

Fire Investigation and Products Liability Litigation
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**PLAINTIFF SPOILIATION:
STRATEGIES FOR YOUR FIRE RELATED PRODUCTS LIABILITY LAWSUIT**

1. INTRODUCTION

Products liability cases pose special problems for manufacturer defendants. The public policy onus placed on product manufacturers through a strict liability regime means that few effective defenses are available. More and more, courts are allowing cases in products liability to proceed on amorphous “duties to warn” and other theories while curtailing the traditional defenses of alteration, misuse and assumption of the risk as manufacturers are charged with anticipating a seemingly infinite array of alterations or misuses a product may encounter in its lifecycle. It is little wonder then that any strategy that would allow manufacturers to take a preemptive attack or aggressive counterattack is a welcome addition to an almost empty quiver.

One strategy which can provide an effective defense in the proper factual circumstances is spoliation. True, it may only prove fatal to the plaintiff’s case on rare

occasions, but it is worth considering and as early in the process as possible. Fire related cases are unique in relation to spoliation because of the inherent nature of the fire cause and origin investigation that will accompany all attempts to defend against a product liability claim. The plaintiff will have premised his claim on the “defective” product as the cause of the fire and the ensuing damage to property or person. Just as certainly, it will be of great importance for the manufacturer’s representative, insurance adjuster, or other interested party being sued in the action to have a fire cause and origin investigator examine the product and fire scene as quickly and thoroughly as possible. If we convey any general principles today they revolve around three themes and an admonition to begin thinking about the issue of spoliation at the earliest stages of the defense in such circumstances. Further, the defense should look to three areas for clarifying its options. The spoliation at issue will deal with the product itself or the fire scene; the spoliation may be engaged in by the plaintiff’s expert, own insurance adjuster or some other party; and finally, the types of sanctions that are available to the court may influence the decision regarding when and how to deploy the spoliation issue in the litigation.

The National Fire Protection Association’s 921 guidelines are the standard for fire investigation. Chapter 11.3.5 states, “Spoliation of evidence refers to the loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation. Spoliation of evidence may occur when the movement, change or destruction of evidence or the alteration of the scene significantly impairs the opportunity of other interested parties to obtain the same evidentiary value from the evidence, as did any prior investigator.” (Chapter 11.3.5.)

NFPA 921 is the acknowledged authority on standards, techniques and methodologies for use by all cause and origin experts for fires and explosions. In fact NFPA 921 will be the primary source of the analysis and methodologies used to determine whether a particular product itself was the cause and origin of the fire in the underlying litigation. Because this is so, courts have increasingly looked to this standard both to qualify expert fire investigators for providing testimony and to make evidentiary rulings as to the fruits of NFPA 921 sanctioned or non-sanctioned activity. The most recent edition of NFPA 921 has impacted the ways in which interested parties, attorneys and courts have addressed spoliation and as a result the strategies for defending products liability lawsuits.

First, we will examine some of the basics of NFPA 921 and address the areas where spoliation questions appear most prominently. We review the methodological, legal and physical evidence areas of most import. Then we address the parameters of a strategic deployment of a possible spoliation defense. In this section we take a closer look at the interrelationship between the remedies and sanctions available to the court and its intersection with the product, fire scene and the fire investigating expert. The basics of NFPA 921, recognition of its fundamental importance, and a global view of the options available to manufacturer's counsel in a fire related products liability situation should prove useful.

2. NFPA 921

The National Fire and Protection Agency Guide for Fire and Explosion Investigations, generally referred to as NFPA 921, functions both as a shield and a sword in spoliation cases involving fire investigations. A general understanding of the circumstances of its application in either mode is helpful. It is important that all of the members of the team that could be part of the defense of a possible or pending action on behalf of a defendant in a products liability case involving a fire or explosion remain cognizant of the advantages of following NFPA 921 protocol and the possibly severe implications for failing to follow this standard. If it is not followed, a range of court sanctions and problems could arise.

Although many investigators, who are most often previous fire fighters, had years of experience and personal familiarity with fires and fire scenes, the methods by which they came to their conclusions for causes and origins on occasion lacked methodological rigor. The first edition of the NFPA guide was produced in 1992 primarily as an attempt to clarify and codify more rigorous standards and methods for the investigation of fires and explosions and to emphasize the need to include the scientific method into the process of fire investigation and evaluation. NFPA 921 was written by the NFPA Technical Committee and has undergone numerous revisions since 1992. The most recent edition was released in 2004.

The important sections for spoliation related investigation include Chapter 4—Basic Methodology; Chapter 11—Legal Considerations, and; Chapters 16-18—which provide standards and methods for engaging, analyzing and preserving a fire scene for interpretation. We will not analyze the last set of chapters in great detail here, but we do

need to address the first two issues—basic methodology and legal considerations in some depth.

A. Basic Methodology

Without an understanding of the basic methodology, the remainder of NFPA 921 would be useless. Though this methodology is laid out crisply, almost minimally, in Chapter 4, we should realize that this is the heart of the document. This chapter is the theoretical core from which the remainder issues. And at the very center of the new guidelines resides the scientific method. As a preamble to elucidating this method in the fire investigation context, the authors make plain that fire investigation is “a complex endeavor involving skill, technology, knowledge and science.” (4.1.) Fire investigation should not be thought of as a seat of the pants operation, or one based solely on many years of experience. It is not guesswork but “[t]he compilation of factual data, as well as an analysis of those facts . . . accomplished objectively and truthfully.” (4.1.) Most of all the approach to the investigation must be systematic.

In answering, “what is systematic?” 4.2 tells us that the approach recommended is the scientific method and that it is not only “desirable” but “necessary in a successful fire investigation.” Finally in 4.3 and its subparts the method and its implications are examined. We will not go through the whole litany except to note some important issues. The general outline of the process is set out from 4.3.1 to 4.3.6—Recognize the need (identify the problem); Define the problem; Collect data; Analyze the data (inductive reasoning); Develop a hypothesis; Test the hypothesis, and; though not given its own subsection one might say repeat as needed to get to a final hypothesis.

The Guide's recommendations for analyzing the data and developing the hypothesis show how substantially the authors have used the physical sciences as their model of investigation. When analyzing any data from a fire or explosion the investigator may not use any "[s]ubjective or speculative information . . . only facts that can be proven clearly by observation or experiment." (4.3.4.) But this does not mean that the analysis should abjure the investigator's "knowledge, training, experience, and expertise." (4.3.4.) To the degree any of the latter areas are not subjective or speculative, they should be used in analyzing the empirical data available to the investigator to develop a hypothesis(es). But any hypothesis or hypotheses "should be based solely on the empirical data that the investigator has collected" from all available sources and must be subsequently tested before any conclusion can be drawn. If no hypothesis provides a provable conclusion, a fire cause must be classified as undetermined. (4.3.5, 4.3.6.)

One final, but crucial assumption of this systematic process is presented as part of the sub-sections on the scientific method. It appears to be quite simple but is significant when questioning an investigator's competency; particularly if the investigator is placed in or accepts a partisan position as we will see in later cases discussing the so-called *Daubert* reliability standards for allowing expert testimony. Section 4.3.7, makes clear that "[u]ntil data have been collected, no specific hypothesis can be reasonably formed or treated. All fires, however, should be approached by the investigator without presumption." This by definition means that any investigating expert has a duty to approach his task without any presumptions about what caused the fire. This may be difficult to do in the litigation or insurance context if zealous advocacy on the part of counsel or partisanship on the part of the investigator compromises this basic tenet.

By now it should be clear that the NFPA wants fire investigation to follow the CSI: Miami model rather than Miami Vice model. It is attempting to make fire investigators into scientists in addition to grizzled veterans of fire fighting. It is important to realize because assessments about a spoliation claim may be substantially affected by knowledge about the presumptions or non-rigorous procedures used by an opposing side or a third party. One can attack the conclusions by attacking the method.

B. Legal Considerations

It is obvious that a fire investigator, even in a civil case, operates at the nexus of numerous legal regimes and requirements. Access to the site, the terms of the engagement, police and fire fighting issues, professional ethics and integrity and of course the focus of our concern here, the responsibility for maintaining the value of the evidentiary chain, all are entangled with legal issues or pitfalls. NFPA 921 is fully cognizant of this and provides in chapter 11 a detailed initial exposition of the areas of concern.

Since we began with the definition of spoliation provided by NFPA 921, let's return there for a few moments again and look a bit closer. Note that the definition does not address any factual issues. Rather it is based on the impact it has on other interested parties. This is of course to suggest that the basis in equity for deciding if spoliation sanctions should be sought or levied against a party remains the prejudice suffered by an unequal access to the value of the evidence. The definition does not say how the spoliation must be instantiated, only impairment of the opportunity—in our case of a product liability defendant—to obtain evidentiary value for a defense.

Again, there is no need to go into the exact specifics, but NFPA 921 explicitly indicates the conditions under which a public investigator such as police or fire personnel as well as private investigators have the proper authority to investigate. It should be noted that private investigators get their authority through contract or by consent only. In addition there may be licensing requirements for a private fire investigator. We recently had a case in which a fire expert and his colleague, an electrical engineer, entered a boarded fire occurrence site without the consent of the landowner. It appears that the plaintiff's lawyer gave them the permission to proceed. Much of the fire scene was disturbed when these two experts physically removed many electrical components and moved fire debris.

Unfortunately, a lawyer has no authority to allow such an activity on the land of another. Even so, experienced fire investigators, familiar with NFPA 921, would have known that without the consent of the landowner, they likely lacked the authority to conduct the investigation absent exigent circumstances, and that removal of the evidence from a fire scene which involved a fatality without the proper notification was explicitly forbidden by NFPA 921. In our case, we only discovered the problem when our own cause and origin expert went to the site and reported that the location appeared to be tampered with and crucial evidence was missing. Interestingly enough, the plaintiff in this case is anxious to bring a product liability count against the manufacturer of a product thought to be the cause of the fire. One can already see that the product liability defendant will seek to shield itself with a spoliation defense as has our client.

In most spoliation cases the spoliators are usually the parties and usually do not involve a fire scene. If a fire is involved, generally an expert must be involved to

determine its origin and cause. The parties have a duty to preserve evidence if they should be aware that litigation may ensue. As NFPA 921 explains, in section 11.3.5.1, the fire investigator also has such a responsibility or duty to preserve the evidence. “[R]egardless of the scope and responsibility of the investigation, care should be taken to avoid destruction of evidence.” (11.3.5.1.) It is clear from this section that a court could infer a duty to preserve the evidence incumbent on the investigator. NFPA 921 is aware that the scope of this duty includes the planning, documentation, handling and preservation of the evidence both, before, during and even after the litigation may be finished.

Often fire scenes may present situations such that alteration of the scene may be absolutely necessary to determining the cause and origin of the fire or for some other reason. Perhaps the evidence will be lost, or permanently altered if left in situ, or is of an evanescent nature such as volatile gases or liquids. Often enough the fire scene may be such that the structural integrity of the building may be in jeopardy or the need to restore the site is pressing. Under these circumstances, the movement or alteration of the evidence may be allowed without any inference that the scene has been subjected to spoliation. This is outlined in 11.3.5.4 and 11.3.5.5. The example presented is of interest to us here. “[T]he manufacturer of an appliance may not be known until after the unit has been examined for identification. Such activities should not be considered spoliation.” Thus movement or alteration alone is not enough to base a claim of spoliation if an adequate and necessary reason can be shown. In addition, “[s]teps taken to protect evidence should also not be considered spoliation.” (11.3.5.2.) Complete and exhaustive documentation should be produced even more carefully if the fire scene is to be disturbed

or the scene altered for the purposes of the investigation. Numerous sections of the NFPA 921 elucidate the proper techniques for such documentation.

An important attendant issue to the investigation undertaken with the proper authority centers on the type of notification required to other parties with an interest in the investigation. The type and number of notices will vary depending on the circumstances. Certainly, as 11.3.5.6 asserts, “[o]nce evidence has been removed from the scene, it should be maintained and not be destroyed or altered until others who have a reasonable interest in the matter have been notified.” Lack of such notification may increase the risk of sanction by the courts especially when the situation makes it obvious that litigation or the property interests of another is at stake. As we will see shortly, when weighing the equities, courts naturally frown upon conduct that clearly indicates deceit or obvious shoddiness by plaintiff’s expert.

The expert’s attributes may themselves come under legal scrutiny. In certain jurisdictions, the investigator must be licensed or certified. In Illinois, for example, the appeals courts are split on this issue. This may lead to difficulty qualifying an expert for testifying. One particular issue that we shall address in greater depth later deals with showing the reliability of the expert’s opinion and surviving motions in limine based on so-called “Daubert” challenges in federal courts and similar criteria in state courts. This type of challenge questions the methodology and reliability of the opinions proffered by an expert to meet the threshold for allowing expert evidence to be given to the fact finder. Section 11.5.2.3.6 (C) makes it evident that the authors are fully aware of these challenges and the role of the NFPA 921 guidelines. It is worth quoting at length.

It is important to note that the United States Supreme Court has held that the *Daubert* factors used in determining reliability [of expert witnesses] apply not only to scientific testimony, but to testimony based upon technical or other specialized knowledge. The court's inquiry into the reliability of proposed expert testimony may extend to an evaluation of the methodology on which the opinion is based. The methodology will be validated upon a showing that accepted investigative techniques were used and that the methodology and reasoning were correctly applied to the facts at issue. The potential witness can use this document [that is to say NFPA 921], as well as others, to establish that the methodology used in reaching an opinion was reliable.

It becomes obvious now why not following the guidelines of the most important standard in the field of fire investigation could lead to problems for an investigator. This is not to say that everything must be followed without exception in every circumstance. After all, both courts and the NFPA are aware that the factual circumstances may require flexibility in applying the guidelines and a reasonable basis for not following the tenets in a particular situation may not prove fatal. Even so, we should remember that the methodological requirements, as opposed to the specific procedures elucidated in the NFPA 921, can rarely be ignored and still pass muster in a *Daubert*-type challenge. After all, *Daubert* makes clear that “[t]he subject of an expert’s testimony must be ‘scientific’ . . . knowledge. The adjective ‘scientific’ implies a grounding in the

methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than a subjective belief or unsupported speculation.” Cited in *Royal Insurance Co. of America v. Patrick Magee*, 208 F. Supp. 2d 423, 427 (S.D.N.Y. 2002). This certainly sounds like the methodological standards established by NFPA 921 that we discussed earlier. (See also 18.6.1 which also cites *Daubert* and links it to the need for hypotheses to be testable.) NFPA 921 has transformed the field of fire investigation with this insistence on the scientific method as the core of any origin and cause investigation.

C. Physical Evidence

Chapters 14 through 20 of NFPA 921 provide the nuts and bolts of procedures and protocols associated with the actual process of the fire investigation and the full scope of analysis for determining the origin and cause of a fire or explosion. It certainly can make for some interesting reading, but for our purposes here, we will only be looking selectively at these chapters. The most immediately pertinent one is 16 entitled “Physical Evidence.” 16.3.1 instructs the investigator that “[E]very attempt should be made to protect and preserve the fire scene as intact and undisturbed as possible, with the structure, contents, fixtures, and furnishings remaining in their pre-fire locations.” In addition, the subsequent sub-section introduces a note of strong caution that “the cause of a fire or explosion is not [generally] known until near the end of the investigation. . . . As a result, the entire fire scene should be considered physical evidence and should be protected and preserved. (16.3.1.1) The chapter goes on to detail many different aspects of the process to assure the protection, preservation and proper

basis for subsequent analysis of the fire scene. Yet it recognizes that as with alteration and movement of evidence at the fire scene, the preservation of the scene may not continue indefinitely nor insisted upon if an unsafe condition exists. “Once the scene has been documented by interested parties and the relevant evidence removed, there is no reason to continue to preserve the scene.” (16.3.7.) It further suggests that a decision should be made by all the known interested parties as to when the scene can be demolished, renovated or put back to use.

Chapters 17 and 18 proscribe a method for determining the origin and cause of the fire. Most telling, the authors write that “[i]f no determination is made as to the fire’s origin, then the determination of the fire’s cause becomes very difficult.” One method that is available in such a circumstance is outlined in 18.2, but it is hedged about with cautionary language and another insistence on the scientific method backing up any attempts to determine the cause by a “process of elimination” procedure.

We have provided a review of the more important portions of NFPA 921 that would be applicable for our purposes and as a way to begin thinking about using spoliation as both a shield and a sword. We now turn to the parameters of spoliation strategy for product liability defendants.

3. LITIGATION STRATEGIES

In appraising the value of spoliation as a viable strategy for litigation under our circumstances, the manufacturer's counsel will need to recognize three general areas of decision-making: the product, the expert and the position of courts in sanctioning spoliation. Each of these presents a specific focus of information gathering for manufacturer's counsel though there is plenty of overlap.

A. The Investigation of the Product by the Expert and Attorney

A manufacturer's counsel is often the first to discover that some product has been involved in a fire and that there may be some claim in the offing linking a defect in the product to the fire. Often enough, the lawyer is retained long after the fire. This should immediately give rise to a set of questions about the possible spoliation of the product after the fire and the status of the fire scene for access to alternative causation possibilities. Counsel should be aggressive in attempting to ascertain this information. The earlier in the case that spoliation can be introduced as a concern or legal strategy, if it is appropriate, the better. Failure to actively pursue this information or waiting for standard discovery may mean that the spoliation issue will only become apparent late in the game. A court may not look as kindly on a defendant that has not been actively seeking to acquire the basic information about its product and the fire scene's condition until late in the litigation.

It may be prudent to request the results of the plaintiff's fire investigator's investigation from the plaintiff or his attorney to determine whether the investigator adhered to the dictates of NFPA 921. Initially, a redacted report, omitting any opinions or conclusions, is likely to be the extent of any compliance with the request because the fire investigator will, in most cases, be called as an expert witness by the plaintiff. The

key distinction to make during these threshold inquiries is that the discovery sought is limited to the manner and methods of the fire investigator's examination of the evidence in order to determine if a defense based on that evidence is available or whether a claim of spoliation should be brought.

Courts have found that plaintiff's have a duty to preserve evidence of alternate causes of fires and not deprive the defendants of meaningful investigations. *American Family Ins. v. Black & Decker (U.S.) Inc.*, 2003 U.S. Dist. Lexis 16245 (N.D. Ill. September 16, 2003). In Illinois, the courts have explicitly found that a defendant has a duty to preserve evidence. However, no independent tort of spoliation has been recognized in Illinois. It is reasonable that in jurisdictions recognizing such a duty that the next logical evolution would be the court's recognition of an independent action for spoliation that will deter and redress this recurrent obstacle in the defense of lawsuits in the strict product liability regime.

B. Discovery Related to Spoliation Issues

Although more difficult to obtain, a court may provide supervised limited discovery in order to determine whether possible spoliation has occurred. This will necessitate the filing of a motion in order to inform the court of the purpose of such discovery and identify the information sought. The argument will have to be made that the information sought does not go to the merits of the plaintiff's case, but rather to the formal procedures followed by the plaintiff, his investigator, or insurance company. The standard discovery tools are available. Ideally, an attorney employing this tactic will obtain leave of the court to depose the investigator on the limited subject of the procedures followed in the investigation. Hopefully this deposition will give both parties

an opportunity to determine **at the outset** whether the case will have a spoliation element. The most effective manner of deposing an investigator in this scenario is to follow the requirements of NFPA 921 and ask the investigator whether or not each step was followed. If the requirement was met, then the questioning party moves on to the next requirement confident that the testimony is preserved and that the defense case will not be handicapped by spoliated evidence. If, however, the requirements have not been met, the investigator must offer a reasonable explanation for the deviation. Whether or not the explanation is reasonable may be the subject of motions in limine and expert testimony later in the litigation.

In the event that the court does not grant leave to take the investigator's deposition, a limited amount of written discovery should take place to develop this potential defense. This can come in the form of interrogatories, requests to produce, and requests to admit that are drafted specifically to obtain information regarding adherence to NFPA 921. While written interrogatories and production requests are helpful in this threshold determination, requests to admit can be ideal. A well tailored request to admit will force a plaintiff's attorney to admit or deny facts which will illustrate whether or not the fire investigator adhered to NFPA 921, not through opinions, but through factual assertions. For example, broad questions such as whether, in his opinion, the fire investigator complied with all applicable standards in his investigation may not allow a complete picture whether the standard was followed. A request to admit, however, may be drafted to ascertain whether a specific standard was followed. For example, a request could be related to whether or not the fire investigator indicated the weather conditions on the Fire Incident Field Notes form (NFPA Figure A.15.3.2(a)). If a request to admit is

admitted or unanswered, the request is deemed admitted. This is a very important tool at the disposal of defense attorneys both at the onset of the litigation as well as at trial and as support for motions for summary judgment.

Another option is to seek further information via subpoena. This presents problems when dealing with acquisition of information from the expert retained by the plaintiff. If the expert has been retained by the plaintiff, then he will be an agent of the plaintiff and again not subject to subpoena and his work may fall under attorney work product privilege. Even so, in many jurisdictions, if the plaintiff, or his agent, is the only one that has access to factual information of import, exceptions to the privilege have been carved out. Finally, if the expert is not retained by the plaintiff but by a non-party, such as the insurance company, or is an agent of the insurance company, the defense may under certain circumstances and depending on local case law, issue subpoenas for such experts.

Due to the fact that a request for this limited discovery with respect to the actions of the fire investigatory is being made *prior* to expert discovery (and ideally prior to fact discovery), it is incumbent on the attorney employing this tactic to take the time to explain to the court why the information requested is necessary at the early stages of the litigation. The information obtained aid the defense attorney and court at the early stages of the litigation by placing both on notice that spoliation issues may or may not arise. Further, a plaintiff's attorney will realize that the evidence obtained and the investigation done by his investigator, the basis of his case, may never come before a jury.

On the other hand, counsel for the manufacturer must also be cognizant of spoliation issues linked directly to the status and actions of the plaintiff's fire

investigation expert and perhaps guide his own expert. Numerous cases have been reported where the expert for the plaintiff has been the spoliator, or has failed to follow the protocols of NFPA 921 or any other systematic procedure to pass the *Daubert* threshold, or even simply an expert who negligently keeps the evidence in an inappropriate location. Most commonly, if the plaintiff's expert has not followed the protocols of NFPA 921, there will be an attempt to bring a motion in limine, or initiate a *Daubert* hearing to bar the expert's testimony for lack of reliability.

C. Pre-Trial Motions, Sanctions and Related Evidentiary Issues

Motions in limine are an opportunity for defense counsel to argue that the defense of the case is prejudiced by the plaintiff's spoliation. Likewise, in a *Daubert* hearing, a fire investigator must qualify as an expert in order to testify at trial. This may be the final opportunity to have the evidence and the investigator barred. The investigator must convince the judge that his investigation rendered a sufficiently reliable opinion. Cross-examination by defense counsel with knowledge of unreasonable deviations from NFPA 921 should render the investigation unreliable and therefore the opinion of the investigator as to cause and origin insufficient. As a result, the plaintiff will not be able to prove his case and a directed verdict in the defendants' favor should be granted. The exclusion of evidence in this fashion, of course, may be requested earlier in the litigation, if discovered, and will be the basis for a summary judgment motion on the same grounds.

One of the most extreme rulings a court can make in a case involving plaintiff spoliation is outright dismissal of the lawsuit, often as a result of disallowing an the plaintiff's expert's evidence. It is extreme (and therefore rare) because it denies the plaintiff his day in court without taking into consideration the merits of his case. Usually, the court will require intentional actions on the part of the plaintiff in order to trigger dismissal. The level of egregious conduct required varies because the courts must balance the right of the plaintiff to have his day in court with the potential prejudice to the defense of the manufacturer. Generally speaking, courts require either bad faith or lesser malfeasance. In *Citizens Insurance Company of America v. JUNO Lighting, Inc.*, 247 Mich. App. 236 (2001) the Court of Appeals of Michigan upheld the trial court's dismissal of a case due to the plaintiff's investigator's failure to preserve all lighting fixtures that may have cause the fire. The appellate court noted that the trial judge had considered less severe sanctions, but then determined that sanction short of dismissal would be ineffective.

The destruction of evidence does not necessarily indicate that sanctions will be imposed against the spoliator. Courts have adopted many tests for determining when sanctions are appropriate. One of the most widely-accepted standards was formulated by the Third Circuit in *Schmid v. Milwaukee Electric Tool Corp.*, 13 F. 3d 76 (3rd Cir. 1994). The *Schmid* court found it appropriate to impose sanctions by weighing the following factors:

- (1) the degree of fault of the party who altered or destroyed the evidence;
- (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the

opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

The *Schmid* test highlights the two most important considerations to be weighed in spoliation claims - the conduct of the destroyer and the resultant prejudice suffered by the other party. The elements of the test also demonstrate the difficulty in striking a balance between these two considerations.

The difficulty in managing these two sometimes contrary considerations was acknowledged by the *Schmid* court when it stated that "we consider it more prudent to rely on the traditional case by case approach" rather than adopt a uniform rule which could result in injustice in many situations. While the first two factors are the most important in deciding whether to impose sanctions, the third factor merely speaks to determining the appropriate remedy. Therefore, while the *Schmid* test consists of three factors, the court really weighs the first two and subsequently applies the third to determine the appropriate remedy.

With such a fact-specific approach, disparate results can occur from application of the same test. In both *Schmid* and *Schroeder v. Commonwealth*, 710 A. 2d 23 (Pa. 1998) the courts applied the three factors to reverse trial court dismissals for spoliation. The courts felt dismissal was too harsh under the circumstances. However, in *Moyers v. Ford Motor Co.*, 941 F. Supp. 883, 884 (E.D. Mo 1996) a different court applied the same factors to a similar set of facts and found that dismissal of the plaintiff's case was appropriate.

A second test, applied by some lower district courts in the First Circuit, focuses

on five factors: "1) prejudice to the defendant, 2) whether the prejudice can be cured, 3) the practical importance of the evidence, 4) whether the plaintiff [acted] in good faith or bad faith, and 5) the potential for abuse." The only significant difference between *Schmid* and these lower district court cases in the First Circuit is the latter's specific reference to the notion of bad faith. This added element of the test is also used in the Fourth Circuit, for example, where bad faith has been regarded as a prerequisite to obtaining dismissal. Bad faith is a higher standard than the fault-based test articulated in *Schmid*, which a court could use to allow sanctions whenever a party is guilty of destroying evidence regardless of the party's intent. Therefore, the bad faith element required in the lower district courts of the First Circuit's seem to place more emphasis on the conduct of the spoliator rather than on the spoliation's effect on the other party. However, the First Circuit Court of Appeals has not yet adopted this test of its lower courts, so it is unclear if it is the definitive test for spoliation in that circuit.

The Tenth Circuit has adopted still a third test for imposing sanctions for spoliation. This test takes into account the following: (1) the degree of prejudice to the defendant's case, (2) whether the spoliation interfered with the judicial process, (3) the plaintiff's culpability, (4) whether the plaintiff was warned that noncompliance with discovery could result in dismissal, and (5) the efficacy of imposing a lighter sanction. By its very language, this test applies specifically to the remedies available for violations of Federal Rule 37. Therefore, the two basic considerations present in the other tests - the spoliator's conduct and the prejudice to the other party - must also be weighed against the effect the destruction of evidence has had on the discovery process.

While the language of the tests may vary slightly, the underlying considerations

are the same. Despite any semantic differences, all courts weigh the negative impact on the defendant against the nature of the plaintiff's conduct to determine an appropriate sanction on a case-by-case basis. Various jurisdictions may emphasize one factor over another, such as a specific reference to bad faith or the discovery process, but all take the same considerations into account.

In *American Family Insurance Co. v. Village Pontiac GMC, Inc.*, 223 Ill. App. 3d 624 (2nd Dist. 1992) the trial court entered an order barring the plaintiff from presenting any evidence as to the condition of the subject vehicle at the trial as a sanction for the plaintiffs' acquiescence to the destruction of the subject vehicle after his investigator's inspection. The defendant promptly moved for summary judgment which was granted. On appeal, the Illinois Appellate Court upheld the entry of summary judgment, reasoning "defendants were unable to inspect, as plaintiffs' experts were, the most important evidence because of plaintiffs' actions. Plaintiffs were the only individuals with first-hand knowledge of the physical evidence which is far more probative under these circumstances in determining whether the vehicle caused the fire than photographs and two wires taken from the trunk area. The physical object itself in the precise condition immediately after an accident may be far more instructive and persuasive to a jury than oral or photograph descriptions." *American Family Ins. Co.* 223 Ill. App. 3d 624, 627 (Ill. App. Ct., 1992).

Another remedy available to courts is the jury instruction or spoliation inference. In this case, the court will instruct the jury that the missing or altered evidence should be presumed to have been unfavorable to the party responsible for the destruction or alteration of the evidence. For example, in Illinois, courts have approved the use of

Illinois Pattern Jury Instruction 5.01 against spoliators, which allows a jury to infer that the evidence within the control of a party which fails to produce would be unfavorable to that party.

Judicial sanctions are also frequently invoked for the loss or destruction of evidence. Sanctions may be particularly severe where the evidence was the subject of a protective order. In *Jones v. Goodyear Tire and Rubber Co.*, 966 F.2d 220 (7th Cir. 1992) the Seventh Circuit affirmed a directed verdict against Goodyear, which had lost an essential piece of evidence in violation of a protective order. A more frequently employed sanction is to bar evidence or testimony which presumably would have benefited the spoliator.

In the event that the spoliation issue is latent, the options available to defense counsel are necessarily delayed due to lack of information at the outset of the litigation. Traditional discovery processes may uncover previously unknown issues, including spoliation. Unfortunately, extensive legal fees are incurred by this point in the litigation. However, some jurisdictions like Ohio have taken strong stances on spoliation of evidence by establishing an independent action for intentional or negligent spoliation of evidence. In *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037 (Ohio 1993) the Ohio Supreme found that the cause of action for interference or destruction of evidence exists when there is pending or probable litigation involving the plaintiff, knowledge by the defendant that there is a potential for litigation, willful destruction of evidence designed to disrupt the case, disruption of the case, and damages proximately caused from the acts. Especially in the strict liability arena, an independent action may serve some salutary functions in creating an incentive for plaintiff's and their agents to avoid spoliation.

