Spoliation of Evidence: The Continuing Search for a Remedy and Implications for Aviation Accident Investigations

Kenneth R. Lang
Pamela Clancy
Matthew D. Flesher

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SPOLIATION OF EVIDENCE: THE CONTINUING SEARCH FOR A REMEDY AND IMPLICATIONS FOR AVIATION ACCIDENT INVESTIGATIONS*

KENNETH R. LANG**
PAMELA CLANCY***
MATTHEW D. FLESHER****

TABLE OF CONTENTS

I. INTRODUCTION ............................................. 998
II. OVERVIEW OF SPOLIATION .............................. 1000
III. THE SANCTION OF DISMISSAL OR DEFAULT FOR SPOLIATION ............. 1002
   A. DISMISSAL OR DEFAULT WHEN SPOLIATION RESULTS FROM WILLFUL CONDUCT .......... 1003
   B. DISMISSAL OR DEFAULT WHEN SPOLIATION RESULTS FROM GROSSLY NEGLIGENT OR RECKLESS CONDUCT .......... 1009

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** Partner, Morrison & Hecker, Wichita, Kansas; United States Naval Academy; Texas Lutheran College; B.A., 1974, Kearney State College; J.D., 1976, University of Nebraska College of Law.
*** Associate, Morrison & Hecker, Wichita, Kansas; B.H.S., cum laude, 1980, Wichita State University; J.D., 1989, University of Denver College of Law.
**** Associate, Morrison & Hecker, Wichita, Kansas; B.S., magna cum laude, 1987, Wichita State University; J.D., magna cum laude, 1990, Washburn University School of Law.

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997
C. DISMISSAL OR DEFAULT WHEN SPOILATION RESULTS FROM MERELY CARELESS CONDUCT 1012

IV. EXCLUSION OF EVIDENCE AND/OR EXPERT TESTIMONY 1014

V. ADVERSE PRESUMPTION INSTRUCTION 1019

VI. TORT REMEDIES 1020

VII. IMPLICATION FOR AVIATION ACCIDENTS AND NTSB INVESTIGATIONS 1025

VIII. SUGGESTIONS AND CONCLUSIONS 1031

I. INTRODUCTION

One of the issues arising with increasing frequency in products liability litigation, including aviation related cases, is the question of how the courts should respond when a party is found to be responsible for altering, failing to preserve, losing, or destroying crucial pieces of evidence. A number of courts and commentators have recently begun to address these questions, suggesting a variety of possible solutions and remedies for such "spoliation" of evidence. The resulting opinions offer a range of available sanctions, which have been imposed on the basis of conduct along a continuum of culpability from mere carelessness to willful misconduct.

The purpose of this article is to group significant cases broadly by the nature of the remedy fashioned by the court and by the character of the conduct found to justify imposing each remedy upon the wrongdoer. It is hoped that analysis of the cases in this manner will provide the aviation practitioner with a valuable understanding of the current trends in spoliation law and serve as an aid in formulating case strategy when spoliation problems arise.

Part II provides a general overview of the nature and scope of spoliation remedies. The sources of judicial authority to punish spoliation, the objectives of courts imposing such punishment, and the types of remedies that have emerged are summarized.

Part III discusses cases in which courts, faced with a spoliation issue, imposed the ultimate available punishment on
the wrongdoer: dismissal of its claims or the entry of judgment against it. Part III additionally examines the nature of the actions and conduct found to warrant this rather extreme remedy. Examples are given of cases where disposi-
tive action was taken by the courts for willful, grossly negligent or reckless, and merely careless acts resulting in the loss or destruction of evidence.

Part IV examines cases where the courts found that the appropriate remedy for the acts of spoliation in question was the exclusion of evidence and/or expert testimony from the wrongdoer’s case-in-chief. This section considers the courts’ apparent desire to “level the playing field” in applying the exclusion remedy.

Part V briefly discusses the most traditional and arguably the least effective of the spoliation remedies: an instruction to the jury that a rebuttable adverse presumption arises that the destroyed or lost evidence, if produced, would have been unfavorable to the wrongdoer. The continuing viability of this remedy and the rationale for its imposition are examined.

Part VI examines the relatively recent development of independent tort remedies for spoliation which may be brought by the aggrieved party against the wrongdoer. The evolution of these remedies, their current status, and the elements of the torts as delineated by the courts that recognize them are discussed.

Finally, Part VII, for the consideration of the aviation practitioner, raises questions about the application of the emerging law of spoliation to the conduct of an accident investigation by the National Transportation Safety Board (NTSB). Such investigations frequently are conducted, at least in part, with direct participation by potential defendants or their representatives (for example, airframe manufacturers, power plant manufacturers, and component suppliers) and often without any participation by potential plaintiffs. The statutory and regulatory framework under which these investigations are conducted are outlined, and authorities are discussed which indicate that a private party
participating in such an investigation at the request of the NTSB investigator-in-charge may be subject to spoliation remedies if evidence is lost as a result of the party's actions in connection with the NTSB investigation. Measures are suggested which, if taken by such private participants, may reduce the possibility of spoliation claims arising while they fulfill their roles as members of the investigative team.

II. OVERVIEW OF SPOLIATION

The term "spoliation of evidence" refers to the loss, destruction or material alteration of tangible evidence, whether negligent or intentional. Spoliation may be due to careless inaction, mere fault, or simple negligence and does not always involve blatant conduct of the "willful," "bad faith," "deliberate," or "grossly negligent" type. The spoliation may occur prior to or after the commencement of litigation.

Spoliation of evidence involved with products liability lawsuits is not a novel problem; however, during the past six years, federal and state courts around the country have begun to take a more aggressive approach to addressing this recurring problem. To date, the majority of the decisions have arisen over spoliation claims raised by defendants. Frequently, a defendant manufacturer, faced with claims of product defect, finds itself deprived of the opportunity to conduct an examination of the allegedly defective product because of prior spoliation. This situation often arises after an opposing party, and frequently that party's expert, has examined, and perhaps even tested, the product.¹ Spoliation claims can also arise against a manufacturer, for example, where a plaintiff releases key evidence to a manufacturer or its insurance company for examination during pre-litigation claim evaluation and the evidence is lost or destroyed, either before or after it is tested by the defendant.

¹ See Sam LaManna, Courts Take a Harder Line On Spoliation, Nat'L L. J., July 26, 1993, at 17.
In such a situation, the party deprived of the evidence in question may be faced with insurmountable difficulty in proving its claim or defense. The potential harm from spoliation of evidence is greatest in these situations, and the imposition of sanctions by courts within their broad discretionary powers is most warranted. Increasingly, courts have recognized that they must take some action to compensate the aggrieved party for the loss of the evidence, to "level the playing field," and to deter future incidents of spoliation.2

Courts often find their authority to take corrective action to grant relief to the aggrieved party for the spoliation under Rule 37 of the Federal Rules of Civil Procedure, or when in state court, the local counterpart to that rule.3 When the discovery sanction rule may not apply, courts are vested with inherent powers that are governed not by rule or statute but by the control necessarily vested in courts to manage their affairs so as to achieve the orderly and expeditious disposition of cases.4

For the purpose of this article, the remedies fashioned by the courts are grouped into four very broad categories. First, and most extreme in nature, courts have with increasing frequency found that spoliation of key evidence in products liability cases may justify sanctions constituting a total adverse disposition of the case against the alleged wrongdoer. These sanctions include, among others, dismissal of the wrongdoer's claims, entry of judgment on liability issues, and striking of defenses. Second, courts have entered sanctions that attempt to "level the playing field" by

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2 The purpose of sanctions for spoliation is "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).


removing from the case any advantage the wrongdoer may have achieved from the evidence which has been denied to the other party. These sanctions most frequently involve exclusion by the court of testimony from the wrongdoer's expert who examined the lost evidence and/or exclusion of any testing or analysis the wrongdoer completed on the lost evidence. Third, and historically the least potent sanction in practice, the courts have attempted to correct the spoliation problems by instructing the jury that a presumption exists that the missing piece of evidence, if produced, would have been adverse to the wrongdoer.

The fourth remedy differs substantially from the first three. Rather than attempting to address the effects of spoliation within the context of the products liability claim itself, a few courts have recognized a separate tort action against the wrongdoer based on spoliation. Under such a tort claim, the wrongdoer may be subjected to damages for the loss or destruction of critical evidence. This tort claim may be asserted by way of counterclaim or cross-claim in the products liability suit, or may be asserted in a separate lawsuit. Both negligent and intentional spoliation have been recognized as tort claims. The elements of each claim are discussed below.

Each of the four types of sanctions has been imposed by the courts on the basis of some type of culpable conduct by the wrongdoer. The types of conduct range from simple carelessness or neglect, to gross negligence or recklessness, to actual willfulness. In the sections that follow, cases are arranged by the type of sanction imposed and, where possible, by the level of wrongful conduct which supported that sanction.

III. THE SANCTION OF DISMISSAL OR DEFAULT FOR SPOLIATION

The case law concerning sanctions for evidence destruction has evolved only recently; more than eighty percent of the cases in this area have been reported in the past dec-
Although a variety of sanctions are available, the penalty in more than half the reported spoliation sanction cases has been dismissal or default judgment. Willful conduct would seem to be the most likely to result in dismissal or default; however, in the cases that follow, the courts have been willing to grant dismissal or default relief to the non-offending party in situations where the conduct amounted to little more than bad judgment and carelessness.

A. DISMISSAL OR DEFAULT WHEN SPOILATION RESULTS FROM WILLFUL CONDUCT

When a party spoliates evidence intentionally, willfully, or in bad faith, the sanctions of dismissal or directed verdict in favor of the party deprived of the evidence are clearly appropriate. For example, in *Iverson v. Xpert Tune, Inc.* the Alabama Supreme Court recognized that in some cases such a severe sanction is simply the only appropriate remedy. In *Iverson*, the supreme court upheld the trial court’s sanction of dismissal for destruction of evidence in direct violation of a court order. *Iverson* sued Xpert, alleging that Xpert diagnosed Iverson’s automobile as having a defective fuel pump, when, in fact, the fuel pump was in good working order. Xpert filed a motion with the trial court requesting production and/or inspection of the fuel pump. The court ordered the production, but it was never produced. Iverson, in fact, allowed the fuel pump to be destroyed in direct violation of the court’s order. The Alabama Supreme Court focused on the trial court’s dismissal of the action for intentional refusal to provide discovery, and concurred in the trial court’s specific finding that Iverson had “willfully discarded the fuel pump to avoid production.”

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6 Id.
7 553 So. 2d 82 (Ala. 1989).
8 Id. at 86-87.
9 Id. at 86.
This type of extreme misconduct, however, is not required to warrant dismissal for "intentional" spoliation of evidence. Intentional destruction of material evidence long before the commencement of suit, when no court has yet ordered discovery, may also subject the case to dismissal if the party destroying the evidence knows or should know an action will likely be filed involving the evidence. Although many cases rely on Rule 37 of the Federal Rules of Civil Procedure or its state law counterpart to sanction destruction of evidence, prelitigation destruction must be remedied by reliance upon the court's inherent powers to control and manage its affairs.\textsuperscript{10}

In \textit{State Farm Fire \& Casualty Co. v. Frigidaire}\textsuperscript{11} State Farm brought an action against Frigidaire, alleging one of Frigidaire’s dishwashers had caused a home fire. After State Farm’s expert inspected the dishwasher, State Farm informed its insured that she could dispose of the dishwasher, there being no need to save it anymore. As a result, Frigidaire was denied the opportunity to inspect the dishwasher. Frigidaire filed a motion to dismiss, or, in the alternative, to bar State Farm from presenting any evidence, direct or circumstantial, regarding the condition of the dishwasher. The court concluded that State Farm’s complaint should be dismissed due to State Farm’s failure to preserve the allegedly defective product, knowing it would be material evidence in the products liability action.\textsuperscript{12}

Likewise, in \textit{Capitol Chevrolet, Inc. v. Smedley}\textsuperscript{13} the Alabama Supreme Court held that the lawsuit should have been dismissed since the insurer had authorized the sale of the product in issue for salvage eleven months prior to the time the action was filed against the manufacturer. Smedley purchased a conversion van from Capitol Chevrolet. Approximately five months later, the van was destroyed by fire.

\textsuperscript{10} \textit{But see} \textit{Beil v. Lakewood Eng’g \& Mfg. Co.}, 15 F.3d 546 (6th Cir. 1994). Federal Rule of Civil Procedure 37 is a procedural rule, governing only conduct during the pendency of a lawsuit.

\textsuperscript{11} 146 F.R.D. 160 (N.D. Ill. 1992).

\textsuperscript{12} \textit{Id.} at 163.

\textsuperscript{13} 614 So. 2d 439 ( Ala. 1993).
Auto Owners Insurance Company, Smedley's insurance carrier, investigated the fire, paid Smedley for the van, and disposed of the van. Smedley and Auto Owners then sued Capitol and General Motors (GM) to recover damages. The jury returned a verdict in favor of the plaintiffs, and Capitol and GM appealed.\(^\text{14}\)

Capitol and GM requested that the case be dismissed due to the spoliation of evidence. In support of their position, they submitted the affidavit of their expert who had worked for GM for over thirty years. That expert stated that he had reviewed the available file material as well as the plaintiffs' photographs of the van and concluded that, because of the limited information available, he was extremely disadvantaged in making a determination of the true cause or origin of the fire. The expert explained that an important aspect of determining the exact cause and origin of vehicle fire is an examination of the van as well as any trailer involved and the fire artifacts at the scene. He further stated that the photographs taken by the plaintiffs were inadequate because they reflected the findings and conclusions of the plaintiffs' expert and did not present a complete picture of the van in such detail as would be necessary for him to determine the exact cause and origin.\(^\text{15}\)

In \textit{Capitol}, the court found that when Auto Owners dispatched its expert to inspect the van and to make photographs, Auto Owners knew or reasonably should have known it might sue Capitol and GM.\(^\text{16}\) The stark result was that relevant evidence was irreparably lost by Auto Owners' actions. The Alabama Supreme Court concluded that the trial court had abused its discretion by not dismissing the case.\(^\text{17}\) The court found that Smedley's homeowner's policy paid him for the loss of his vehicle as well as his personal belongings.\(^\text{18}\) The court pointed out that this case was es-

\(^{14}\) Id. at 440.
\(^{15}\) Id. at 441.
\(^{16}\) Id. at 442.
\(^{17}\) Id. at 443.
\(^{18}\) \textit{Capitol}, 614 So.2d at 443.
sentially a subrogation claim brought by an insurance company that ordered the destruction of items that would have been crucial evidence in this case.  

Similarly, the Supreme Court of Nevada in *Stubli v. Big D. International Trucks, Inc.*, held that dismissal was justified where evidence was destroyed through intentional misconduct. In *Stubli*, a truck driver who was involved in a single vehicle accident brought a products liability and negligent repair action against the manufacturer of the truck trailer and the company that repaired the trailer’s suspension system. The court granted the defendants’ motion to dismiss based on the destruction of the trailer just prior to the filing of the truck driver’s complaint, and the plaintiff subsequently appealed. The court held that dismissal of the truck driver’s action was an appropriate discovery sanction.

On June 27, 1984, the plaintiff, Stubli, was involved in an accident allegedly due to separation of part of the trailer’s suspension system (the spring hammer) from the trailer frame. Defendant Big D. had repaired the spring hammer by welding it back to the trailer frame in December of 1983. Stubli’s insurance company, Northwestern, hired a mechanical engineer, Limpert, to inspect the trailer wreckage. As a result, Limpert submitted photographs and a detailed report. Limpert concluded that the right front spring hammer had fractured from the frame and that the cause of the accident was an inadequate weld repair job by Big D. After receiving this information, Northwestern retained an attorney, McCarthy, to handle the subrogation claim. In a January 18, 1985 letter to McCarthy, Northwestern advised the attorney that fees for storing the trailer would soon surpass the trailer’s salvage value. Thus, Northwestern requested that McCarthy expedite any additional inspections

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19 *Id.*
21 *Id.* at 787.
22 *Id.* at 788.
23 *Id.* at 786.
and discovery and inquired whether there would be any harm in inviting the defendants to inspect the trailer.

Neither defendant received such an invitation to inspect the wreckage. The allegedly failed part of the trailer was saved, and the plaintiff's counsel advised Northwestern on March 8, 1985 that the remainder of the trailer was discarded as salvage. On May 14, 1985, Stubli filed a complaint against Big D. Despite Big D.'s discovery efforts as early as September of 1985, Limpert's report and photographs were not provided to Big D. until August of 1988. At that time, Big D. also learned that the trailer wreckage, less those portions in Limpert's custody, had been discarded.\(^\text{24}\)

Thereafter, Stubli filed a motion to dismiss pursuant to Nevada Rule 37. The district court entered an order granting the motion. On review, the Supreme Court of Nevada held that a "somewhat heightened" standard of review should apply where the discovery sanction was dismissal.\(^\text{25}\) Citing \textit{Young v. Johnny Ribeiro Building Inc.}\(^\text{26}\) the court set forth a nonexhaustive list of factors that a court may properly consider in deciding whether dismissal is an appropriate sanction:

1. the degree of willfulness of the offending party;
2. the extent to which the non-offending party would be prejudiced by a lesser sanction;
3. the severity of the sanction of dismissal relative to the severity of the discovery abuse;
4. whether any evidence has been irreparably lost;
5. the policy favoring adjudication on the merits;
6. whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and
7. the need to deter both the parties and future litigants from similar abuses.\(^\text{27}\)

The court held that the dismissal of the Stubli case was a proper response to destruction of evidence and that the re-

\(^{24}\) Id. at 787.
\(^{25}\) Id.
\(^{26}\) 787 P.2d 777 (Nev. 1990).
\(^{27}\) Stubli, 810 P.2d at 787 (citing Young, 787 P.2d at 780).
quirements of Young had been satisfied for the following reasons:

1. the loss of evidence . . . was wholly due to willful actions taken by Stubli's counsel . . . and Stubli's expert, prior to any involvement in [the] case by [the defendants];

2. a plethora of expert testimony support[ed] [the defendants'] contention that examination of the lost evidence would be necessary to prove or disprove [the plaintiff's] theory; and

3. imposition of a lesser sanction such as excluding Limpert's testimony while allowing [the plaintiff] to proceed on the basis of circumstantial evidence would be insufficient to cure the prejudice sustained by [the defendants].

Stubli's claims all revolved around the allegedly defective design and repair of the trailer's suspension system that was discarded by Stubli just prior to the time that the complaint was filed. While no court order existed compelling discovery, the timing of the destruction of evidence was due to the actions of Stubli's counsel and expert and could not be relied upon by Stubli to preclude the imposition of discovery sanctions pursuant to Rule 37. The court held that, "[a]lthough dismissal precludes adjudication on the merits and penalizes Stubli for the misconduct of his attorney and expert, such consequences are unavoidable and are outweighed by the need to remedy the unfair litigation practices employed in this case, and the benefit of deterring similar abuses in future cases."  

In Graves v. Daley the court dismissed the products liability action due to the destruction of evidence. The homeowner destroyed an allegedly defective furnace after the insurer decided that an alleged defective condition in the furnace was the probable cause of the fire and gave the homeowner permission to dispose of it. Despite the fact that the furnace had been destroyed before the products

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28 Id. at 788.
29 Id.
liability action was filed, and that no specific court order existed, the dismissal of the products liability action was justified.\textsuperscript{31}

The homeowner willingly destroyed the furnace with the insurer's approval, and the insurer and homeowner knew or should have known that the alleged defective condition of the furnace was a crucial piece of evidence and should have been preserved.\textsuperscript{32} "[P]laintiffs are not free to destroy crucial evidence simply because a court order was not issued to preserve the evidence."\textsuperscript{33} In this case, the court could not have issued a preservation order because the furnace was destroyed by the plaintiffs after their experts had examined it but before the suit was filed.\textsuperscript{34} The appellate court upheld the trial court's order barring all evidence relating to the condition of the furnace and dismissal of the case.\textsuperscript{35}

B. DISMISSAL OR DEFAULT WHEN SPOLIATION RESULTS FROM GROSSLY NEGLIGENT OR RECKLESS CONDUCT

Some courts have found that severe sanctions should be imposed where the conduct resulting in the loss was either directly or intentionally attributable to the offending party. Irresponsible actions in view of existing circumstances may be sufficient to warrant complete disposition of the case.\textsuperscript{36} Jones v. Goodyear Tire & Rubber Co. was a products liability action against tire manufacturers. The plaintiff moved for sanctions against Goodyear because Goodyear had lost the material evidence of the case.

Goodyear signed a protective order that allowed it to inspect the allegedly defective product. Goodyear agreed to

\textsuperscript{31} Id. at 680-81.
\textsuperscript{32} Id. at 682.
\textsuperscript{33} Id. at 681.
\textsuperscript{34} Id.
\textsuperscript{35} Graves, 526 N.E.2d at 681.
\textsuperscript{36} See, e.g., Jones v. Goodyear Tire & Rubber Co., 137 F.R.D. 657 (C.D. Ill. 1991), aff'd sub nom. Marrocco v. General Motors Corp., 966 F.2d 220 (7th Cir. 1992) (holding that a directed verdict against the spoliator of evidence was an appropriate sanction).
the entry of the protective order requiring it to preserve, keep safe, and maintain the product in an unaltered state while in its custody. The local Goodyear store manager had arranged to have the product shipped via United Parcel Service (UPS) to Goodyear's Akron office. The decision on how to package the product was made solely by the store manager. Approximately sixty days after shipping the product, the store manager received a call from Akron advising him that the shipment had not arrived. The store manager contacted UPS, and UPS placed a tracer on the shipment. Sometime later, the store manager learned that part of the shipment had not been received at Goodyear.

The court concluded that Goodyear violated the protective order and was grossly negligent in the exercise of its duty by:

1. its failure to take adequate precautionary measures to preserve the integrity and safety of the [product];
2. its failure to timely monitor the UPS shipment and delivery to Goodyear in Akron, Ohio and monitor the apparent separation and misdelivery of the [product]; and
3. its failure to timely notify Plaintiff's counsel of the missing [product] when it may have been possible for Plaintiff['s] [counsel] to initiate their own investigation and independently trace the [product] through UPS.37

The court held that Goodyear's product was material and irreplaceable evidence necessary to establish the plaintiff's theories of a manufacturing defect or deviation from design specification.38 In this type of case, physical examination by a qualified engineer would be necessary to ascertain whether the Goodyear product deviated from its design and manufacturing specifications.39 The loss of the product substantially prejudiced the plaintiff's ability and opportunity to establish and prove the existence of a manufacturing

37 Id. at 663.
38 Id.
39 Id.
defect that may have proximately caused or contributed to
the plaintiff’s injuries.40

The court subsequently granted the plaintiff’s motion for
sanctions and ordered that a directed verdict be entered in
favor of the plaintiff.41 The court believed the sanction was
necessary given the alternatives.42 If the plaintiff was to pro-
ceed without the lost evidence, no chance existed for the
plaintiff to prevail on the negligent manufacturing claim.43
Thus, Goodyear would profit from its gross negligence in
mishandling the evidence despite the clear language in the
protective order requiring Goodyear to protect this
evidence.44

In support of its decision, the court cited Barker v. Bled-
soe,45 which did not involve a protective order, where an ex-
pert destroyed evidence in testing:

When an expert employed by a party or his attorney con-
ducts an examination reasonably foreseeably destructive
without notice to opposing counsel and such examination
results in either negligent or intentional destruction of evi-
dence, thereby rendering it impossible for an opposing
party to obtain a fair trial, it appears that the court would be
not only empowered, but required to take appropriate ac-
tion either to dismiss the suit altogether, or to ameliorate
the ill-gotten advantage. A presumption as to certain evi-
dence is simply not sufficient to protect against such
conduct.46

Based upon the circumstances of the case, the Jones dis-
trict court found the issue of whether it was appropriate to
grant a directed verdict on the negligent manufacturing
claim a proper question to certify to the court of appeals.
On appeal, the Seventh Circuit Court of Appeals held that
fault alone would be sufficient. “[T]he Supreme Court has

40 Id. at 664.
41 Jones, 137 F.R.D. at 664.
42 Id.
43 Id.
44 Id.
46 Jones, 137 F.R.D. at 664 (citing Barker, 85 F.R.D. at 547-48).
expressly stated that sanctions may be appropriate in any one of three instances—where the noncomplying party acted either with willfulness, bad faith or fault."\(^{47}\)

The aforementioned measures of culpability are wholly different from one another. "Bad faith" is characterized by conduct which is either intentional or in reckless disregard of a party’s obligation to comply with a court order; "fault," by contrast, does not speak to the noncomplying party’s disposition at all, but rather only describes the reasonableness of the conduct—or lack thereof—which eventually culminated in the violation. The court of appeals held that Goodyear’s conduct readily fell within the classification of "fault."\(^{48}\) Sanctions are not limited solely to situations where noncompliance with court orders is willful or deliberate. Consequently, the court of appeals affirmed the district court’s sanctions.\(^{49}\)

C. Dismissal or Default When Spoliation Results From Merely Careless Conduct

The continuum of cases where courts are willing to completely dispose of a case for spoliation of evidence becomes complete with the imposition of such sanctions for parties’ or their representatives’ failure to take proper care to preserve material evidence. For example, in Jackson v. Nissan Motor Corp.,\(^{50}\) the court dismissed the plaintiffs’ case as a sanction for his careless spoliation of evidence. Jackson was a products liability action against the manufacturer of an automobile involved in an accident. Before the lawsuit was filed, the plaintiffs’ attorneys located and purchased the wrecked car. The car was later inspected by the plaintiffs’ expert. Plaintiffs’ counsel paid the salvage owner for the wreck and told him they would remove the vehicle from his

\(^{47}\) Marrocco, 966 F.2d at 224 (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640 (1976)).

\(^{48}\) Id.

\(^{49}\) Id. at 225.

\(^{50}\) 121 F.R.D. 311 (M.D. Tenn. 1988), rev’d on other grounds, 888 F.2d 1391 (6th Cir. 1989).
property as soon as possible. The yard owner was not advised that the car was an important piece of evidence.

Shortly after the suit was commenced, attorneys for the defendant began inquiring of plaintiffs' counsel regarding the whereabouts of the wrecked car. Plaintiffs' counsel was made aware that the defendant wished to have an expert examine the vehicle. Plaintiffs' counsel provided only vague responses to most of these inquiries and delayed scheduling the defendant's inspection of the car.

After the plaintiffs' counsel failed to remove the car from the salvage yard as promised, the yard owner notified them that he would start to charge them storage fees for each day it remained in his lot. Nevertheless, the plaintiffs did not remove the car and, in addition, failed to pay the fees as the yard owner insisted. Eventually, over $800.00 in storage fees were unpaid. The yard owner threatened to have the car destroyed if he was not paid. The plaintiffs failed to act and the yard owner made good on his promise before the defendant had an opportunity to inspect the car.

The plaintiffs' theory was that Jackson, the driver, was injured when the force of the collision thrust the battery into the car's interior, spraying battery acid and burning Jackson. The defendant's expert testified that without examining and testing the car he could form no opinion, to a reasonable degree of scientific certainty, about whether battery acid was in the car's interior. The court found that the defendant had been deprived of the opportunity to defend against the plaintiffs' theory concerning battery acid.

After analyzing these facts, the court found that the plaintiffs' attorneys did not act in bad faith or with willfulness. The plaintiffs' "misconduct arises not from a calculated plot to deprive defendant of relevant evidence but from extremely careless inaction."\(^5\) Despite the absence of bad faith, however, the court held that dismissal was warranted:

The difficult sanction of dismissal is justified in this case. Defendants' experts cannot reasonably share plaintiffs' ex-

\(^5\) Id. at 321.
pert examination of the car. Precluding all of the plaintiffs' expert testimony undercuts whatever proof of causation plaintiffs did have. Dismissal is a sanction permitted by Rule 37 and authorized by both the Supreme Court and the Sixth Circuit . . . .

Likewise, in *Stegmiller v. H.P.E., Inc.* the plaintiff alleged that an improperly insulated swimming pool filter electrocuted her son. After several unsuccessful requests by the defendants for the plaintiff to produce the filter for examination, the defendants filed a motion for sanctions requesting dismissal of the complaint.

The investigator hired by the plaintiff's attorney picked up the pool filter in August of 1972. The lawsuit was filed in 1974. In January of 1973, the filter had been moved to the attorney's office. Sometime later that month, the attorney moved to new offices. Despite a thorough search, the pool filter was not found. The court held that the sanction of dismissal was appropriate because the plaintiff's conduct reflected an unreasonable non-compliance with discovery. The attorney had not taken appropriate safeguards for the most significant piece of evidence, the filter.

IV. EXCLUSION OF EVIDENCE AND/OR EXPERT TESTIMONY

This article treats the sanctions of adverse presumption and exclusion of evidence and/or expert testimony separately. However, it can be argued that the latter is in fact a logical extension of the former. The loss or destruction of evidence has long given rise to the presumption that the evidence, if produced, would be unfavorable to the party failing to produce it. With the increasing use of experts to explain everything from the division of the amoeba to the precise timetable for armageddon, courts are recognizing that adverse presumptions regarding spoliated evidence

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52 Id. at 323.
54 Id. at 1158.
would pale in comparison to the testimony of expert witnesses.

The exclusion of all evidence and expert testimony concerning lost or destroyed evidence often has the same effect as an outright disposition of the case. When dismissal or default is not granted outright, some courts have instead excluded expert testimony and evidence concerning the spoliated product. By doing so, the courts are ameliorating the offending party’s ill-gotten advantage. The courts have found that any adverse presumption which a court might have ordered as a sanction for the spoliation of evidence would be ineffective because it would be easily overcome by the testimony of the wrongdoer’s expert witnesses, which because of the spoliation becomes essentially uncontested. Several courts have found such situations to be intolerable and have taken steps to prevent them.

In *Unigard Security Insurance Co. v. Lakewood Engineering & Manufacturing Corp.*, the insurer of a boat that was destroyed by fire brought a subrogation claim against the manufacturer of an electric space heater that the insurer alleged was responsible for the fire; the manufacturer counterclaimed in tort for spoliation of evidence. The district court dismissed the plaintiff’s claims, and the Ninth Circuit Court of Appeals affirmed. The court of appeals held that Unigard’s evidence was properly excluded as an exercise of the district court’s inherent powers. Courts are vested with inherent powers that are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs and to achieve the orderly and expeditious disposition of cases.

The court held that Lakewood was precluded from obtaining expert testimony related to whether the heater caused the fire and that the plaintiff’s destruction of key

55 982 F.2d 363 (9th Cir. 1992).
56 Id. at 366, 371.
57 Id. at 368.
evidence rendered a full defense impossible. The court's determination provided ample support for the discretionary conclusion that allowing Unigard to introduce the testimony of its experts would unfairly prejudice the district court's ability to conduct a fair trial.

Unigard's destruction of evidence was not in dispute. It precluded Lakewood from any opportunity to inspect the evidence, and it rendered unreliable virtually all of the evidence that a finder of fact could potentially consider. Given those factors, it was within the district court's discretion to determine that a rebuttable presumption against Unigard would have been insufficient to cure the prejudice arising in the context of the case. Once the district court excluded the expert testimony and evidence concerning the unavailable heater, Unigard lacked the ability to put forward a prima facie case or to offer any admissible evidence creating a material fact. Therefore, summary judgment was entirely appropriate as a matter of law.

The Nevada Supreme Court also held the exclusion of expert witness testimony appropriate in spoliation cases. In Fire Insurance Exchange v. Zenith Radio Corp. the court held that a party had a duty to preserve evidence, even prior to the commencement of litigation, if it knew or reasonably should have known that the evidence was relevant to the potential litigation. In Fire Insurance Exchange, a fire investigator, hired by the insurer, determined that a television set manufactured by the defendant was the cause of the fire. Discovery revealed that the plaintiff's expert had not retained the subject television set. The trial court barred the plaintiff's expert and granted summary judgment for the defendant. The plaintiff contended that the sanction was inappropriate as she did not have possession of the evi-

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59 Id.
60 Unigard, 982 F.2d at 368.
61 Id. at 369.
62 Id.
63 Id.
64 747 P.2d 911 (Nev. 1987).
65 Id. at 914.
dence at any time during the litigation and because the evi-
dence had been destroyed prior to the commencement of
the action. "[E]ven where an action has not been com-
 commenced and there is only a potential for litigation, the liti-
gant is under a duty to preserve evidence which it knows or
reasonably should know is relevant to the action."66

The court held that the plaintiff's actions effectively re-
served all expert testimony based upon examination of the
television set.67 Any adverse presumption which the court
might have ordered as a sanction for the spoliation of evi-
dence would have paled in comparison to the testimony of
the expert witness. Thus, barring the expert's testimony
was appropriate.68 Where an expert has removed an item
of physical evidence and the item has disappeared, the
court at a minimum should preclude the expert from
testifying:69

The rule should be applied without regard for whether the
expert's conduct occurred before or after the expert was re-
tained by a party to the litigation. The reason for the rule is
the unfair prejudice that may result from allowing an expert
deliberately or negligently to: put himself or herself in the
position of being the only expert with first-hand knowledge
of the physical evidence on which expert opinions as to de-
fects and causation may be grounded.70

As a matter of sound policy, an expert should not be per-
mitted to substitute his or her own description of the evi-
dence after he or she has negligently disposed of the
evidence.71

In Northern Assurance Co. v. Ware72 a fire insurer sued the
manufacturer, distributor and installer of a metal chimney,
which purportedly caused a fire, alleging negligence,

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66 Id.
67 Id.
68 Id.
69 Nally v. Volkswagen of Am., Inc., 539 N.E.2d 1017 (Mass. 1989); see also Headley
70 Nally, 539 N.E.2d at 1021.
71 Id.
breach of contract, breach of warranty, and strict liability. The manufacturer and installer moved to dismiss the action due to the insurer's decision to allow the house where the fire occurred to be destroyed before initiation of litigation. The district court held that the appropriate remedy for the fire insurer's decision to allow the destruction of the burned dwelling without preserving relevant evidence and without notice to the defendants was to prevent the insurer from presenting testimony or conclusions of its expert as to the cause of the fire in its case-in-chief.\footnote{Id.}

In Headley v. Chrysler Motor Corp.,\footnote{141 F.R.D. 362 (D. Mass. 1991).} the plaintiffs intentionally allowed the most crucial piece of evidence, the car, to be destroyed. The court sanctioned the plaintiffs by barring the introduction of direct or circumstantial evidence concerning the condition of the car and granted summary judgment in favor of the defendants. After the plaintiffs' expert inspected the allegedly defective car, the car was put on the auction block. The car was subsequently sold for $5.00 and crushed. The defendant moved to dismiss or, in the alternative, to preclude the plaintiffs' expert testimony. The court cited five factors to be considered before deciding whether evidence should be excluded: (1) whether the defendant was prejudiced as a result of the spoliation; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff was acting in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded.\footnote{Id., at 365.} The court also noted that the fact the plaintiffs may also have been prejudiced by their spoliation does not mean that the defendant is not prejudiced. "Equal prejudices" do not cancel each other out.\footnote{Id., at 366.} The court concluded that the defendant was in fact prejudiced, that the prejudice could not be

\footnotesize
\begin{itemize}
  \item \footnote{Id.}
  \item \footnote{141 F.R.D. 362 (D. Mass. 1991).}
  \item \footnote{Id., at 365.}
  \item \footnote{Id., at 366.}
\end{itemize}
cured, and that the destroyed evidence was crucial—indeed the linchpin—to the case framed by the plaintiffs.77

V. ADVERSE PRESUMPTION INSTRUCTION

Although some courts have found adverse presumption instructions clearly inadequate in contrast with expert testimony to the contrary, a number of others continue to believe that, when jurors are instructed that certain evidence would have been favorable to the party not responsible for its alteration, loss, or destruction, they will level the playing field themselves.78 Some courts seem to struggle with finding the appropriate set of facts to warrant the instruction. The court in Mason v. E. L. Murphy Trucking Co., Inc.,79 would require the showing of "intentional" conduct by the offending party before imposing "any sanction."80 In a second case, where the plaintiff had deliberately disposed of all of a play tent except the part that broke and thereby destroyed markings that would have conclusively identified the defendant as the proper manufacturer of the product, the same court said that the "nature of the inferences or presumptions to be made . . . is dependent upon the party's intent or motivation."81

The Texas courts, while apparently still embracing the adverse presumption preference, clearly are willing to consider a variety of sanctions intended to address the offending conduct with "punishment fitting the crime" when evidence is withheld, altered, lost, or destroyed.82 Without

77 Id.
78 See, e.g., Voelkel v. General Motors Corp., 846 F. Supp. 1468, 1482 (D. Kan. 1994) ("[a]ny potential for prejudice from the writings on the belt can be cured effectively through testimony and jury instructions").
80 Id. at 345.
82 See, e.g., Abcon Paving, Inc. v. Crissup, 820 S.W.2d 951 (Tex. App.—Fort Worth 1991, no writ) (holding the striking of pleadings and entering judgment to be an excessive sanction for removal of a portion of a concrete driveway that was the subject of the lawsuit); Pelt v. Johnson, 818 S.W.2d 212 (Tex. App.—Waco 1991, no writ) (vacating order striking pleadings for failure to produce checks, check stubs, and the copies maintained by the plaintiff's bank in the normal course of business); San Antonio Press, Inc. v. Custom Bilt Machinery, 852 S.W.2d 64 (Tex. App.—San
finding it necessary to fashion a new tort for spoliation of evidence, Texas appears to have provided broad discretion by procedural rules and statutes to its trial courts in imposing sanctions covering a broad spectrum. While favoring lesser sanctions for spoliation such as "instructions to the jury" and rulings on "the admission of evidence," Pennsylvania courts, in turn, acknowledge that summary disposition may be appropriate for intentional acts that deprive the opposing party of crucial evidence to support or defend a claim.  

VI. TORT REMEDIES

The evolution of tort remedies for spoliation of evidence presents the most recent and most extensive recognition that the rights and duties of litigants and potential litigants will be protected by the courts. A relatively small number of states have recognized these torts. The interest espoused by states to be protected by these torts is the interest that a civil litigant has in ongoing or prospective litigation. Damages are seldom stated with specificity, and at least in California, it is sufficient to plead that the movant's case was "significantly prejudiced" by the lost or destroyed evidence. Presently, only three states recognize the tort of intentional spoliation of evidence—California, Alaska and Ohio.

Antonio 1993, no writ) (affirming trial court's restrictions on spoliating party's expert witness testimony where evidence was altered but not destroyed).

See, e.g., Shulz v. Barko Hydraulics, Inc., 832 F. Supp. 142 (W.D. Pa. 1993) (permitting defendants to move for special spoliation instruction to the jury); Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir. 1994) (reversing trial court decision where expert's testimony had been stricken in case where design defect common to all similar products was alleged rather than defect unique to the specific injury-causing product); Schwartz v. Subaru, Inc., 851 F. Supp. 191 (E.D. Pa. 1994) (granting summary judgment where subject vehicle was destroyed after notice and request to inspect).

Currently, California and Florida recognize the tort of negligent spoliation of evidence; and California, Alaska and Ohio recognize intentional spoliation of evidence as an independent tort.


Although the California case of *Smith v. Superior Court* is most frequently cited as recognizing the tort of intentional spoliation of evidence in California, both *Velasco v. Commercial Building Maintenance Co.* and *Smith* (which officially adopted negligent spoliation) point to *Williams v. State* as opening the door for the new tort. *Williams* involved a claim by an injured party to an automobile accident, alleging that the investigating officer so botched the investigation that the plaintiff was prevented from bringing an action against the person or persons that caused her injuries. The Supreme Court of California affirmed the trial court's dismissal of the State from the action, holding that the plaintiff had failed to establish a "duty" owed by the investigating officer to an individual involved in a traffic accident. The court was clearly saying, however, that if the duty were established, an action for "negligent" spoliation could be properly alleged.

When *Smith* came before the California Court of Appeals six months later, intentional rather than negligent acts were alleged. On that occasion the court had little difficulty in finding a "duty" or "special relationship" between the parties. Defendant, Abbott Ford, Inc., had agreed with Smith's attorney to preserve the evidence. Its failure to follow through on the agreement prevented Smith from examining, testing and thereby pursuing a claim for his injuries. The court held that a "new tort" should be fashioned with elements of proof "[a]nalogous to intentional interference with [a] prospective business advantage." Whether pled as an intentional or negligent act in California, common elements appear to be: (1) possession or control of the evi-


90 Id. at 142-43.
91 *Smith*, 198 Cal. Rptr. at 833.
92 Id. at 832, 836.
dence in another; (2) duty or agreement to maintain the evidence; (3) reliance on the duty or agreement; (4) knowledge of the importance of the evidence; and (5) failure to preserve or maintain the evidence.

In a very brief opinion, the Ohio Supreme Court held that a claim existed for "interference with or destruction of evidence." The court stated that the action may be brought simultaneously with the primary action against another party to that action or against a third party. The acts of the offending party in Ohio must be "willful," and the party must have knowledge that "litigation exists or is probable." The added element in Ohio is that the willful act resulting in the alteration, loss, or destruction of the evidence must be "designed to disrupt the plaintiff's case."

Another nuance to Ohio law on the subject was added less than a year after Smith v. Howard Johnson in the case of Moskovitz v. Mount Sinai Medical Center. There the court stated that, while recognizing intentional spoliation as an independent tort in Howard Johnson, it was not its intent to make it the exclusive remedy for "interference with or destruction of evidence." In Ohio, an award of punitive damages serves the same purpose when based upon concealment, alteration, loss, or destruction of evidence. Similar to the California court, the Ohio court held that proof of actual damages was not required whether the award comes by way of punitive damages or through a compensatory form when alleged as an independent tort.

As a remedy for an aggrieved litigant deprived of evidence by alteration of an audiotape, the Supreme Court of Alaska followed California in 1986 by recognizing a "new tort" of intentional spoliation of evidence. In Hazen v. Mu-

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94 Id.
95 Id.
96 635 N.E.2d 331 (Ohio 1994).
97 Id. (citing Howard Johnson, 615 N.E.2d at 1038)).
98 Velasco, 215 Cal. Rptr. at 504.
99 Moskovitz, 635 N.E.2d at 331.
nicipality of Anchorage Penny Hazen was arrested in 1977 for alleged assignation of prostitution. Hazen’s criminal defense attorneys listened to the “arrest tape” made by undercover officers, and at a dismissal hearing requested that the tape be preserved since Hazen was contemplating a civil action for false arrest. Hazen’s attorneys alleged that it contained statements by Hazen specifically stating to the undercover officer that sex could not be obtained at her massage parlor. By the time the tape was delivered to Hazen’s attorneys in the civil action, it was largely inaudible.

The court in Hazen held that the spoliation cause of action could not be pursued against individual officers without evidence sufficient for a jury to determine which of the officers committed the act, or evidence of a joint agreement or conspiracy between or among them to alter the tape. However, the court did hold that the municipality could be held liable since it had the custody and control of the evidence, and the “discretionary function” exception would be inapplicable to a “decision to alter an arrest tape.”

Those decisions by a minority of states illustrate the legal arguments, policies and philosophies employed to provide a remedy for an aggrieved party. There are, however, equally compelling reasons given by some courts for rejecting the notion that spoliation of evidence demands recognition as a “new tort.” In Edwards v. Louisville Ladder Co. Edwards was injured on the job when he fell from an allegedly defective ladder manufactured by the Louisville Ladder Company. Edwards’ employer failed to preserve the ladder after the fall. Edwards sought to recover under a products liability theory but alleged that he was foreclosed from proving this theory because the evidence has been destroyed.

100 718 P.2d 456, 463 (Alaska 1986).
101 Id.
102 Id. at 466.
104 Id.
The federal court, interpreting Louisiana law, noted three policies with which the adoption of the "new tort" would conflict. First, it could produce an outcome unwarranted if the evidence still existed because "it is impossible to know what the destroyed evidence would have shown."105 Second, it conflicts with the rights of a person to dispose of his own property as he chooses.106 There simply was no duty obliging the employer to preserve property for the prospective lawsuit absent some agreement, contract, special relationship, or statute requiring it. Third, the "tort for spoliation of evidence is inconsistent with the policy favoring final judgments."107 It would give the plaintiff two bites at the apple: the first lawsuit to establish the relevance of the piece of missing evidence, and the second against the party that lost or destroyed it.

Although some practitioners in California recommend pleading intentional or negligent spoliation as a defense, counter, and/or cross-claim where the plaintiff or co-defendant is the spoliating party, there is no clear statement in case law that the principles enunciated in recognizing the tort can be practically applied to providing relief for a defendant. In order to provide a more clearcut remedy for either plaintiff or defendant, a New Jersey court preferred that states adopt an "analogous" tort to intentional spoliation of evidence, designated "fraudulent concealment of evidence."108 The court noted that the elements of both actions were analogous; however, where the "duty" to preserve under intentional spoliation required an agreement or order to preserve, fraudulent concealment did not. Rather, the duty under the latter arose from the foreseeability of harm to a party.109

There are other states that appear to have considered the recognition of some form of affirmative relief for the de-

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105 Id. at 969 (citing Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 437 (Minn. 1990)).
106 Id. at 970.
107 Id. at 971.
109 Id. at 1116.
struction of evidence. Certainly, those jurisdictions that believe adverse presumptions may be ineffective in certain circumstances will move toward more extreme measures to "deter" this behavior. Given the aforementioned comments of the courts in *Hirsch* and *Edwards*, it is time to re-evaluate the validity of the separate tort and perhaps fashion appropriate sanctions with uniform application to plaintiffs and defendants. If the objective is fairness to all parties and equal opportunity to prosecute and defend legitimate claims, would the fashioning of evidentiary and discovery rules not accomplish the purpose without imposing an entirely new cause of action upon the legal system? A cause of action that lends itself to speculative outcomes and damage awards is at best tangential to the merits of the underlying case.

VII. IMPLICATIONS FOR AVIATION ACCIDENTS AND NTSB INVESTIGATIONS

Given the rapid expansion of spoliation claims and defenses, a number of questions arise regarding the probable impact of the development of the law in this area on the activities of participants in National Transportation Safety Board (NTSB) accident investigations. For example, the NTSB investigator is likely to ask representatives of the aircraft's airframe and engine or other component manufacturer to participate as part of his or her investigative team. Their activities as part of that team might be alleged to have altered or destroyed certain crucial pieces of evidence. If so, might an injured passenger, a pilot, a maintenance facility or other interested party whose representatives were not a part of the investigative team (and who may have requested and been denied participation), raise a spoliation claim against the manufacturer in a lawsuit resulting from the accident? To analyze this issue, one must consider the regulatory framework and the practicalities of aviation accident investigations.

As most readers are already aware, the NTSB is statutorily charged with the responsibility to investigate and report
upon accidents and incidents involving aviation. Federal law mandates that it is the duty of the NTSB "to prescribe regulations governing the notification and reporting of accidents involving civil aircraft,"\(^{110}\) to "investigate or have investigated . . . and establish the facts, circumstances, and cause or probable cause of an aircraft accident,"\(^{111}\) and to make its reports public in such fashion as it may deem to be in the public interest.\(^{112}\) In carrying out this duty, the NTSB is specifically authorized to "inspect and test, to the extent necessary, any civil aircraft, aircraft engine, propeller, appliance, or property on an aircraft involved in an accident in air commerce."\(^{113}\)

The regulations promulgated for the NTSB further explain the manner in which investigative activities are conducted. After an accident occurs, the designated NTSB investigator-in-charge organizes and controls the field phase of the investigation and assumes the responsibility of supervising and coordinating the resources and activities of all personnel involved in the investigation.\(^{114}\) As a part of this responsibility, the investigator-in-charge may designate the parties to the field investigation.\(^{115}\) Only persons designated by the investigator-in-charge are permitted access to the wreckage.\(^{116}\) Such persons are limited, moreover, to "persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel to actively assist in the field investigation."\(^{117}\) In addition, no party to the

\(^{110}\) Act of July 5, 1994, Pub. L. No. 103-272, § 1(d), 108 Stat. 753 (to be codified at 49 U.S.C. § 1132(b)).


\(^{112}\) Id. (to be codified at 49 U.S.C. § 1131(d)).


\(^{114}\) 49 C.F.R. § 831.8 (1993).

\(^{115}\) Id. § 831.9(2).

\(^{116}\) Id. § 831.10(a).

\(^{117}\) Id. § 831.11(a).
field investigation may be represented by any person who also represents claimants or insurers.\(^{118}\)

The participants in an accident investigation are required to be "responsive to the direction" of the NTSB investigator-in-charge.\(^{119}\) The participants are legally and technically acting under the authority and supervision of the investigator-in-charge during the field investigation. Consequently, some practitioners have suggested that the participants of an NTSB accident investigation should be shielded from civil spoliation claims arising from actions taken in furtherance of that investigation.

As a practical matter, however, the NTSB investigator may lack significant technical expertise in the areas of science, engineering, mechanics, powerplants, avionics, and the like. Indeed, it is this very lack of comprehensive expertise that is anticipated in authorizing the investigator to appoint representatives from manufacturers and operators to serve on the investigative team. The NTSB investigator necessarily relies heavily on the recommendations, judgments, and methodologies offered by the manufacturer’s representative.

Thus, it is to be expected that while the NTSB investigator remains technically in charge of all aspects of the field investigation, there are times (for example, during an engine teardown) when the investigator in fact defers to and expects leadership from the manufacturer’s representative. If an allegation is made that the manufacturer’s representative recommended or performed a procedure that resulted in the destruction of evidence, a spoliation claim might be pursued against the manufacturer in a subsequent products liability litigation. This is particularly likely where it is alleged that an alternative, non-destructive procedure was available but was not utilized. There is at least limited authority that indicates such a claim is possible.

\(^{118}\) Id. § 831.11(c).

\(^{119}\) Id. § 831.11(b).
In *Graham v. Teledyne-Continental Motors*\(^{120}\) the Ninth Circuit Court of Appeals considered an appeal from a California federal district court's refusal to enjoin the NTSB from going forward with an accident investigation. Graham, the executrix of the estate of the pilot of the accident aircraft, sought to prevent the NTSB from conducting an engine teardown at Teledyne's facilities without the participation of her expert. Graham requested that her expert be given permission to participate in, or at least observe, the teardown inspection. When her request was denied by the NTSB and Teledyne, Graham filed suit seeking injunctive relief, alleging that the teardown would destroy evidence and would deprive her of due process by impairing her legal rights.\(^{121}\)

The Ninth Circuit noted that it is common practice for the NTSB to disassemble aircraft engines on the premises of the manufacturer with the participation of the manufacturer's personnel. This practice "grows out of the NTSB's belief that the manufacturer and its staff are best equipped to perform such functions."\(^{122}\) The court also recognized that this is a cost-saving practice for the NTSB, because it saves the NTSB from maintaining staff and facilities of its own capable of performing this aspect of the investigation.\(^{123}\) Thus, the court clearly recognized that the NTSB, in some respects, relies on the facilities and the expertise of the manufacturer.

The Ninth Circuit considered and rejected each of Graham's suggested grounds for enjoining the engine teardown. It held that under the NTSB's regulations, she had no right to participate through her expert unless authorized by the investigator-in-charge.\(^{124}\) Further, the court held that the investigator-in-charge did not act improperly by designating Teledyne as a participant and not the plain-

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\(^{120}\) 805 F.2d 1386 (9th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987).

\(^{121}\) *Id.* at 1387-88.

\(^{122}\) *Id.* at 1387.

\(^{123}\) *Id.* at 1387 n.1.

\(^{124}\) *Id.* at 1389.
tiff’s expert, because “use of Teledyne’s facilities and expertise . . . could be indispensable [sic] in enabling the NTSB to carry out its mission,” whereas the plaintiff’s expert had nothing unique to add to the investigation. Additionally, the court held that the plaintiff’s situation did not implicate her constitutional rights to due process because the mere deprivation of evidence does not result in a due process violation.

Finally, the court addressed Graham’s claim that she feared Teledyne might alter or destroy evidence during the course of the inspection. The court stated:

Appellant has expressed concern that Teledyne may alter or destroy vital evidence. This case, however, is not much different from those where an adverse party retains possession of key elements of proof, e.g., purloined trade secrets, documents proving fraud, or machinery involved in personal injury accidents. The presumptions and sanctions available to punish those who alter or destroy evidence must be considered sufficient to deter any misconduct and Teledyne is no doubt aware that its handling of the materials may come under intense scrutiny. In any case, as we understand the NTSB’s procedures, the engines will be handled by Teledyne employees only under the supervision of NTSB investigators.

This language in the Ninth Circuit’s opinion suggests that the spoliation remedies available in an ordinary case are also available against a manufacturer in the context of an NTSB investigation. It should be remembered that the Graham case arose in California, which has recognized tort actions for spoliation. Therefore, the “presumptions and sanctions” to which the Ninth Circuit referred may include all four of the previously discussed spoliation remedies.

The court’s final sentence in the quoted language indicates an assumption that spoliation may be less likely to occur in the NTSB investigation context, because the NTSB

125 Id.
126 Id. at 1390.
127 Id. at 1390 n.9 (citations omitted).
investigator is ostensibly obligated to be present at all times during the teardown inspection. Such an assumption may be correct regarding instances of intentional, overt spoliation. That is, an employee of a manufacturer is less likely to intentionally destroy or discard a component of the engine when an NTSB investigator is standing next to him or her. As we have seen above, however, the trend in spoliation law is to impose sanctions for careless acts and omissions leading to the alteration or destruction of evidence. This type of spoliation is not automatically less likely to occur merely because the teardown is being supervised.

For example, if one assumes that the NTSB investigator on the scene lacks significant expertise regarding mechanical and engineering problems, he or she is reliant on the "indispensable expertise and facilities" of the manufacturer. Therefore, although the investigator is supervising the teardown, his or her supervision is less meaningful because he or she may be unable to identify errors in procedures employed or suggested by the manufacturer's representative. The investigator may also be unaware of available alternatives that would preserve more evidence. The investigator is, in addition, more likely to accept without challenge the recommendations and conclusions of the manufacturer's personnel.

If during such an investigation a sealed part is disassembled without its condition first being tested or documented through available non-invasive procedures (for example, x-ray photography), and the condition of that part at the time of the accident becomes a significant issue in a subsequent products liability case, might the manufacturer be charged with spoliation? Manufacturer's personnel present at the investigation likely knew that the non-invasive procedures were available. These personnel were probably also the most likely to fully appreciate the possible significance of the part's condition to the operation of the aircraft. Under these conditions, failure to make the necessary tests, or to suggest that they be made, might be deemed by a court to be sanctionable as a careless act of spoliation. Depending
on the remedy imposed by the court, the result could be catastrophic to the manufacturer's ability to defend against the claimant's charges of defectiveness.

The authors suggest that participants of an NTSB investigation should not allow the technically subordinate status in the investigation or the presence of the investigator-in-charge to lull them into complacency regarding the responsibility for the conduct of that investigation. Care should be taken to ensure that the representatives in the field understand that their employer may be later called into account for the actions taken by the investigative team, particularly actions involving the employer's own product or within the representative's area of expertise.

Additional and alternative procedures that are available should be suggested and explained to the investigator-in-charge, and his or her approval of the selected procedure should be obtained. The representatives should document this approval in their notes of the investigation. If a decision is made to undertake a test procedure with which the representative disagrees, his or her reasons for disagreement should be stated to the investigator-in-charge prior to performance of the test. Any such conversations and objections should also be recorded in the representative's investigation notes. Even if all reasonable precautions are taken, spoliation claims cannot be rendered entirely impossible. However, the likelihood that such a claim may successfully be made can, at the very least, be reduced.

VIII. SUGGESTIONS AND CONCLUSIONS

One only need observe the number of cases on this subject reported in the past ten years or the number and frequency of articles written in the past five years to be convinced that we are in the midst of a dynamic, developing and perhaps expanding area of law regarding spoliation of evidence. Concerns with the degree of culpability, appropriateness and degree of sanctions, origins of the duty owed, and presumptions about damages arising comprise the active dialogue of the cases. The courts seem intent on
protecting parties from unjust results that could arise from haphazard or intentional mishandling of evidence. The extent to which courts will go in the future is not entirely clear, and how a party to an aircraft accident investigation is dealt with for being a participant to a spoliated piece of evidence is uncertain and likely dependent upon where the case is pending, or in the case of the independent tort, where the spoliation occurred.

It seems doubtful that this area of law will be extended to the on-site field investigations as a matter of practicality. Can the entire site be maintained in an undisturbed state until all parties have viewed the location and condition of the wreckage and its parts? Would the time required to accomplish that not invite spoliation by the elements? Nothing in the published cases indicates that proper documentation and photography of the site and wreckage would not constitute adequate preservation of evidence.

The off-site inspection and testing would seem to be a different matter, however. After the wreckage and components are removed to a salvage yard, teardown facility, fixed base operations facility, or an airframe or component manufacturer's facility, the impracticality of preserving evidence dissipates. If a crucial bit of evidence is irreparably changed in a manner that could affect the outcome of a subsequent trial, it appears that the courts in several jurisdictions will find a means to correct the wrong. It appears unlikely that fault will be placed upon the governmental agency charged with overall responsibility for the inspection and testing, unless that agency has sufficient knowledge concerning the effect that the questioned procedure would have on the item as a piece of evidence. It is more likely that the manufacturer with superior knowledge of the effect that such testing will have upon the permanent alteration of the evidence might be found responsible for the spoliation.

What action should interested parties take who are not included? This group could consist of passengers, pilots, owners of the aircraft, rebuild facilities, and maintenance facilities. Obviously, some of these persons or entities will
not suspect that they will become parties until long after the incident. The following suggestions, then, should be followed as soon as notice is received that the non-participants may be the subject of a claim or possess a claim. When they receive such notice, they should consider taking the following actions either directly or through their authorized representative:

1. Contact the facility maintaining the wreckage, the NTSB, and the owner of the wreckage if known, and copy all known parties that participated in the investigation and request the following:
   - preservation of wreckage in its current state;
   - notification of all planned testing, teardowns, removal of components, and request to participate or observe; and
   - identification of any and all components or parts that are being kept at a different facility or facilities.

2. State with as much specificity as possible in your notice letter:
   - that you anticipate the filing of a legal action for or against you;
   - the importance of certain components and the condition to the pursuit or defense of a potential claim; and
   - that alteration, loss or destruction of identified components or the parts of the wreckage could substantially affect your ability to prosecute or defend a legal action arising from the accident.

The notice under current policies will likely have little impact upon what you actually receive in response and will typically not result in an invitation to participate. It will, however, provide a basis for asserting a position that the participants may have been substantially prejudiced by any spoliation that might subsequently occur. This will meet the criteria of most courts for seeking either sanctions or other available remedies.

What actions should participants take to protect themselves and their employers from liability? For that matter, how should the participant in an NTSB investigation respond to a notice such as that suggested above? Unless you
are the NTSB, you should consider the following in any response to a non-participant's request:

(1) acknowledge the request, and advise that decisions on matters addressed in the request are within the authority of the NTSB investigator-in-charge (you might even enclose a copy of the pertinent regulation);
(2) avoid any statements that could be construed as an "agreement" to maintain evidence unless you have control over that component and decisions affecting its handling; and
(3) copy the NTSB office with which you are working on the response and enclose a copy of the nonparticipant request.

In general, regarding any aircraft accident, organizations that regularly participate in NTSB investigations should discuss the subject of potential spoliation of evidence with personnel involved on-site and at teardown or testing facilities. Be certain that those persons clearly understand their function relative to the NTSB investigator, and inform them that their duty in assisting and supporting the investigation may include advising the investigator of the possible effect of certain procedures on the condition of the component or part. They should also suggest the least invasive procedures that will accomplish the intended purpose of the investigation. Documentation by means of photographs, videotapes, and/or x-rays should be suggested whenever more invasive procedures are required. Finally, make notes or use a checklist to record everything that is done with the wreckage during the investigation. This list should include recommendations and suggestions made that are intended to preserve parts and components.

The suggested procedures are minimal and should in no way interfere with the mandate of the NTSB in conducting its investigation. Each participant will likely not be involved with every piece and component of the wreckage. For that reason, the participant's notes should clearly reflect those duties assigned by the NTSB investigator-in-charge and the parts or components with which the participant had first-hand contact during the investigation.
Given the number of reported cases in 1993 and 1994, it appears that the courts will continue to expand and define the law regarding spoliation of evidence. The jurisdictions that are granting judges broad discretion in fashioning appropriate sanctions from adverse presumption to summary disposition and costs seem to avoid the problems with equality in application of tort remedies between plaintiffs and defendants. As those jurisdictions define the parameters of conduct and their corresponding sanctions with more clarity, perhaps the deterrent effect for such behavior that the courts have tried to remedy will occur as a byproduct.
Comments