

*To the Victor Go the Spoils*

## Be Wary of Independent Tort Claims for Spoliation

by Jeffrey L. O'Hara and Matthew I. Gennaro

**"It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic."**

Justice Benjamin Nathan Cardozo,  
*Shepard v. United States*,  
290 U.S. 96, 104 (1933)

**"See ya in court, Simpson. Oh, and bring that evidence with ya. Otherwise, I got no case and you'll go scot-free."**

Police Chief Wiggum, "The Simpsons"

One person's refuse may not just be another person's treasure—it may be evidence. Given that evidence is the very foundation upon which all cases are built, the preservation of evidence, or anything that may potentially become evidence, is paramount and should be foremost on the mind of counsel in any given scenario.



Jeffrey L. O'Hara is a partner, and Matthew I. Gennaro an associate, in the Roseland, New Jersey firm of Connell Foley LLP. Mr. O'Hara has handled over 50 jury trials and is designated by the Supreme Court of New Jersey as a Certified Civil Trial Attorney. He is a member of DRI's Trial Tactics Committee. Mr. Gennaro focuses his practice in the areas of litigation and insurance law.

But what about those lawyers and, indeed, clients who are yet not parties to a case? Does any burden fall upon them? Is there an affirmative duty to preserve and store potential evidence in cases not yet alleged? Increasingly, the answer is no. Yet, the possibility of an independent action for evidence spoliation should be considered. Case law in this area is contentious, changing and, where it does exist, often incomplete. This is because there are four possible claims that may arise from spoliation of evidence, and few courts have ruled definitively on all four, nor have they reached a consensus as to the elements or proofs required for each. Combine this with the fact-sensitive nature of any spoliation claim and counsel should be wary of opening the door with a scenario that may be the newest arrow in a plaintiff's quiver. Counsel should assume that spoliation is an issue with any property that may be related to a claim, and take steps to protect all interests accordingly.

### The History of Spoliation and Its Remedies

Spoliation is best described as "the willful destruction of evidence or the failure to preserve potential evidence for another's use in pending or future litigation." *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D.Va.2001). While

spoliation may bring to mind visions of late-night paper shredding sessions by scandal-ridden politicians or corporate executives, it is not merely a modern problem. In *Armory v. Delarmirie*, 93 Eng. Rep. 664 (K.B.1722), the most commonly cited early case of spoliation, a chimney sweeper's boy found a ring and brought it to a goldsmith to be appraised. The goldsmith's apprentice removed the jewels from the ring before summoning the goldsmith to appraise it, and then refused to return the jewels to the boy. Upon the boy bringing suit, the court instructed the jury that "unless the defendant did produce the jewel, and shew [*sic*] it to not be of the finest water, they should presume the strongest case against him, and make the value of the best jewels the measure of their damages: which they accordingly did." *Id.*

The remedy used in *Armory* for spoliation, the spoliation inference, is by far the most common and well known. This evidential inference is a civil remedy which allows the factfinder "to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her." *Rosenblitt v. Zimmerman*, 766 A.2d 749, 755 (N.J.2001). The spoliation inference, in the form of establishing facts for lack of evidence, has existed in the United States at the state and federal level since the early days of the Constitution. See *Hammond Packing v. Arkansas*, 212 U.S. 322, 351–353 (1909). Moreover, it is codified in Federal Rule of Civil Procedure 37 and the corresponding state court rules. Indeed, the very term "spoliation" is derived from the legal maxim describing the spoliation inference, "*omnia praesumuntur contra spoliatorem*," or "all presumptions are against one who wrongfully dispossesses another (a despoiler)." *Black's Law Dictionary* 1671 (7th Ed.1999).

Other remedies for spoliation have developed over the years. For example, a court may impose sanctions on a party for failure to make disclosures in discovery. While Federal Rule 37(b)(2) and corresponding state court rules predicate such sanctions on the existence of an Order, courts have used their "inherent power" to impose sanctions in the absence of an order. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("The inherent powers of federal courts are those which 'are necessary to the exercise of all others.'") (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812); *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1998); *Calabrese v. Trenton State College*, 392 A.2d 600 (N.J.App.Div.1978), *aff'd* 413 A.2d

315 (N.J.1980). In some cases, sanctions for spoliation have gone so far as the entry of a default judgment in favor of the non-spoliating party. See, e.g., *Keene v. Brigham and Women's Hosp., Inc.*, 786 N.E.2d 824 (Mass.2003); *DiDomenico v. C&S Aeromatic Supplies*, 252 A.D.2d 41 (N.Y.App.Div.1998).

In addition, counsel inculpated in spoliation may face ethical or malpractice allegations. See Model Rule of Professional Conduct 3.4 (2001) (an attorney shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value" or "falsify evidence" or assist another in doing so). Also, a great many states have gone so far as to make spoliation of evidence a criminal offense, although such laws are only rarely enforced. See, e.g., West's Ann. Cal. Penal Code §135 (West 2004) (misdemeanor); 720 Ill.Comp.Stat. 5/31-4 (Smith-Hurd 1998) (class 4 felony); N.Y. Penal Law §215.40 (McKinney 1998) (Class E Felony).

### Spoliation as an Independent Tort

The most controversial and far-reaching remedy for spoliation of evidence has been its recognition as an independent claim for either intentional or negligent destruction of evidence. Both remedies originated in California. In *Smith v. Superior Court*, 151 Cal.App.3d 491 (Cal.Ct.App.1984), the California Court of Appeals first recognized the intentional spoliation of evidence as a separate and distinct tort. The plaintiff was blinded by injuries when, while driving a car, the wheel of a passing van flew off and crashed through her windshield. The van was taken for repair to the company that had installed the van's custom wheels. The defendant, however, later destroyed certain automotive parts key to the plaintiff's claim against it, despite an agreement with counsel to maintain those parts. The California Court of Appeals held that the plaintiff could bring an independent action against the company for intentional spoliation of evidence.

*Smith* was soon followed by *Velasco v. Commercial Building Maintenance Co.*, 169 Cal.App.3d 874 (Cal.Ct.App.1985), which ruled that negligent spoliation of evidence may constitute a separate cause of action. In *Velasco*, a maintenance worker at a law firm threw away an unmarked paper bag sitting on an attorney's desk. Unfortunately, the bag contained pieces of a glass bottle that were key to a product liability claim being brought by that attorney's client, Pedro Velasco. Velasco brought suit for negligent spoliation of evidence against the maintenance company. While the California Court of Appeals did not find the maintenance worker liable for negligent spoliation (stating that a reasonably thoughtful worker could not have foreseen the harm), it opined, "[f]or the reasons described in *Smith*, we hold that a cause of action may be stated for negligent destruction of evidence needed for prospective civil litigation." *Id.* at 877. *Velasco* was unique in that a third party, not a party to the litigation, perpetrated the negligent spoliation.

**I**n reality, spoliation of evidence can encompass not one, but four separate torts.

In the years since, over 26 jurisdictions have addressed the issue of whether to adopt an independent tort for the spoliation of evidence. See *Hannah v. Heeter*, 213 W.Va. 704, n.4 (2003). In the end, however, "the tort of spoliation of evidence has not been widely adopted in other jurisdictions, nor has much agreement emerged on its contours and limitations." *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So.2d 1124, 1128 (Miss.2002). This is not surprising when one considers that, in reality, spoliation of evidence can encompass not one, but four separate torts: (1) intentional spoliation by a party to underlying litigation; (2) negligent spoliation by a party to underlying litigation; (3) intentional spoliation by a third party not a party to underlying litigation; and (4) negligent spoliation by a third party not a party to underlying litigation. See Bart S. Wilhoit, "Spoliation of Evidence: The Viability of Four Emerging Torts," 46 U.C.L.A. L.Rev. 631 (1998). Even the California Supreme Court, in a dramatic turnaround, overruled both *Smith* and *Velasco* in 1999 and no longer recognizes either intentional or negligent spoliation of evidence as a separate cause of action for first- or third-party conduct. See *Temple Community Hosp. v. Superior Court*, 976 P.2d 223 (Cal.1999).

The vast majority of courts have held that intentional and/or negligent spoliation by a party to underlying litigation ("first-party spoliation") is not actionable separately in tort. These courts have generally reasoned that, given the evidential remedies for spoliation

already available to parties in litigation, outside remedies are superfluous: "[w]ithout creating a new cause of action, there are still a variety of remedies available to punish spoliators, deter future spoliators, and protect non-spoliators prejudiced by evidence destruction." *Trevino v. Ortega*, 969 S.W.2d 950, 961 (Tex.1998) (Baker, J., concurring). As such, the number of states that currently recognize first-party spoliation in some form is limited. Four states recognize only first-party intentional spoliation of evidence as an actionable tort: Louisiana, Indiana, Ohio, and West Virginia. Additionally, the District of Columbia, Illinois and Pennsylvania only recognize negligent first-party spoliation as a distinct cause of action. Florida recognizes both.

The reasoning for declining to recognize a separate claim for intentional or negligent first-party spoliation is sound. Traditional remedies are tailored to most common intra-litigation situations. Since "obligations not to destroy evidence arise in the context of particular lawsuits... spoliation is best remedied within the lawsuit itself, not as a separate tort." *Trevino*, 969 S.W.2d at 953.

### Third-Party Spoliation

Traditional remedies for spoliation, however, are wholly ineffective in dealing with both intentional and negligent third-party spoliation. As one commentator noted:

The traditional remedy of an evidentiary inference is wholly inapplicable to a third party. A fact-finder may not use an adverse inference against a third party to determine liability in the underlying case. Therefore, if a third-party spoliation tort is not recognized, "there may be no civil remedy to compensate a litigant who is victimized by a nonparty spoliator."

Benjamin T. Clark, "The License to Spoliate Must Be Revoked: Why Missouri Should Recognize a Tort for Third-Party Spoliation," 59 J.Mo.B. 308, 311 (2003) (quoting Jonathan Judge, "Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort," 2001 Wis. L. Rev. 441, 459 (2001)).

This perspective is critically important to any attorney, as it may create a situation where you or your client may not be conscious of the litigation consequences of seemingly innocuous actions with regard to what later may be held to constitute evidence: your client could find itself dragged into court defending a civil claim for spoliation of evidence. A simple ex-

ample, substituting a truck for the *Velasco* bag of glass, highlights the potential problem: Joe Smith is injured in a car accident when he loses control of his car and hits a truck driven by Bob Jones. Jones does not appear to be liable in any way, and both vehicles are totaled. The truck is placed in storage for several months before the trucking company has it scrapped and recovers its insurance policy proceeds. Months later, as the attorney for the trucking company, you receive a call from counsel for the manufacturer of Joe's car. Joe has filed a product liability suit against the car's manufacturer and key (relatively speaking) to the manufacturer's defense is an accident reconstruction that will require an expert to inspect the truck. Uh-oh.

Should there be an affirmative duty to keep evidence in the absence of a suit if a reasonable person would expect that litigation might ensue? This simple question raises a myriad of other questions which should concern counsel evaluating a client's exposure to a spoliation claim: Where and when does such a duty arise? How long must evidence be preserved? What is evidence? Most important, what damages may arise from this action or inaction? Thankfully, the answers to these questions raise such serious concerns about the imposition of duties and the calculation of damages that courts have been increasingly hesitant to permit independent spoliation theories against third parties.

### Majority View: *Intentional Third-Party Spoliation Not Recognized*

The principles enunciated in two recent cases succinctly set forth the majority view that third-party spoliation is not an independent claim whether it be intentional or negligent. As noted, California, which originated both first- and third-party spoliation as stand-alone causes of action, overruled *Velasco* in the 1999 *Temple* decision. In *Temple*, a former patient sued a hospital for intentional spoliation after it destroyed medical equipment that had allegedly caused her injuries. The patient needed the equipment as evidence to substantiate a product liability claim against its manufacturer. Although the court had previously noted that the "intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation," *Cedars-Sinai Med. Ctr. v. Superior Court*, 74 Cal.Rptr.2d 248, 249 (Cal.1998), it held that intentional third-party spoliation was not actionable, and overruled *Velasco*. The *Temple* court did not

consider addressing third-party spoliation.

While sympathizing with the position of victims of spoliation, the *Temple* court held, in the final analysis, "the benefits of recognizing a tort cause of action, in order to deter third party spoliation of evidence and compensate victims of such misconduct, are outweighed by the burden to litigants, witnesses, and the judicial system that would be imposed by potentially endless litigation over a speculative loss, and by the cost to society of promoting onerous records and evidence retention policies." 976 P.2d at 233. The court was not concerned that the majority of sanctions for spoliation were ineffective in deterring third parties, reasoning that this "may well be because third party spoliation has not appeared to be a significant problem in our courts." *Id.* at 232.

With respect to the imposition of a duty on third parties, the court questioned the efficacy of imposing a duty on those not a party to a lawsuit. The plaintiff had contended "her constitutional right of free access to the courts bars private persons from destroying objects of potential relevance to a lawsuit." *Id.* at 233. The court disagreed and opined that, to the extent that a third party has a legislative or contractual duty to preserve evidence, civil and criminal sanctions may be imposed. The court, however, did not provide examples of such duties. Further, the court was concerned that "the broad threat of potential liability, including that for punitive damages, might well cause numerous persons and enterprises to undertake wasteful and unnecessary record and evidence retention practices." *Id.* at 232.

Concerns relating to the issue of damages were of utmost importance to the decision to reject the claim. The court was hesitant to "provide disappointed litigants a second opportunity to seek the compensation they sought in the original lawsuit, even if they [sought] it against a party not involved in the original lawsuit." *Id.* at 229. The court reasoned that the spoliation tort would, in effect, require a retrial to permit the plaintiff to demonstrate "in what respect the alleged spoliation altered the outcome of the first trial." *Id.* In addition, the court commented that a third-party spoliator would normally be discovered during the trial of the underlying action, resulting in "potential for jury confusion and for inconsistency" in results. *Id.* at 231.

Several recent cases have followed the reasoning of *Temple*. See, e.g., *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So.2d 1124 (Miss.2002);

*Timber Tech Engineered Bldg. Products v. The Home Ins. Co.*, 55 P.3d 952 (Nev.2002); *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 303 A.D.2d 30 (N.Y.App.Div.2002), *aff'd* 1 N.Y.3d 478, 775 N.Y.S.2d 754 (2004).

### Majority View: *Negligent Third-Party Spoliation Not Recognized*

In *MetLife*, a home insured by MetLife sustained over \$330,000 in damage from a fire that allegedly developed in an aftermarket electronic remote starter system installed in the dashboard of a Chevy Tahoe parked in the garage. Royal Insurance Company, which insured the dealership which owned the car, took possession of the vehicle after indemnifying its insured, the car dealer. Even though it voluntarily agreed in a phone conversation to preserve the vehicle for inspection by MetLife and others, Royal later allowed the car to be sent to a salvage yard and scrapped. MetLife then sued Royal for negligent and reckless spoliation of evidence, which it claimed irrevocably impaired its ability to successfully pursue a claim against the installer of the custom electronics system.

In reviewing the case, the Appellate Division of the New York Supreme Court (noting that the issue of whether to recognize a cause of action for negligent third-party spoliation had not yet been considered by it or the New York Court of Appeals) was wary of the underlying problem, noting "we are concerned with an act of spoliation allegedly committed by an entity that, if not entirely a stranger to the underlying claim, certainly could not have been held liable on that claim." 303 A.D.2d at 34. The court also recognized, however, that the societal costs of mandating the preservation of anything that might conceivably be or become evidence may be enormous, given that, as an example, "many vehicles regulated to a salvage yard would ordinarily constitute relevant evidence of at least a potential property damage claim." *Id.* at 39. Moreover, the court mirrored *Temple* in its concerns over the establishment of causation, proof of injury, the possibility of contemporaneous litigation, and the calculation of damages. *Id.* "Even if the fact of harm can be ascertained or assumed, it would be virtually impossible to measure the degree of harm and the precise extent of damages, and any attempt to do so would involve inherent and irreducible speculation." *Id.* at 42. As such, the court, relying heavily on *Temple*, concluded that it would

not recognize a cause of action against negligent third-party spoliators, considering the potential burdens on third parties to be too great. *Id.* at 43.

In affirming this decision, the New York Court of Appeals similarly concluded that the potential burdens on third parties weighed against recognizing an independent claim for negligent third-party spoliation:

The burden of forcing a party to preserve [evidence] when it has no notice of an impending lawsuit, and the difficulty of assessing damages militate against establishing a cause of action for spoliation in this case, where there was no duty, court order, contract or special relationship.

*MetLife*, 1 N.Y.3d at 484, 775 N.Y.S.2d at 757.

### Minority View: Third-Party Spoliation Recognized as Independent Tort

Not all courts, however, have followed the reasoning in *Temple*. Indeed, even the majority opinion in *Temple* prompted a spirited dissent, which argued that a separate tort should be recognized. “There are no strong and effective nontort remedies that would significantly deter third party spoliation,” and “the interests of the spoliation victim are entitled to legal protection.” 976 P.2d at 240. In addition, *Temple* was in direct contradiction to one California commentator who suggested that intentional third-party spoliation was the only instance in which a separate tort should be recognized. Wilhoit, *supra*, at 674 (“Courts should only recognize a separate tort for spoliation in the rare situation of intentional spoliation of evidence by a third party.”).

The recent decision in *Hannah v. Heeter*, 584 S.E.2d 560 (W.Va.2003) dramatically displays reasoning in polar opposite to *Temple* and *MetLife*. In *Hannah*, the West Virginia Supreme Court of Appeals ruled that both intentional and negligent spoliation by a third party are separate actionable torts. In this case, Patricia Hannah brought a sexual harassment suit against her employer, David Heeter. Hannah alleged that Heeter, during numerous meetings, offered to promote her in exchange for sexual favors. Hannah allegedly tape-recorded one of these meetings. The tape was produced and submitted to an expert to determine if the recording had been altered. The expert claimed that it was not an original recording, and that he could not properly analyze the tape. It was later revealed that Hannah’s mother had destroyed the original recording, and Heeter

filed a counterclaim against Hannah and her mother for several causes of action, among them negligent and intentional spoliation of evidence. The West Virginia Supreme Court considered the certified questions of whether to recognize an independent tort for negligent first-party spoliation, negligent third-party spoliation, and intentional spoliation (by either a first or third party).

In answering the latter two questions in the affirmative, the court stated that to do otherwise would be inconsistent “with our policy of providing a remedy for every wrong and

**Y**our client may not be

conscious of the litigation

consequences of seemingly

innocuous actions.

compensating victims of tortious conduct.” *Id.* at 568. This is in stark contrast to the dismissive views of *Temple* and *MetLife* that, *inter alia*, a stand-alone tort is not necessary given that third-party spoliation “has not appeared to be a significant problem [in our courts].” Further, the *Hannah* court held that a duty to preserve evidence does in fact exist in certain circumstances. “[A] duty to preserve evidence for a pending or potential civil litigation may arise in a third party to a civil action through a contract, agreement, statute, administrative rule, voluntary assumption of duty by the third party, or special circumstance.” *Id.* at 569.

Thus, the West Virginia court required six elements for the bringing of a claim for negligent spoliation of evidence:

- The existence of a pending or potential civil action;
- Actual knowledge of the pending or potential civil action;
- A duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances;
- Spoliation of the evidence;
- The spoliated evidence was vital to a party’s ability to prevail in a pending or potential civil action; and
- Damages.

*Id.* at 569–570.

For intentional spoliation, the court required seven elements:

- A pending or potential civil action;

- Knowledge by the spoliator of the pending or potential civil action;
- Willful destruction of evidence;
- The spoliated evidence was vital to a party’s ability to prevail in the pending or potential civil action;
- The intent of the spoliator to defeat a party’s ability to prevail in the pending or potential civil action;
- The party’s inability to prevail in the civil action; and
- Damages.

*Id.* at 573.

Most important in the successful pursuit of these two independent torts is the calculation of damages. If the requisite elements are established under either test, a rebuttable presumption arises that, but for the spoliation, the victim would have succeeded in their underlying lawsuit. Thus, the potential for damages in these cases is enormous, potentially encompassing every conceivable type of civil case with damages ranging from minimal to financially back-breaking.

West Virginia’s decision followed others that contained similar reasoning. *See, e.g., Smith v. Atkinson*, 771 So.2d 429 (Ala.2000); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C.1998); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267 (Ill.1995).

### Conclusion

Although courts have been loathe to recognize spoliation as an independent cause of action, case law in this area is hardly consistent and the concept is replete with danger. While courts rarely permit third-party spoliation claims, siding with the rationale enunciated in *Temple*, *MetLife* and *Hannah* demonstrate the potential for change in the appropriate venue or factual scenario.

How then should counsel proceed in the face of this uncertainty? The safest course is to presume the law does or will recognize spoliation as an independent claim and take precautions accordingly. First, if a client has the unfortunate opportunity to possess potential evidence, it should be safeguarded until it can be confirmed that the potential claimant does not require it. If one is uncertain, a telephone call and confirming letter advising of the existence of the item and, most importantly, the intention to discard it should provide some future protection. If the potential claimant expresses the desire to utilize the item, depending on its value, give it to

the claimant or store it with the expressed understanding that the claimant will be responsible for the storage costs.

While this suggestion may be easy to articulate but difficult to implement, the alternative is to absorb the value of the item or storage costs. Simply stated, from a business and future litigation perspective, it may be better to pay now than to pay later. **FD**