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Avoiding the Innocent Spoliation of Evidence

Everyone loses and damages personal items from time to time. Likewise, business enterprises often misplace and inadvertently dispose of information in the form of e-mails, electronic files and even hard copies of documents. Unfortunately, the inability to locate and produce information that later becomes relevant to a lawsuit can be devastating.

SPOLIATION IS THE LOSS, ALTERATION, DAMAGING OR destruction of evidence attendant to civil litigation. There are repercussions for the spoliation of evidence because it often gives one litigant an unfair advantage over another, thereby interfering with the proper administration of justice. Clearly, the judicial system as we know it would breakdown if every litigant could simply destroy bad evidence and make use of the good.

What Constitutes the "Spoliation Of Evidence"?

Spoliation includes the *nonpreservation* of evidence, as well as the destruction or significant alteration of evidence, relevant to pending or reasonably foreseeable litigation." 10 ILPRAC §23:32(2008). It comes in many forms:

> [Spoliation] can occur as the result of actions by parties or by nonparties. It can be inadvertent or intentional. *It can be the product of absolute good faith*, the result of negligence or the exercise of consummate evil.
>
> *Id.*

Over the past 14 years, an evolving body of case law has emerged from Illinois courts on the parameters of negligent spoliation of evidence. Unlike some jurisdictions, Illinois tort law does not recognize a difference between the intentional destruction of evidence and the negligent spoliation of it. In fact, no Illinois court has recognized the tort of intentional spoliation. *See Jones v. O'Brien Tire & Battery Serv. Center, Inc.,* 374 Ill. App. 3d 918, 937 (5th Dist. 2007); *Stoner v. Wal-Mart Sores, Inc.,* No. 06-4053, 2008 WL 3876077, at *2 (C.D. Ill. Aug. 18, 2008).

Nevertheless, if an entity blatantly sets fire to or shreds a harmful document, or affirmatively erases damaging electronic data, a court may penalize that party irrespective of the bringing of a spoliation claim. Consequences might include contempt proceedings, a monetary penalty, entry of default judgment, and debarment from maintaining any claim or defense relating to the evidence. *See* Ill. S. Ct. Rule 219(c).

Oddly enough, Illinois does not even recognize a *separate* tort action for negligent spoliation of evidence. Rather, an aggrieved party seeks redress for spoliation under the penumbra of general negligence law. *Boyd v. Travelers Ins. Co.,* 166 Ill. 2d 188, 193 (1995); *Stoner,* 2008 WL 3876077, at *2.

What Are The Elements Of A Spoliation Claim?

In order to *avoid* a claim of spoliation, a business should understand its components. The birth of spoliation in Illinois occurred in January 1995, when the State's Supreme Court issued an opinion in *Boyd v. Travelers Insurance Company,* 166 Ill. 2d 188 (1995). *Boyd* was later declared the "watershed pronouncement" of Illinois law regarding negligent spoliation of evidence. *Dardeen v. Kuehling,* 213 Ill. 2d 329, 335 (2004). Since that time, the Supreme Court has revisited this topic and circuit courts have applied and interpreted those opinions, filling in the contours of the law.

To state a negligence claim for spoliation of evidence, a plaintiff must plead the elements of an ordinary negligence claim–but with respect to preserving evidence. Those elements are:

- that the defendant had a duty to preserve the evidence;
- the defendant breached that duty;
- the breach proximately injured plaintiff; and
- resulting actual damages.

See Boyd, 166 Ill. 2d at 194-95; *Jones,* 374 Ill. App. 3d at 924. Each element warrants discussion.

Does A *Duty* To Preserve Exist?

Determining whether a duty to preserve evidence exists is, surprisingly, not a simple task. Nine years after it issued *Boyd,* the Illinois Supreme Court clarified that there is a two-prong test to determine if such a duty is implicated, both prongs of which must be satisfied to give rise to the duty to preserve. *Dardeen,* 213 Ill. 2d at 336; *Jones,* 374 Ill. App. 3d at 924-25.

Under the first prong–the "relationship prong"–the plaintiff must show that a duty arose through:

- an agreement or contract between the parties to the spoliation claim;
- a statute;
- another special circumstance; or
- by the defendant's voluntarily assuming the duty through affirmative conduct.

See Boyd, 166 Ill. 2d at 195; *Dardeen,* 213 Ill. 2d at 337; *Village of Roselle v. Commonwealth Edison Co.,* 368 Ill. App. 3d 1097, 1113 (2d Dist. 2006). If the plaintiff can make that showing, it then must establish the second prong, known as the "foreseeability prong." *Village of Roselle v. Commonwealth Edison Co.,* 368 Ill. App. 3d 1097, 1113 (2d Dist. 2006).

To fulfill the second prong, there must be a showing "that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have known the evidence would be material to potential litigation." *Jones,* 374 Ill. App. 3d at 924-25; *accord Boyd,* 166 Ill. 2d at 195; *see also Village*

of Roselle v. Commonwealth Edison Co., 368 Ill. App. 3d 1097, 1113 (2d Dist. 2006). In short, the parties' relationship must warrant the imposition of a duty, which extends to the specific evidence that was allegedly damaged or destroyed. *See Dardeen,* 213 Ill. 2d at 336.

The Fifth District applied this two-prong test in *Jones v. O'Brien Tire & Battery Service Center, Inc.,* and found that an insurer was under a duty to preserve a wheel assembly that detached from a truck and struck a car, causing it to hit a semi, killing the car's driver. *Jones,* 374 Ill. App. 3d at 921-23. The insurer's claims adjuster instructed the truck's owner to preserve the wheel assembly. Then, the adjuster later advised the owner that he could repair the truck. *Id.* at 922-23. When the truck was repaired, the "crucial" outer wheel was tossed. *Id.* at 923.

The *Jones* court held that the insurer's voluntary undertaking to direct its insured to preserve the wheel assembly satisfied the first prong of the duty test. *Id.* at 926-27. The court reasoned that while the defendant did not have actual possession of the wheel, it exercised "enough control over the evidence to allow it to take appropriate steps to preserve it." *Id.* at 927. Once the defendant undertook the duty to preserve the wheel assembly, the court held, it had a duty to exercise reasonable care to preserve it as evidence for future litigants, which satisfied the second prong. *Id.* at 928.

If the plaintiff fails to satisfy either of the prongs of the duty test, the spoliation claim fails. *See Dardeen,* 213 Ill. 2d at 336. As a potential defendant, a business should be particularly wary of a claim that the first prong of the test, that a "special circumstance" exists, can be satisfied.

Has A Duty To Preserve Been *Breached?*

If a duty to preserve the evidence is established, it is typically not difficult to establish a breach of that duty. Of course, if the evidence at issue is in fact lost, destroyed, significantly damaged or altered, a breach will most likely be found. *See, e.g., Boyd,* 166 Ill. 2d at 194-95; *Fuller Family Holdings, LLC v. Northern Trust Co.,* 371 Ill. App. 3d 605, 624 (1st Dist. 2007); *Stoner,* 2008 WL 3876077, at *3. Clearly, the best way to avoid committing a breach is to preserve any evidence that might become relevant to a lawsuit.

That said, even when the evidence has been damaged or destroyed, there is usually an argument to be made *against* finding that a breach of the duty occurred. For instance, a copy of the document at issue may have been made before its destruction. Or a detailed close-up photograph of spoiled physical evidence may exist. Or perhaps reasonable care was taken to adequately–albeit unsuccessfully–preserve the evidence. *See Cangemi v. Advocate S. Suburban Hosp.,* 364 Ill. App. 3d 446, 472 (1st Dist. 2006); *Jones,* 374 Ill. App. 3d at 929-31. If so, the requisite breach may not be present.

Did The Loss Of Evidence *Cause An Injury* To Plaintiff?

Causation is the most difficult element of a spoliation claim to define. *Boyd's* pronouncement of the requisite causal connection, and subsequent decisions' attempts to clarify it, leave one wondering what is truly required. Consequently, litigation over this element likely will be contentious in the vast majority of spoliation claims.

According to *Boyd,* the necessary causal connection exists when "the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit." *Boyd,* 166 Ill. 2d at 196. Expounding further–and adding to the confusion–*Boyd* said that "[a] plaintiff must demonstrate…that but for the defendant's loss or destruction of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit." *Id.* at 196. Still, *Boyd* does not require a plaintiff to show that it *would have prevailed* but for the spoliation, but, rather that it would have had a *reasonable probability of succeeding* on the merits of the underlying case but for the spoliation. *See Stoner,* 2008 WL 3876077, at *2.

The concurrence in the Illinois Supreme Court opinion in *Miller v. Gupta* sheds some light on this topic:

> As elaborated in *Boyd,* the causation element requires a plaintiff to demonstrate how the missing evidence is critical to the plaintiff's inability to prove the underlying suit, and it prevents a plaintiff from recovering where the underlying suit is meritless.

Miller v. Gupta, 174 Ill. 2d 120, 130 (1996) (J. Bilandic, concurring).

Jones later explained that there was nothing in *Boyd* or subsequent cases "to suggest that a spoliation plaintiff can only prevail by demonstrating that the loss of critical evidence leaves it with no evidence at all to support a claim or defense in the underlying action." *Jones,* 374 Ill. App. 3d at 933. It goes on to say that "if a spoliation plaintiff did not have a valid claim or defense supporting a reasonable chance of success in the underlying action, it should not be able to prevail on a spoliation claim." *Id.* at 932.

At bottom, a viable claim must allege that the spoliation of the evidence caused the plaintiff to be unable to prove the

How Can A Business Avoid Spoliation Claims?

What can entities do to minimize the risk of spoliation of evidence in the context of civil litigation? This is a particularly important topic in the context of business litigation. Indeed, the albatross of electronic discovery requires following a laborious protocol to avoid the inadvertent spoliation of digital information. Although nothing can guarantee that an entity will not inadvertently damage or destroy evidence, steps can be taken to dramatically reduce the chances that this will happen:

First, in preparation for electronic discovery, the business' legal counsel should thoroughly familiarize himself or herself with the business' electronic systems. Electronic discovery is a veritable spoliation minefield due to the sheer volume of information and storage constraints that often mandate an "out with the old, in with the new" method of record-keeping. Andrew Hebl, Spoliation of Electronically Stored Information, Good Faith, and Rule 37(E), 29 N. Ill. U.L. Rev. 79, 89 (Fall 2008). Counsel's familiarity with how information is stored and deleted will assist the business in avoiding spoliation.

Second, when litigation is imminent, a business should thoroughly document sources of relevant information, key players, and potential custodians of records. This will enable it to provide informed answers to questions its counsel should pose regarding both: (a) the source, content and quantity of potentially discoverable material; and (b) the business' document retention policy.

Third, if a business foresees a future claim arising out of an accident, event or injury, action should be taken *promptly*. Potentially relevant documents, whether in hard copy or electronic form, should be quarantined and preserved. The same should be done with any and all physical evidence related thereto. Taking no action for weeks or even days may allow the destruction of evidence through otherwise harmless routine practices.

Fourth, *the business should suspend all electronic auto-delete policies and programs with respect to the individuals that were involved in the matter at issue.* Likewise, these individuals should be told of this procedure and directed to preserve all non-electronic materials (as well as electronic materials) to which they have access.

Fifth, someone in authority, whose directives will be followed, should work with litigation counsel to implement a litigation hold. A "litigation hold letter," advising employees to preserve evidence should be sent to anyone that may have relevant information. This individual should play an integral role in the identification and collection of the potentially responsive documents. It may be necessary for him or her to testify if a spoliation claim is later made.

Sixth, as a precaution, the business should consider having individuals with access to potentially relevant evidence verify, in writing, that they understand their preservation responsibilities. Those individuals can also be required to identify, in writing, the location of all potentially responsive hard-copy materials, electronic documents and physical evidence.

underlying action. *See Jones,* 374 Ill. App. 3d at 932; 1 Trial Handbook for Illinois Lawyers, Civil §14:36 (7th ed. 2008). This causation element is tricky, indeed, because it is not necessarily true that a plaintiff who lost without the evidence would have won with it. 10 ILPRAC §25:11 (2008).

Did The Loss Of Evidence *Damage* Plaintiff?

As with all negligence claims, an actionable spoliation claim must allege that the aggrieved party suffered actual damages resulting from the breach. *See Boyd,* 166 Ill. 2d at 197. It must be alleged that "defendant's loss or destruction of the evidence caused the plaintiff to be unable to prove an *otherwise valid*, underlying cause of action." *Id.* (emphasis added).

The "otherwise valid" language means a defendant can defeat a spoliation claim by showing that the plaintiff would have lost its underlying claim even with the evidence at issue:

> [I]f the plaintiff could not prevail in the underlying action even with the lost or destroyed evidence, then the defendant's conduct is not the cause of the loss of the lawsuit. This requirement prevents a plaintiff from recovering where it can be shown that the underlying action was meritless. *Id.*

The trier of fact–whether judge or jury–determines the amount of damages after a full trial on the merits. *See id.* at 198. A single trier of fact considers the underlying case and negligent spoliation claim concurrently because it is in the best position to determine if the spoliation of the evidence was the reason why plaintiff could not prove its case. *Id.*

Courts disagree as to the proper measure of damages in spoliation cases. Some say it is the amount that the plaintiff would have recovered at trial, multiplied by the probability of success, while others find that the plaintiff is entitled to the full amount recoverable at trial if the evidence was available. *See Jones,* 374 Ill. App. 3d at 935.

In Jones, where the underlying case settled, the court stated that "[a]s a practical matter, the most accurate measure of damages would be the difference between the amount for which the case settled without the evidence and the amount upon which the jury finds it likely that the parties would have settled had the evidence existed allowing the defendant to present a stronger case." *Id.* at 936.

It appears courts are trending toward fully compensating the aggrieved party for the entire amount of the potential trial recovery with the evidence. *See id.* at 936-37. Whatever the formula for measuring the damages, if an adversary presents a viable spoliation claim, a business' out- of-pocket liability will be tied to the theoretical recovery value of the underlying case.

In sum, under Illinois law, potential litigants owe a duty to their adversary to take reasonable measures to preserve the integrity of material evidence. By taking the foregoing actions, a business will make substantial inroads into fulfilling this duty, preparing itself for what looms ahead, and either averting or prevailing on a spoliation of evidence claim. ■

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