Medicine (Editor-in-Chief 2011-present)

**Court Admissions**
- State Courts of Illinois and Missouri

**Education**
- Juris Doctor, Southern Illinois University School of Law, 2006
- Bachelor of Arts-Business Administration, Illinois Wesleyan University, 2003