Consumer Fraud Class Action Trials: Calling Plaintiff Counsel's Bluff

Linda Woolf and Rick Barnes
Goodell DeVries Leech & Dann (Baltimore, MD)

lsw@gdldlaw.com and rmb@gdldlaw.com | 410.783.4011 and 410.783.4004
http://www.gdldlaw.com

Taking Class Actions to Trial
Derek Stikeleather, Linda S. Woolf and Richard M. Barnes

The conventional wisdom in consumer class action litigation has long been that cases are won or lost when the court decides the plaintiffs' motion for class certification. Virtually no class representative continues to pursue his or her individual claim after a court denies class certification. And defendants have long considered certified consumer class claims too risky to defend at trial, preferring instead to settle the overwhelming majority of them. Many courts have accurately recognized that as "a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591 n.2 (3d Cir. 2012) (citing Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 (3d Cir. 2001) ("[D]enying or granting class certification is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . .")). Accordingly, it remains true that "denying or granting class certification is often the defining moment in class actions." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008).

But, for many reasons, defendants have nonetheless been reconsidering their traditionally strong aversion to trying consumer class claims. First, many plaintiffs have pushed the boundaries of traditionally viable class actions and are now simply over-reaching. So concerned with crafting a claim that meets the procedural requirement of presenting some common questions of law or fact for classwide resolution, many plaintiffs' lawyers have lost sight of the need to have a meritorious underlying dispute and legitimately aggrieved named plaintiffs. Plaintiffs can no longer celebrate merely because their case has been certified because increasingly frivolous claims are increasingly likely to be tried.

Second, the procedural demands for a viable class action are rising. The Supreme Court's recent emphasis on all federal courts' requirement to conduct rigorous analysis to ensure compliance with Rule 23 not only makes class certification more difficult to obtain – at least in federal court – but also makes class certification more difficult to preserve as the trial unfolds and plaintiffs must fully articulate how they plan to prove their damages on a classwide basis. See Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515 (2013) (holding "at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case") (internal quotation marks omitted). See also Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

Third, many permissive consumer-protection statutes have been amended to prevent frivolous claims and class action abuse. Most notably, California voters passed Proposition 64 to amend their state's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq., which broadly proscribes any "fraudulent," "unlawful," and even "unfair" business practice. Named plaintiffs now must show "actual reliance" on the challenged practice to represent the class. In re Tobacco II Cases, 46 Cal. 4th 298, 314-15 (2009).

Case Study: Weinstat v. Dentsply, CGC-04-432370 (Cal. S.F. Sup. Ct. Jan. 21, 2014)

The case is certified and decertified
In Weinstat, plaintiffs challenged the FDA-cleared prescription medical device labeling of Dentsply's Cavitron ultrasonic scaler, which dentists and hygienists

use to clean teeth, as "deceptive" and "misleading" for not including more explicit statements on the microbiological quality of dental water. Plaintiffs claimed that the content of the device's instruction manual ("Directions") violated California's Unfair Competition Law and breached an express warranty to purchasing dentists of fitness for "surgical" use. As is often the case in California, the case was quickly certified as a class action based on limited discovery and plaintiffs' assurances that the case was appropriate for class treatment. The same court de-certified the case just a few months later based on the California appellate courts' then-conflicting views on the legal ramifications of the recently passed Proposition 64. The Weinstat plaintiffs appealed the decertification order, and the appeal was stayed pending the California Supreme Court's decision in Tobacco II, which settled Proposition 64's meaning for named plaintiffs in UCL cases.

The appellate court re-certifies the case while accepting plaintiffs' factual assertions as true

Tobacco II clarified that Proposition 64 creates an "actual reliance" requirement for named plaintiffs, but not for the absent class members, in a UCL action. In UCL cases alleging fraudulent conduct, if the named plaintiffs prove their "actual reliance," the plaintiffs need only show that the challenged conduct was "objectively likely to deceive" the absent class. Following Tobacco II, the intermediate appellate court in Weinstat re-certified the case and remanded it with orders to proceed on whether the named plaintiffs had satisfied the actual reliance requirement under Tobacco II. Weinstat v. Dentsply Int'l, Inc. (2010) 180 Cal.App.4th 1213.

In resolving the discrete procedural question raised by the original Weinstat appeal, the appellate court ventured deeply into the merits of the underlying dispute. Despite the fact that discovery had not been completed and the trial court had not yet made any factual findings, the appellate court issued a scathing opinion that essentially accepted all of the plaintiffs' contested factual assertions as true. The appellate court held that, for purposes of classwide resolution of the UCL and breach of express warranty claims, it did not matter that the Cavitron Directions were sealed in the box and could not be read until after the purchase. Among the disputed factual assertions that the court assumed to be true when coming to these conclusions and ordering the class re-certified were that 1) the microbiological quality of dental water made the Cavitron an "unsafe" device for oral surgery and 2) professionally trained and licensed California dentists were generally unaware of the microbiological quality of dental water and how to properly maintain the dental water lines of a Cavitron. Operating on these unproven assumptions, the appellate court essentially treated any plaintiff's purchase and use of the device as conclusive proof that the dentist was deceived:

> The safety of the Cavitron would be material to any dentist regardless of when the representation was made. The materiality of Dentsply's representations concerning the Cavitron's safety for surgical uses was established objectively by appellants' actual use of the device for oral surgery, in accordance with those representations, regardless of whether appellants saw the Directions before or after purchasing the device.

180 Cal.App.4th at 1223 n.8. Rejecting Dentsply's arguments that professional purchasers already understood the water quality issues that plaintiffs alleged Dentsply had deceptively concealed from them, the appellate court found that "[t]here was no evidence that appellants were aware of the biofilm risk posed by Cavitron usage, but purchased and used it anyway." Id. at 1235.

The trial court on remand resists summary judgment and, despite new evidence favorable to Dentsply, pushes for trial in the absence of any real settlement prospects

Given these sweeping statements in the appellate court's opinion, plaintiffs were essentially unwilling to settle for anything less than what they were already seeking as damages at trial. And the trial judge, despite further post-remand discovery, the dismissal of two named plaintiffs, and the addition of another named plaintiff, seemed reluctant to make any case-dispositive rulings that may have seemed inconsistent with the appellate court's factual presumptions without a full trial and additional factual findings. With virtual surrender as its only other option, Dentsply proceeded to trial to disprove the factual contentions that had allowed the plaintiffs to progress so far in the case and receive such a favorable initial appellate opinion.

Put to their proof, plaintiffs could not make their case at trial

At trial, plaintiffs' case crumbled. Over three weeks, the court heard fact witness and expert witness testimony that exposed the baseless nature of their claims. First, lacking any evidence that Cavitron output water had ever harmed anyone, despite hundreds of millions of uses over several decades, plaintiffs dropped their

"safety" claim. They focused, instead, on the theory that the Directions caused purchasers to violate controlling regulations on proper surgical uses. But their named plaintiffs and paid experts could not back up their legal theories.

The named plaintiffs were completely unable to show anything approaching "actual reliance" on Dentsply's Directions in purchasing and using the device for surgery. The Court's post-trial ruling explained that "class representatives still must establish reliance on some misrepresentation. But there was no substantial evidence that they relied on anything." Jan. 21, 2014 Mem. Op. at 16. Regarding named plaintiff Dr. Murray, the Court quoted her to explain that the "Directions were irrelevant when she decided which procedures to use it for:

> Q: Did you rely on anything in the D[irections] in deciding what to use your Cavitron for?
> A: No.

Mem. Op. at 17. The other named plaintiff "testified that he did not consider the Directions relevant to his practice and never used them for any purpose." Instead, he "first read his Directions when preparing for his deposition . . . after he stopped using the Cavitron and after his discussions with counsel." Id.

Beyond the named plaintiffs' inability to show actual reliance, they also could not show the Directions were objectively misleading. Plaintiffs presented no survey evidence that suggested any confusion among purchasing dentists. Id. at 20. Ultimately, the trial court found that dental "professionals already know the facts which plaintiffs say ought to have been disclosed: they know the CDC Guidelines, [and] they know dental water contains biofilm." Id. at 26. It concluded that the "evidence does not show anyone was misled, or that the class was likely to be misled." Id.

Key to the trial court's final decision were the factual findings that squarely rebutted many of the unproven factual premises that the California Court of Appeal had relied upon in writing its 2010 Weinstat decision, including the false premise that professional dentists were unaware of biofilm formation in all dental water lines. Mem. Op. at 16 ("When the Court [of Appeal] wrote these words [in 2010], there was 'no evidence that appellants were aware of the biofilm risk posed by Cavitron usage, but purchased and used it anyway.' There is now."). In particular, the Weinstat plaintiffs' expert and the class representatives all conceded at trial that professionally trained dentists have been well aware since the mid 1990s that biofilm forms naturally in all dental waterlines and that dental practitioners have many commercially available water line treatment options that allow them to control the quality of their output water. Id. at 5-6.

Lessons going forward

Weinstat shows that companies faced with baseless class actions are not always compelled to settle them after they are certified, even in jurisdictions that plaintiffs favor, like California. If plaintiffs have their class certified, they will often waste their leverage in settlement negotiations by seeking relief that does not materially differ from what they could prove they are entitled to recover after a full trial and neutrally administered claims process. If the claim exists more in theory than in reality, plaintiffs are stuck with the fact that they ultimately have no significant number of customers who can come forward with meritorious claims.

The incentive to go to trial is especially strong where, as in Weinstat and many other consumer class actions, the class representatives are not strong. Although defense counsel appropriately focus on using the class representatives' depositions to draw out testimony that shows why a class should not be certified, it is equally important, either in the first instance or in separate merits discovery, to obtain the substantive testimony that shows the case's failure on the merits. This is particularly true in states like California where consumer protection laws impose greater burdens on the named plaintiffs than on the absent class.

Class action trials, once rare, are becoming increasingly common. In many, defendants prevail after a full trial on the merits. See, e.g., In re BankAtlantic Bancorp, Inc., 07-61542-CIV, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) aff'd on other grounds sub nom. Hubbard v. BankAtlantic Bancorp, Inc., 688 F.3d 713 (11th Cir. 2012); In re Am. Mut. Funds Fee Litig., CV 04-5593 GAF (RNBX, 2009 WL 5215755 (C.D. Cal. Dec. 28, 2009) aff'd sub nom. Jelinek v. Capital Research & Mgmt. Co., 448 F. App'x 716 (9th Cir. 2011). Where plaintiffs' case is flawed, trial may be the best option.

Despite the Proposed FRCP 37(e), Spoliation Claims Will Still Hinge on Effective Story Telling About Justice

Linda S. Woolf and Sarah L. Scott

The Committee on Rules of Practice and Procedure of the Judicial Conferences of the United States ("The Committee") released a lifeboat on August 15, 2013, for both federal judges and attorneys desiring firmer grounds for, and stronger justifications of, the application of spoliation sanctions, in the form of The Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure ("Preliminary Draft").[1] The comment period closed February 15, 2014 and the Committee will reconsider the rule and submitted comments starting in April 2014. Overall, the proposed amendments are beneficial. However, these proposed changes are controversial[2] and it is not clear that the changes will be adopted. Moreover, any such change would affect only federal courts.[3] Therefore, despite some potential progress in federal jurisdictions, practitioners are well advised to tread carefully when advocating for or against spoliation sanctions, and to create a compelling story of justice to support their positions.

After discussing the proposed changes to FRCP 37(e) and the potential ramifications of these changes, this paper will turn to the current federal and state common law governing destructive testing and similarity in testing, to illustrate both the different "justice" considerations courts latch onto when determining such evidentiary issues and to highlight some common guidelines. In so doing, we will examine the need to tread carefully and be cognizant of the vagaries of each particular jurisdiction, while emphasizing what practitioners must argue to further their positions to impose or prevent spoliation sanctions.

The Proposed Changes to FRCP 37(e) and Some (Unintended) Potential Consequences

The Preliminary Draft gives both judges and attorneys more framework for spoliation sanctions in that Rule 37(e) would now require both demonstrable, substantial prejudice to the non-spoliating party and willful or "bad faith" conduct causing the spoliation before any spoliation sanctions may be applied—unlike previously, where slight prejudice or mere negligence might have justified such sanctions.

Given the reality of class action and multidistrict litigation, the amendments appear aimed at crafting a uniform rule that covers all types of spoliation—ediscovery issues or product destruction issues. The lack of uniformity between the circuits encourages forum shopping, and creates confusion as to what standards ought to apply in complex litigation.[4] Also, the additional requirements add structure. Though terms like "substantial prejudice" and "bad faith" still allow for some wiggle room, as will be discussed below, requiring that both of these elements be satisfied would create more structure in spoliation sanction decisions. This additional structure would enable parties who disagree with a given spoliation decision more ammunition in the appeals process and create more consistency in spoliation sanction decisions in this regard.

The framework, however, is still shaky. The revised rule contains consequences that might not have been fully realized by its drafters. First, the requirement that the conduct be either willful or in bad faith will potentially allow nonintentional electronically stored information (ESI) conduct—like certain automatic deletions from computer systems[5]—to be sanctioned, despite the committee's stated rejection of those decisions that have authorized the imposition of sanctions for "negligence" or "gross negligence."[6]

Second, though the proposed rule would apply to all destruction of evidence, it is clear that the committee was focusing on e-discovery problems and not the

1 Comm. on Rules of Practice and Proc., Judicial Conf. of United States, Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure, Aug. 15, 2013, available at http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf; Leta Gorman, Prejudice Required or Presumed? Proposed Amendment to FRCP 37(e) versus Sekisui American Corp. v. Hart, IADC Comm. Newsletter, Oct. 2013, at 2, available at http://www.iadclaw.org/assets/publication/Product_Liability_October-2013.pdf.

2 See, e.g., Henry Kelston, Are We on the Cusp of Major Changes to E-Discovery Rules? L. Tech. News, Apr. 17, 2013, available at http://www.lawtechnologynews.com/id=1202596362366?slreturn=20140304143658.

3 Though it does emphasize that 37(e) creates the authority to impose sanctions and, so, "forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of" what is required under 37(e), that applies only in federal court. Additionally, the proposed rule does not "affect the validity of an independent tort claim for relief for spoliation if created by the applicable law" so state tort claims for spoliation, where available, would be unaffected. Preliminary Draft, supra note 1, at 40.

4 See, e.g., In re Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation, MDL No. 2327, 2014 WL 439785, at *8 (S.D.W.Va. Feb. 4, 2014); Tera E. Brostoff, Testimony on Changes to FRCP 26(b) and 37(e) Reflects Continuing Discord, Bloomberg News, Nov. 21, 2013, available at http://www.bna.com/testimony-changes-frcp-n17179880278/ ("[a lawyer testifying] said a lack of circuit uniformity on sanctions exists and is an affront to the litigation system.").

5 See Lawyers for Civil Justice, Briefing Points: Proposed Amendments to the Federal Rules of Civil Procedure, available at http://www.lfcj.com/documents (last accessed Apr. 3, 2014).

6 Proposed Rule, supra note 1, at 41. One Second Circuit judge, interestingly, has argued against this proposed amendment because she feels that the change would not allow any spoliation sanctions in cases where the destruction was merely negligent. Seikisui American Corp. v. Hart, 945 F. Supp. 2d 494, 503 n.51 (S.D.N.Y. Aug. 15, 2013).

more traditional problems arising from the destruction of, for example, the allegedly defective car seatbelt.[7] There is only a very limited exception to the "willful" or "bad faith" requirement, which requires that the party's actions irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation."[8] If the "limited" aspect is expansively enforced, it would give businesses arguably more clear guidelines for the retention of e-documents and a safe harbor despite the destruction of some documents; however, the revisions may unfairly deprive defendants in more traditional product liability cases access to spoliation sanctions like dismissal in instances where, for example, the plaintiff has destroyed the toaster that allegedly caused a fire.

This possibility is made even more likely by the committee's decision to explicitly list within the rule considerations the court should weigh when determining whether the exception applies, as one of the considerations the committee emphasized was the party's sophistication.[9] Individual plaintiffs are generally considered unsophisticated and, therefore, their destruction of the product central to their cause of action might be argued to nonsanctionable despite the effect on the defendant's ability to defend the case. Additionally, the court must consider all causes of action when determining whether the party requesting spoliation sanctions was irreparably deprived: if not all claims, or defenses to claims, are extinguished, then the court ought not apply this exception, according to the committee.[10]

As a result, cases like Pennsylvania Trust Co. v. Dorel Juvenile Group, Inc[11]., would likely not apply spoliation sanctions to the plaintiff, an outcome that would be unfair to the defendant manufacturer. In Pennsylvania Trust Co., the plaintiff father had control of the minivan containing the allegedly defective booster seat after the accident that caused severe brain damage to plaintiff infant. Plaintiff father then voluntarily transferred the minivan's title to the towing company, after taking pictures inside and out of the vehicle.[12] The court found that, though the booster seat was not intentionally destroyed, that seat was relevant to the litigation because it was "evidence bearing on causation."[13] Consequently, the court imposed exclusion of testimony and adverse inference instructions as spoliation sanctions. This outcome seems appropriate, as the father knew he was likely going to litigate—thus, the photographs—yet still voluntarily got rid of the minivan containing the disputed seat. Under the new "limited exception," however, there might not be enough prejudice to warrant sanctions; the plaintiff was an unsophisticated party who did take photographs of the inside of the van, and the court did not find that there was no way that the manufacturer could mount a defense to the claims without access to the booster seat in dispute.

If, on the other hand, courts do not take seriously the committee's admonition to apply the exception only in "very rare cases,"[14] the exception might lead to extensive motion practice by plaintiffs alleging that they have been 'irreparably deprived" of important information, even if the failure to preserve such information was neither willful nor in bad faith. The factors set forth by the drafters of the amendments are intended to be utilized in making a determination of the "reasonableness" of conduct. There is some real risk that the factors could distract courts from the primary purpose of the rule or be misinterpreted as an exhaustive list of mandatory considerations for a court evaluating discovery conduct under Rule 37(e).

Given these considerations, then, and given that the proposed changes to Rule 37(e), if adopted, would not be implemented until December 2015, practitioners need to look to federal and state precedent in order to pick through the dangerous field of spoliation sanctions. This paper will focus on warnings, advice, and guidelines for practitioners involved particularly in product liability cases.

Varying Results in Spoliation Actions Under Current State and Federal Law

In product liability cases especially, appropriate pre-litigation handling of evidence is key to both parties. A plaintiff's chief evidence will likely be the product itself: were that evidence to be altered or destroyed, there

7 Also, too, the comments focus on the ediscovery issues. Almost none of the 2,343 comments, if they mentioned changes to 37(e), mentioned the spoliation of tangible objects. The Motor Vehicle, Highway, and Premises Liability Section of the American Association for Justice's comment discussed the proposed rule in light of potential losses of things such as videotapes of premises, and the Lawyers for Civil Justice's Comment, supra note 4, stated that the exception found in (1)(b)(ii) should apply only to the loss of "tangible things".

8 Preliminary Draft, supra note 1, 37(e)(1)(B)(ii).

9 Preliminary Draft, supra note 1, at 45.

10 Preliminary Draft, supra note 1, at 44. ("The requirement that a party be irreparably deprived of any meaningful opportunity to present or defend against the claims in the litigation is further narrowed by looking to all the claims in the litigation. Lost information may appear critical to litigating a particular claim or defense, but sanctions should not be imposed—or should be limited to the affected claims or defenses—if those claims or defenses are not central to the litigation.").

11 No. 07—4029, 2011 WL 2789336 (E.D.Pa. July 18, 2011).

12 Id. at *4.

13 Id.

14 Preliminary Draft, supra note 1, 37(e)(1)(B)(ii).

might no longer be any case. On the other side, if a defendant is unable to examine the product to see if, in fact, its product is somehow faulty, the defendant will be unable to determine how best to defend itself or, perhaps whether it ought to explore settlement in lieu of trial. If a party does not properly handle evidence pre-litigation, one or both parties may be prevented from presenting its case.

Because of this substantial possibility of prejudice, a party who does alter or destroy evidence prior to trial may well face a range of sanctions for so doing—sanctions that are at the sole discretion of the trial judge, under the current Rule 37 of the Federal Rules of Civil Procedure, the corresponding state rule, or under the court's discovery rules, and which can be as severe as dismissing the case.[15] When a party destroys or alters evidence, knowingly allows evidence to be altered or destroyed, or fails to prevent alteration or destruction, that party has committed spoliation of evidence, and may be subject to spoliation sanctions.[16] Here, the focus will be on the adverse evidence sanction and the exclusion of evidence sanction: both potentially serious, case-destroying spoliation sanctions. The adverse evidence sanction requires the finders of fact to assume that the destroyed or altered evidence was unfavorable to the position of the destroying party.[17] An exclusion of evidence sanction may require either part or all of an expert's testimony regarding the alleged defects to be excluded, or that photographs or videotape of the testing be excluded from presentation during trial.[18]

The adverse evidence sanction is commonly—and seemingly inconsistently—applied.[19] In upholding an adverse evidence sanction, the First Circuit opined that "the real underpinning [of such sanctions] may be a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof."[20] In so doing, the Court emphasized a common theme of "justice being served" underlying seemingly inconsistent spoliation sanction standards and their inconsistent intra- and inter-jurisdictional application.[21] This implicit policy motivates, in part, why some jurisdictions require "malice," some "bad faith," and some require neither in, for example, their guidelines for appropriate application of adverse evidence sanctions.[22]

Finding that the lower court did not abuse its discretion in applying the adverse evidence sanction though those actions had not risen to the level of "bad faith," the First Circuit tellingly observed that "[t]he "bad faith" label is more useful to summarize the conclusion that an adverse inference is permissible than it is actually to reach the conclusion."[23] Judges have an immense amount of discretion in both allowing evidence to be admitted and in preventing admission through evidentiary sanctions. And if the court thinks that justice is served by, for example, applying the adverse evidence sanction, the sanctioned party has little remedy: the standard of review for such evidentiary issues is the highly deferential "abuse of discretion."[24]

---

15 See F. R. Civ. P 37; Evelyn R. Storch & James Simpson, Spoliation, or Please Don't Leave the Cake Out in the Rain, 32 No. 4 Litig. 28, Summer 2006, at 32-3.

16 See, e.g., Michael E. Oldam, The Product Liability Case, 26- Mar. Col. Law. 3, Mar. 1997, at 3.
Spoliation is generally seen as an evidentiary issue, giving rise to prejudice that should be remedied either by evidentiary sanctions or by discovery sanctions. Thomas J. Vesper, *Common Evidence Problems I've Bumped Into and/ Or Tripped Over*, 1 Ann. 2000 ATLA-CLE 175, July 2000, at 7. Because spoliation is seen as a secondary, or trial-related, issue that does not give rise to damages separate from the trial at issue, spoliation is not generally recognized as an independent tort. *Id.* at 7. When it is so recognized, it is often available only against a third party. *See*, *e.g.* Diana v. NetJet Services, Inc., 974 A.2d 841, 844-856 (Conn. Super. Ct. 2007) (finding an independent spoliation tort for third parties, with a lengthy analysis of the purpose of an independent spoliation tort, its history within Connecticut and other states, and the lack of alternative remedies available for third-party spoliators); Hibbets v. Sides, 34 P.3 327, 329 (Alaska 2001) (stating that Alaska has an independent tort for *intentional* third-party spoliators). Those jurisdictions that recognize an independent tort for spoliation may apply stricter standards than apply for spoliation sanctions. *See*, *e.g.*, Martin v. Keeley & Sons, Inc., 979 N.E.2d 22, 28 & 32 (Ill. 2012) (highlighting the differences between spoliation as an actionable form of negligence for first-party spoliators and spoliation as a discovery sanctionable action, stating that spoliation as a form of negligence requires that a plaintiff bears the burden of showing that a duty to preserve evidence has arisen on the part of the defendant, in contrast to spoliation as a discovery sanction, where the duty to preserve evidence is assumed for a potential litigant).

17 See, e.g., Vesper, supra note 16, at 6.

18 See, e.g., San Antonio Press, Inc. v. Custom Bilt Machinery, 852 S.W.2d 64, 66-7 (Tex. Ct. App. 1993) (affirming the exclusion of defense expert's testimony about his testing, against plaintiff's request for dismissal of defendant's pleadings or for adverse evidence sanctions, citing the court's discretion in imposing such sanctions); Sentry Ins. V. Royal Ins. Co. of America, 539 N.W.2d 911, 918-19 (Wis. Ct. App. 1995) (affirming sanction of precluding evidence of the refrigerator's condition, including the photographs of it and component parts that were preserved, in a products liability case where it was alleged that the refrigerator caused a house fire, even when this sanction precipitated a dismissal of the complaint for lack of evidence); Vesper, supra note 2, at 7 ("Sanctions range from exclusion of expert testimony as to the spoliated evidence to the granting of default judgments".); .

19 Vesper, supra note 16, at 6-7.

20 Nation-Wide Check Corp. v. Forest Hills Distrib., 692 F.2d 214, 218 (1st Cir. 1982) (internal quotations and brackets omitted) (quoting McCormick on Evidence § 273, at 661 (1972) (emphasizing that discovery sanctions such as the adverse evidence sanction are imposed for both "prophylactic and punitive effects").

21 See, e.g., Vesper, supra note 16, at 6-7; Finkelstein et al, supra note 15, at 28-9.

22 See Vesper, supra note 16, and Finkelstein et al, supra note 15, for synopses of different guidelines governing different jurisdictions regarding evidentiary sanctions such as that of adverse evidence.

23 Nation-Wide Check Corp., 692 F.2d at 219 (emphasis added).

24 See, e.g., SDI Operating Partnership v. Neuwirth, 973 F.2d 652, 655 (8th Cir. 1992) ("Our review of questions concerning discovery matters is

Because decisions concerning spoliation sanctions have "little uniformity,"[25]one party's "story of justice" may be key to whether, and what type of, spoliation sanctions are applied. Each potential party in a product liability action, therefore, must be exceedingly careful in pre-trial testing and in the handling of potentially relevant evidence, in order to obviate any need to present the more compelling "story of justice" for or against sanctions: lack of uniformity in application and counsels' differing storytelling abilities mean that any individual party's results may vary.[26]

3 Spoliation Claim Cases and their Surprisingly Different Resolutions — Or, How Courts Might Treat Comparatively Unsophisticated Litigants Differently because of Perceived Justice Concerns

Here are three illustrative cases with demonstratively different results, all involving prelitigation spoliation claims against the plaintiffs, where there has been no discovery request or order to turn over that now destroyed or altered evidence.[27] Steffy v. Home Depot, Inc.[28] and Miner Dederick Const., LLP v. Gulf Chemical & Metallurgical Corp.[29] both involve product defects—the first a construction defect and the second a product liability suit.[30] Foley v St. Thomas Hospital[31] is a wrongful death and medical malpractice suit. Foley and Steffy both involve relatively unsophisticated individuals as plaintiffs, while Miner Dederick involves a relatively sophisticated corporate person as plaintiff. In none of these decisions were the defendants given advance notice of destructive testing. In all three cases, the court determined whether to apply sanctions for prelitigation spoliation under the court discovery rules.[32] All three seem to be decisions where the court, essentially, was deciding whether justice would be served were sanctions granted. Despite similar factual structures, the courts did not all agree whether justice would be so served.[33]

In Foley, the court reversed the lower court's spoliation sanction excluding the testimony of the doctor who performed the autopsy on Plaintiff's exhumed husband.[34] Plaintiff had sought legal counsel to pursue a claim of medical malpractice for her husband's death shortly after a hip replacement.[35] Plaintiff was instructed to get her husband exhumed and autopsied, in order to determine whether he had died from the stated spontaneous pulmonary embolism, or instead from medical negligence.[36] Plaintiff's expert pathologist dissected the body and its organs, photographed the pulmonary artery and the operative site, recorded the weights and sizes of organs, and collected some tissue samples. The pathologist determined that Plaintiff's husband had bled to death.[37] The body was then cremated.[38] After deposing Plaintiff's expert pathologist, the defendants moved for, and received, a spoliation sanction excluding this expert's testimony. Due to Plaintiff's resulting paucity of evidence for her claim,

---

very deferential," affirming a lower court's decision to apply a lesser sanction than that of adverse evidence); Trask-Morton v. Motel 6 Oper., 534 F.3d 672, 682 (7th Cir. 2008) (in a case with bizarre facts, affirming the District Court of Indiana's decision not to apply discovery sanctions, as there was no "abuse of discretion"); Battocchi v. Washington Hospital Center, 581 A.2d 759, 767 (D.C. 1990) (in remanding to the lower court for an express finding on degree of fault for losing a note that plaintiff's wanted to submit as evidence in a medical malpractice case, the court emphasized the deferential nature of the evidentiary standard of review, stating that "were this the sort of issue this court decides de novo, we might well agree with appellants…But we do not decide the issue afresh…a finding of a trial court as to the degree of fault of a party in failing to produce or preserve evidence will not be disturbed unless clearly erroneous" and also stated that the court could not find an abuse of discretion by the trial court); Shimanovsky v. General Motors, Inc., 692 N.E.2d 286, 291 (Ill. 1998) (stating that reversal of a particular sanction is "only justified when the record establishes a clear abuse of discretion"); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852 (Tex. 1992).

25 Finkelstein et al, supra note 15.

26 See Oldham, supra note 16, at 1 ("It is also important to identify what constitutes the product or product environment for the purpose of establishing a defect and the elimination or proof of other causes. For example, counsel should preserve the car, not just the alleged defective seat belt; or the house that burned, not just the alleged defective toaster."); Finkelstein et al, supra note 15, at 9 ("we suggest you care for potentially relevant evidence as you would treat a rising soufflé—with delicacy, or it and your client may fall flat.").

27 See Finkelstein et al, supra note 15 (While expressing the authors' agreement with the Massachusetts Supreme Court, which declined to apply court discovery rules to prelitigation spoliation, noting that "Nevertheless, many courts have held that discovery rules enable them to impose sanction for prelitigation spoliation.")

28 No. 1:06—CV—02227, 2009 WL 4279878 (M.D. Pa. June 15, 2009).

29 ---S.W.3d---(Tex. App. Apr. 11, 2013).

30 For another products liability case where an individual person brought the suit, where that plaintiff caused a partially destructive test on a seatbelt without informing the defendant and where that testing was photographed and videotaped, and where the court found that plaintiff committed no sanctionable conduct because plaintiff needed to determine whether the seatbelt was defective for her suit, see Donahoe v. American Isuzu Motors, Inc., 157 F.R.D. 238 (M.D. Pa. 1994). For space considerations, it is not discussed in the body of this paper. However, it is another where the theme as to whether sanctions were warranted seemed more to be general justice considerations than those to which the court referred.

31 906 S.W.2d 448 (Tenn. Ct. App. 1995).

32 *See generally Foley*, 906 S.W.2d 448; *Steffy*, 2009 WL 4279878; *Miner Dederick*, ---S.W.3d---.

33 Greenwood v. Mepamsa, NO. 1CA-CV 11-0782, 2013 WL 485727 (Ariz. Ct. App. Feb. 7, 2013) is a good example of a case where the lower court had abused its discretion on so many grounds that the appeals court appears to state that the evidentiary sanctions imposed by the lower court were also an error almost solely on the basis that there were so many other problems that the appeals court was primed to see these sanctions as an injustice.

34 *Foley*, 906 S.W.2d at 453-55.

35 Id. at 450.

36 Id.

37 Id. at 450-51.

38 Id. at 451.

the court then granted Defendant summary judgment.[39] The Court of Appeals reversed the spoliation sanction, finding that preserved tissue samples and photographs were enough evidence for Defendants to examine and, therefore, that Defendants were not prejudiced by the cremation of the body itself.[40] In so finding, the Court noted that the defendants could have asked for an autopsy of Plaintiff's husband initially, but had not done so. Interestingly, despite the fact that Plaintiff retained a lawyer, exhumed her husband, and had this doctor autopsy her husband in order to strengthen the possible basis of her medical malpractice claim, the Appeals Court stated that there was no reason the expert pathologist should have known to preserve the organs for future litigation.[41]

In Steffy, the District Court found that spoliation sanctions should not be applied to Plaintiffs in their product liability suit. Plaintiffs had used plywood instead of drywall for the interior of a structure they built on their property. When Plaintiffs started experiencing adverse effects from being in this structure, they used a handheld device that revealed the presence of formaldehyde in the air.[42] Plaintiffs then contacted an expert to test samples of the plywood—presumably, to determine if the plywood had elevated levels of formaldehyde and was, therefore, improperly or insufficiently labeled or manufactured.[43] Defendant moved for spoliation sanctions against Plaintiffs, claiming prejudice in, among other things, the lack of notification for destructive testing and the lack of opportunity to collect contemporaneous plywood samples (formaldehyde content in plywood decreases over time).[44] The court found that it was not Plaintiffs' fault the samples were destroyed, and that there was little prejudice in Defendant not being notified because Plaintiffs were merely determining how strong their basis was for filing suit. Additionally, the Court noted that there was still plywood available to test upon the opening of discovery, some six to eight months later, but the Defendants did not ask to test the plywood at that time.[45]

Contrast those two cases with Miner Dederick, where the Texas Court of Appeals found that the lower court abused its discretion in denying spoliation sanctions against Plaintiff.[46] Plaintiff, here, had sued Defendant for construction defect after Defendant had constructed an expansion of its hazardous materials containment building, which included an expansion joint with a waterstop to prevent leakage.[47] When Plaintiff investigated a leakage complaint from an adjacent property owner, Plaintiff discovered that hazardous materials were leaking out from the new expansion joint.[48] Plaintiff then opened up the repairs for bidding. It retained another contractor to test this joint per the instructions of a forensic engineering firm and to seal this joint.[49] The new contractor removed sealant from the joint and took three core samples from the concrete abutting the expansion joint. Photographs were both taken of the joint after the sealant was removed and of the coring process.[50] The contractors then put in new sealant and poured concrete over the joint.[51]

Here, just like in the above two cases, we have testing that occurs without notice prior to litigation. However, in contrast to those cases, the Court here found that Plaintiff had a reasonable expectation of litigation because Defendant did not fix the joint and because Plaintiff hired an expert to determine whether it had a case against Defendant for construction defect.[52] Additionally, the Court here determined that the joint was altered and effectively destroyed, even though the original joint remained, because the remainder was buried under concrete and the original sealant had been removed. Unlike in either Foley or Steffy, the Court did not find persuasive the claim that parts of the joint remained, or that extensive photographs had been taken and core samples preserved.[53]As the Court stated, "It is not surprising, then, [given no spoliation sanctions], that [Plaintiff]'s evidence supports its claims."[54] In other words, where circumstances suggest that a litigant might have conducted destructive testing in a manner conducive to its ensuing suit, a court may well conclude that justice would not be served by allowing the admission of evidence of such potentially biased testing procedures that could not be vetted or replicated by the Defendant.

In all three cases, there was testing prior to litigation—with an eye to litigation.[55] Plaintiffs performed destructive

39 Foley, 906 S.W.2d at 452.
40 Id. at 453-54.
41 Id. at 454-55.
42 Steffy, 2009 WL 4279878, at *1.
43 Id.
44 Id. at *8-9.
45 Id. at *7-9.
46 Miner Dederick Const., ---S.W.3d, at *16.
47 Id. at *1.
48 Id. at *2.
49 Id. at *2-3.
50 Id. at *3-4.
51 Miner Dederick Const., ---S.W.3d, at *3-4.
52 Id. at *11.
53 Id. at *13-15.
54 Id. at *17.
55 Though a full discussion is outside the scope of this paper, at least two jurisdictions have found that the knowledge of a potential subrogation claim should require the same sort of preservation of evidence that parties should uphold when it is reasonably certain that there will be litigation. *See* Baliotis v. McNeil, 870 F.Supp. 1285, 1290 (M.D. Pa 1994) (citing Fire Insurance Exchange

testing without notice to the defendants, despite each plaintiff having hired testing experts to determine whether the defendant was at fault. Photographs and/or samples were taken of the items being tested in each case. Yet, it is only in the last case that the court found a spoliation sanction to be warranted. While the conclusions seem to be in tension with each other, there is also a sense that, in a sense, justice has been served in each case. In the first two, individual persons (perhaps with little knowledge of evidentiary rules) destructively tested evidence key to their claims.[56] In the last, a large corporation (arguably a much more sophisticated plaintiff) did the same. Additionally, in the first two cases, excluding the evidence would have caused/did cause plaintiffs to lose on summary judgment because it was the only real evidence that the plaintiffs had to support their claims. In contrast, in the third case, the Court of Appeals remanded to the trial court to determine the appropriate spoliation sanctions, in part, because "the strength of the evidence supporting [Plaintiff]'s recovery in this case also cannot be ignored."[57]

The differences in the outcomes, given the factual similarities, cannot be attributed to the standards used for determining whether to apply some sort of spoliation sanction. Courts tend to use similar considerations: (1) how at fault the party is who altered or destroyed the evidence; (2) how much prejudice was suffered by the other party as a result;[58] (3) whether there is a lesser sanction that will avoid "substantial unfairness" to the harmed party while still acting as a deterrence.[59]

Arguably, the plaintiffs in Foley and in Steffy told a more effective "story of justice," while in Miner Dederick, the defendant was the more effective storyteller.

In order, then, to determine additional specific elements potentially important to the court's justice determination, it will be worthwhile to examine certain differences between these three cases. First, there is the difference in jurisdiction: a party who is requesting or defending against evidentiary sanctions needs to check the specific history of the jurisdiction in which they are appearing, to see what particular elements seem uniquely important to that jurisdiction and also whether, for example, that jurisdiction requires something like "malice" or "bad faith" in order to apply certain evidentiary sanctions—like dismissal or like adverse inference. The party should tell a jurisdiction-specific story of justice, emphasizing prejudice or lack thereof, and potentially the punishment that the spoliators deserve.[60]

Second, the party requesting sanctions should have requested—in writing—to be able to attend any destructive testing or to conduct its own testing, if not pre-litigation, then during the discovery period.[61] In Steffy, the court found the defendant was not sufficiently prejudiced by the plaintiff's destructive testing to determine the formaldehyde levels, in part because the defendants did not ask to test the

v. Zenith Radio Corp., 747 P.2d 911, 914 (Nev. 1987).

56 The general presumption for relatively unsophisticated plaintiffs and the concomitant disinclination to impose evidentiary sanctions on these sorts of plaintiffs only goes so far, of course. See, e.g., Dillon v. Nissan Motor Co., 986 F.2d 263, 265-66 (8th Cir. 1993) (appeals court affirming evidence exclusion and adverse inference sanctions imposed on plaintiff by trial court, where plaintiff's attorney allowed the car at issue to be destroyed and where plaintiff did not initially disclose that there had been another inspection of the car that did not support his suit).

57 Miner Dederick Const., ---S.W.3d, at *17.

58 Though at least one court has determined that a dismissal sanction may be awarded in cases where there is "egregious conduct resulting in the destruction of evidence" even if there is no prejudice. Garfoot v. Fireman's Fund Ins. Co., 599 N.W.2d 411, 414 (Wisc. Ct. App. 1999) (reaffirming its standard it outlined in Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist., 502 N.W.2d 881 (Wis. Ct. App. 1993).

59 See, e.g., Steffy, 2009 WL 4279878, at*7; Miner Dederick, ---S.W.3d___, at *14-15 (looking at whether there was destruction, whether the plaintiffs were at fault, and the prejudice the defendants experienced as a result); Trevino v. Ortega, 969 S.W.2d 950, 954-55 (Tex. 1998) (stating that the court must consider at least these three elements: "(1) Whether there was a duty to preserve evidence; (2) whether the alleged spoliator either negligently or intentionally spoliated evidence; and (3) whether the spoliation prejudiced the nonspoliator's ability to present its case or defense. Foley never explicitly states the Court's considerations but it is clear that the Court is considering exactly these types of elements in regards to the spoliation claim therein.

60 See, e.g., Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 -80 (3rd Cir. 1994). Acknowledging that spoliation sanctions are, in part, to punish guilty spoliators, the court found that the lower court abused its discretion in sanctioning the plaintiff by excluding plaintiff's expert testimony on the allegedly defective product at issue in the case. Even though the expert disassembled the saw guard, which allowed the wood particles allegedly causing the malfunction to fall out, the Court found that this did not count as destructive testing and, therefore, there was no guilty spoliator.

It is likely important, here, that the spoliation sanctions caused the lower court to find for the defendant for summary judgment because the expert's testimony was almost the entirety of the plaintiff's case. The defendants were not able to replicate the testing done, nor were they able to replicate the alleged saw guard defect: however, the court found this to be less important in this case because they might be able to use an exemplar saw to attempt to replicate the problem. The court emphasized that the "potential for prejudice" is much less in a design defect case like this one because of the possibility of exemplar testing.

61 This is, of course, a defeasible standard; however, the amount of time a party waits to ask for the destroyed evidence might well influence the court's decision to sanction. Compare, e.g., Sentry, 539 N.W.2d at 912 & 919 (affirming the trial court's exclusionary sanction excluding plaintiff's evidence regarding the condition of the refrigerator whose alleged defect was said to cause a house fire, even though the defendants waited more than a year after being sent the findings to request their own testing, and despite the consequence that the defendants were then awarded summary judgment) with Shimanovsky, 692 N.E. 2d at 292 (finding the five and a half years the defendant waited to compel production of the parts destroyed in plaintiff's destructive testing key in affirming the appellate court's reversal of trial court's dismissal sanctions for spoliation of evidence, even though plaintiffs had not given any notice to defendants prior to its destructive testing).

plywood during discovery.[62] Whether the defendants would have been able to obtain meaningful evidence it they had performed such testing during discovery is questionable, given the apparently time-sensitive nature of determining the formaldehyde levels in plywood; the court, however, focused on the fact that the defendants had not requested to perform testing. Similarly, in Foley, the court emphasized that the defendants had the opportunity to conduct the autopsy first but did not.[63] In contrast, the court in Miner Dederick emphasized that the defendants three times requested, in writing, to examine the expansion joint at issue, and that the plaintiffs refused at least once.[64] A written pre-litigation or discovery request to test is persuasive that the requested evidentiary testing is necessary to that party's case, instead of merely a "trial strategy" for the purpose of disadvantaging the opposing side.

A third consideration, found in Miner Dederick alone of the three illustrative cases, is the expert's testimony that he would have performed additional tests on the expansion joint, had it not been altered.[65] Being explicit in how it might have tested the evidence but was prevented because of the opposing party's spoliation helps a party show the particular manner in which it is prejudiced—despite the opposing party having photographed, sampled, and potentially videotaped its destructive testing.[66] Had the defendant's expert in Foley, for example, been able to identify a test that he would have performed—but was not performed—on the body, the defendants might have better argued that they were prejudiced by the cremation, despite the organ samples and photographs.[67]

Destructive Testing Requirements

Where there is ongoing litigation, it is imperative that a party wishing to destructively test crucial evidence inform the court and the other parties prior to that testing—and that the testing party allows all other parties to observe. Otherwise, that party will likely be sanctioned and might well be subject to a "death penalty" sanction.[68] Taking photographs and videotaping such testing is important but, without notice, those types of documentation might not be seen as sufficient to overcome the prejudice of not being present for, or not being informed of, destructive testing.[69] This is in contrast to non-destructive testing, where the opposing party is usually excluded from observing the other party's tests due to work product doctrine considerations.[70] Like the discussion above, these requirements are to ensure that "justice is served"—the party who was not informed of the destruction might not have had the opportunity to do the testing it would have liked to undertake, or might not approve of the procedures used by the opposing party. Determining whether destructive testing will be allowed is totally up to the judge: it is exceedingly important, then, that a party compellingly argue their story of justice in advocating for or fighting against spoliation

62 Steffy, 2009 WL 4279878, at *8.

63 Foley, 906 S.W.2d at 454.

64 Miner Dederick, ---S.W.3d---, at *14.

65 Id. at *15.

66 See, e.g., Sentry, 539 N.W.2d at 919 (affirming lower court's sanction excluding the condition of the refrigerator, despite numerous photographs of the testing and despite the preservation of the component parts).

67 Compare Guerrero v. General Motors Corp., No. 1:06-cv-01539-LJO-SMS, 2007 WL 3203014, at *5 (E.D.Ca. Oct. 29, 2007) (finding, in a design defect suit, that disassembling the seat belt assembly to examine the retractor teeth on a seat belt retractor with allegedly defective design was destructive testing, and would be detrimental enough to the plaintiffs that this testing must be done during trial and after plaintiffs are able to show the untested-upon seatbelt in court) with Donohoe, 157 F.R.D. at 244 (in a product defect case, the court denied spoliation sanctions against a plaintiff whose expert had disassembled a seatbelt retractor that had an allegedly defective design because the defendants may test exemplar belts and because plaintiff's expert videotaped the disassembly procedure).

68 See, e.g., Morris v. Rickel Home Centers, No. 2242, 1993 WL 1156105, 27 Phila. Co. Rptr. 293 (1993) (in a product liability case where plaintiff fell off of an allegedly defective ladder, the court dismissed the case as a sanction because the plaintiff's lawyer destructively tested the ladder nine court days before the start of the trial without notice to either the court or the defendants, and where the court determined that the defendants were unduly prejudiced merely because they could not now present the ladder in court and would have had to have relied on a photograph); Graff v. Baja Marine Corp., No. 2:06-CV-68-WCO, 2007 WL 6900792, at *2-4 (N.D. Ga. Dec. 20, 2007) (finding that plaintiff's expert's evidence and testimony ought to be excluded in a product liability case where the decedent's boat throttle system and steering was disassembled and the gimbal housing was cut by the plaintiff's experts prior to trial, where there was no notice to defendants and where the court determined that litigation was reasonably foreseeable); Cooper v. United Vaccines, Inc., 117 F. Supp. 2d 864, 874 (E.D. Wisc. 2000) (finding that excluding certain testimony was appropriate in a case where plaintiff's expert had ordered destructive testing of the remaining, allegedly defective, vaccine prior to filing suit, stating that plaintiff should have at least informed defendant of the destructive testing, so that defendant could either participate or conduct its own tests).

69 Oddly, in the medical malpractice arena, at least one court has determined that "missing" evidence is somehow different from "destroyed" evidence and has refused to allow spoliation sanctions because of "missing" evidence—emphasizing that they were not making this distinction because of intentionality considerations. Brewer v. Dowling, 862 S.W.2d 156, 159-60 (Tex. App. 1993).

70 See, e.g., Hajek v. Kumho Tire Co., No. 4:08CV3157, 2009 WL 2229902, at *5 (D. Neb. July 23, 2009) (agreeing that "the presence of plaintiffs' counsel during the examinations by defendants' experts violates the work product doctrine," citing for support both Shoemaker v. General Motors Corp., 154 F.R.D. 235, 236 (W.D.Mo. Feb. 28, 1994) and Diepenhorst v. City of Battle Creek, 2006 WL 1851243, at *1 (W.D. Mich. June 30, 2006); Ramos v. Carter Ex. Inc., ---F.R.D.---, at *2-3 (Tex. July 10, 2013) ("There appears to be a rather clear distinction forming between cases involving destructive testing and those involving non-destructive testing. Where courts have ordered materials to be subject to destructive testing, they almost unanimously allow the opposing party to bear witness to the inspection and testing, either in person or via another avenue, such as videotaping."…In contrast, when courts compel production of materials for non-destructive testing, they habitually refuse to allow the presence of an opposing party.").

sanctions.[71] Guerrerro v. General Motors Corp. is an example of the extreme consequences that may result if neither party is totally persuasive in its argument.[72] In this product liability case, the defendant argued it would be unable to defend without destructively testing an allegedly defective seatbelt. The plaintiff argued, in opposition to the testing, that the jury must be able to observe the seatbelt in its present condition, in order to effectively evaluate plaintiff's claims. After hearing both arguments, the court determined that "the only possible way to preserve the weighty interests of each side in preserving the evidence and discovering the truth is to permit the trier of fact in this case to observe the seatbelt in its present condition, and then to permit the Defendants' experts thereafter to undertake the inspection and testing they seek to conduct"—not an ideal situation for a defendant who needs to evaluate the strength of its defense and who might need to determine whether settlement would be preferable to trial.[73] Contrast the effectiveness of the parties' "stories of justice" with the defendant's story in Morris v. Rickel Home Centers, where the defendants portrayed the plaintiff's lawyer as recklessly destroying part of the allegedly defective ladder nine days before trial and without notice.[74] The defendants asked for—and received—dismissal sanctions as a result of this spoliation, even though the prejudice claimed was the fact that the ladder didn't look exactly as it had prior to the testing, and that the defendants were therefore unable to present the ladder in the courtroom, and would have to rely on a photograph.[75]

Ensuring Proper Review for the Record

It is especially crucial to preserve the record for appeals on evidentiary rulings. An appeals court may reverse sanctions on review because, for example, the lower court implied—but did not explicitly state—that it was granting defendants summary judgment because of evidentiary sanctions. The standard of review for summary judgment is de novo—a much more stringent standard than the "abuse of discretion" review of evidentiary sanctions.[76] The higher court may therefore be able to substitute its judgment for that of the lower court's in a review of summary judgment, which the higher court is less able to do under the "abuse of discretion" standard.[77]

Obviously, if a party does not seek sanctions, it has waived any opportunity to have evidentiary sanctions imposed upon review: the appeals court's hands are tied—no matter how much it might want to impose such sanctions.[78] In short, make sure to argue for sanctions for any evidentiary violation and to request that the court be explicit in stating the reasons behind its ruling when there are evidentiary concerns.

Similarity of Testing

Similarity of testing becomes an evidentiary issue where the product allegedly at fault is unavailable or destroyed in the initial accident, or where an accident and its concurrent conditions need to be reenacted. Where, for example, a truck with an alleged design defect has been completely destroyed in an accident, one or both parties may test an exemplar truck in similar circumstances to resolve issues of causation. Such tests will either be excluded or prevented if the Court determines that the tests do not adequately mirror factual allegations or if they do not involve a substantially similar item to the one at issue in the case.[79] Whether an item or a test counts as "substantially similar" depends, in part, on the underlying theory of the case.[80] Whether the test driver is an expert might be a key dissimilarity in a case alleging that a vehicle rolls over too easily, while this same fact might not be relevant in a case where skid marks are used to determine the initial speed of the vehicle. Part of a party's storyline, then, will be to highlight the similarities of the testing for the purposes of her particular theory of the case.

Additionally, when a test uses an exemplar, it is important to document clearly and explicitly the procedures used during the testing. In exemplar testing, it is also essential that the analogous circumstances—like temperature and heat generated in a product liability claim involving a fire—are clearly re-enacted.

71 See, e.g., Conway v. Kaz Inc., No. 09-CV-10065-DT, 2009 WL 3698561, at *2 (E.D. Mich. Nov. 4, 2009) ("The decision whether to allow destructive testing is within the sound discretion of the court," citing Ostrander v. Cone Mills, Inc., 119 F.R.D. 417, 419 (D. Minn. 1988).

72 2007 WL 3203014, at *5.

73 Id. (emphasis added).

74 1993 WL 1156105, 27 Phila. Co. Rptr. 293 at 293.

75 Id. at 308-09.

76 See, e.g., Braverman v. Kucharik Bicycle Clothing Co., 678 N.E.2d 80, 85 (Ill. App. Ct. 1997).

77 Compare, e.g. Battocchi, 581 A.2d at 767 (the appeals court strongly suggested that it would rule for the plaintiff were it able to review de novo but stressed that it does not decide the issue afresh) with Braverman, 678 N.E.2d at 85 (the appeals court used its own judgment in a de novo review and decided differently from the lower court).

78 See, e.g., Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155 (7th Cir. 1998) ("[Plaintiff]'s perplexing failure to seek sanctions under Rule 37 forecloses access to the substantial weaponry in the district court's arsenal.").

79 See, e.g., Hunley v. Glencore Ltd., No. 3:10-CV-455 Slip Op., 2013 WL 1681836, at *4-6 (E.D. Tenn. Apr. 17, 2013) (finding that destructive tests cannot be performed where the truck at issue had been rebuilt and where the tests, being done on an incline, where the accident at issue did not occur on an incline).

80 See, e.g., Jodoin v. Toyota Motor Corp., 284 F.3d 272, 278 & 280 (1st Cir. 2002) (citing cases where the facts in similar types of testing in support of different underlying theories caused different similarity determinations).

Otherwise, the testing results will likely be excluded.[81] Photographs or videotape capturing the surroundings and the subsequent testing may be helpful to persuade the court that the testing was performed in similar conditions.[82]

Recreations of accidents to demonstrate a defect—or to refute the possibility of a defect—in product liability suits may be viewed with skepticism: however, if there is "substantial similarity" between the accident and the recreation, including the type of vehicle used, the evidence might be admitted even if the exemplar vehicle is not absolutely identical to the one at issue.[83] Recreation evidence may also be introduced as "an illustration of general scientific principles."[84] If a party does not want evidence from certain tests to be allowed as testimony, that party is best served by emphasizing the dissimilarity of that tests, which dissimilarity will cause prejudice to their side and aggravate injustice.[85]

Conclusion

The proposed changes to FRCP 37(e) would help ease some of the problems and pitfalls in spoliation sanction claims, but still allow for undue bias towards certain parties within litigation, and may not resolve the confusion between jurisdictions as to whether a spoliating party need be doing so in bad faith. Additionally, if passed, they would not come into effect until the end of 2015, and would apply only to federal court. Therefore, practitioners must still rely on conflicting federal and state precedent in analyzing spoliation sanction claims.

Due to the substantial discretion that trial courts enjoy regarding the admission or exclusion of evidence, either on spoliation or similarity of testing grounds, it is key for counsel to argue a compelling story of justice in furtherance of its particular position. Spoliation arguments are jurisdictionally localized, though there are some commonalities—like sophistication, proof of desire to examine the missing or altered evidence prior to requesting sanctions, proof of desire for additional types of tests to be performed, evidence that the court is already predisposed against the spoliating party—that may be helpful in compellingly arguing your own particular story of justice in court. The trial court also has wide discretion on whether a given test is relevantly similar or not. Disallowing a particular test into evidence may have similar effects to exclusion of evidence under a spoliation sanction, in that it may well prevent one or both parties from presenting its case. Careful advocacy, preservation, and proof, therefore, are essential to prevent—or to successfully argue for—exclusions which may be, for all practical effects, case-ending.

Meanwhile, practitioners should advocate for uniform spoliation rules in local, state, and federal jurisdictions, with clear statements as to under what circumstances spoliation sanctions will be appropriate. Until then, even with the proposed FRCP rule revision, the litigation and motions surrounding spoliation claims will likely only increase—thus increasing the cost for the involved parties.

---

81 See, e.g., MMG Ins. Co. v. Samsung Electronics America, Inc., ---F.R.D.---, at *2-3 (D.N.H. 2013) (excluding expert witness's testimony where the "burn tests" he performed on an exemplar DVD tray was not described in any detail regarding the source of the flame and where the heat and temperature likely exceeded from those allegedly generated during the fire).

82 See, e.g., Bronson v. Umphries, 138 S.W.3d 844, 854 (Tenn. Ct. App. 2003) (affirming a jury verdict for defendants, the appeals court found that the meggering of the railroad signal wires after a fatal accident occurred in similar conditions to that at the time of the accident, despite plaintiffs' claim that the testing was done while conditions were dry, because defendants produced photographs taken at the time of the testing that clearing showed standing water in the ditch where the testing occurred).

83 Jodoin, 284 F.3d at 278 & 280; see also Faniola v. Mazda Motor Corp., No. CIV-02-1011 JB/RLP, 2004 WL 5522844, at *1 (D.N.M. Apr. 15, 2004) (finding that accidents that involved collisions were not "substantially similar" to those involving road debris and that, therefore, the expert may not testify on the former type of case).

84 Logan v. Cooper Tire & Rubber Co., No. 10-3-KSF, 2011 WL 3267894, at *3 (E.D.Ky. July 29, 2011).

85 See General Motors Corp. v. Porritt, 891 So.2d 1056, 158-59 (Fla. Dist. Ct. App. 2004) (finding that a videotape of a seatbelt buckle being manipulated should be excluded from evidence because the tests were "misleading and prejudicial," where opposing party emphasized the differences between the actual accident and the tests done on the buckle, including the use of a mallet/hand, foreign objects, etc.).

About Linda Woolf

Managing Partner | Goodell DeVries Leech & Dann | Baltimore, MD

410.783.4011 | lsw@gdldlaw.com
http://www.gdldlaw.com/attorneys/linda-s-woolf

Ms. Woolf is the Managing Partner of the firm and one of its founding members. Ms. Woolf's practice is devoted to the representation of clients in class action and Multidistrict Litigation, complex commercial, insurance coverage, construction, government liability, and employment litigation.

Class Action and Commercial and Business Tort Litigation

- Represents major pharmaceutical company in federal court action seeking certification of nationwide class under consumer fraud statutes, obtaining order denying class certification.
- Represents medical device manufacturer in class actions pending in various federal and state courts arising from sale and distribution of Class II medical device.
- Represents major transportation software engineering company in consolidated lawsuits arising out of Washington Metropolitan Area Transit Authority collision on June 22, 2009 involving nine wrongful death and over 50 personal injury lawsuits.
- Represents major pharmaceutical company in litigation arising from the divestiture of a wholly-owned medical device subsidiary.
- Represents an international manufacturer in litigation arising from the divestiture of a worldwide battery business.
- Represented national food producer in multidistrict litigation seeking certification of nationwide class of consumers involving allegedly false advertising claims.
- Has represented national and local corporations at the trial and appellate levels in state and federal courts in matters involving the sale of corporate subsidiaries and businesses, alleged predatory lending practices and consumer fraud, federal and state antitrust violations, claims arising from non-competition agreements and the misappropriation of technology and other contractual disputes. Represented a surety in protracted litigation with the Resolution Trust Corporation arising from the failure of a savings and loan institution. Represented the majority shareholders of two thoroughbred racing corporations in derivative lawsuits filed by minority shareholders, successfully retaining control of nationally known racetracks.
- Has represented corporate directors and officers, trustees and other fiduciaries in various litigations, including claims for diversion of corporate opportunity, claims under ERISA for alleged breaches of fiduciary duty, and shareholder derivative claims. Defeated proposed class certification in two companion ERISA cases brought by retirees of not-for-profit health insurer seeking enforcement of former welfare benefit plan and damages for breach of fiduciary duty. Has represented a variety of businesses in complex business tort litigation. Defended a defense contractor against claims of defamation and tortious interference with economic relations arising from responses to FRP's. Represented hospitals, health insurers and managed health care organizations and their officers and directors in various litigation involving billing disputes, alleged breach of physician participation agreements, credentialing disputes and claims of defamation, tortious interference with economic relations and other business torts.

Education

- University of Baltimore (B.A., magna cum laude, 1982)
- University of Baltimore, School of Law (J.D., magna cum laude, 1985) Managing Editor, The University of Baltimore Law Review, 1984-85; Heuisler Honor Society

About Rick Barnes

Partner | Goodell DeVries Leech & Dann | Baltimore, MD

410.783.4004 | rmb@gdldlaw.com
http://www.gdldlaw.com/attorneys/richard-m-barnes

Mr. Barnes is a founding partner of the firm. He represents clients in complex tort, commercial, and product liability litigation. During his career, he has represented a variety of clients in disputes involving pharmaceuticals, medical devices, antitrust, breach of contract, unfair trade practices, aviation, commercial torts, and state procurement laws. He has defended companies in federal and state court class actions in Maryland, West Virginia, Alabama, Ohio, Pennsylvania and California. He has also tried to verdict complicated multi-plaintiff product liability, pharmaceutical and medical device cases. He has briefed and argued cases before the United States Supreme Court and various state and federal appellate courts.

Representative clients include Pfizer Inc, Wyeth, Telectronics Pacing Systems, Inc., Pacific Dunlop, Ltd., DENTSPLY International, Johnson & Johnson, DePuy Orthopedics, L. Perrigo Company, Nissan Motor Credit Corporation, ARINC, Vermont Talc, A.H. Robins Co., Gruss & Co., and Correct Rx Pharmacy.

Mr. Barnes' significant representations include trials for Pfizer Inc and/or Wyeth relating to the Bjork Shiley Mechanical Heart Valve (1985-1999), Rezulin (2000-2004), Diet Drugs (2003-2005), and Neurontin (2007-2011). Mr. Barnes has also represented Pfizer in the hormone therapy litigation since 2004 in cases in several jurisdictions including Pennsylvania, Minnesota, West Virginia and Virginia. He also had significant responsibilities for the preparation and presentation of scientific evidence in the Celebrex, Bexta and Chantix Litigations. He has briefed and argued several Daubert motions in pharmaceutical cases. Mr. Barnes served as national counsel to Pfizer Inc and its subsidiaries for claims and disputes arising from the manufacture and sale of the Duracon Unicompartmental Knee. In addition, he obtained a temporary restraining order and permanent injunction against the owner of a pornographic web site in Maryland for the infringement and dilution of Pfizer's "Viagra" trademark.

Mr. Barnes served on the firm's national counsel team representing Telectronics Pacing Systems, Inc. in connection with hundreds of claims arising out of the alleged failure of pacemaker leads. See In Re Telectronics Pacing Systems, Accufix Atrial "J" Leads Litigation, MDL-1057. The firm was responsible for defending state and federal class actions, which involved claims for personal injury and medical monitoring. Mr. Barnes was the lead counsel with primary responsibility for the development and presentation of scientific, regulatory, engineering, and clinical evidence on behalf of the company. He defended depositions of principal company witnesses, including the 30(b)(6) witnesses in the multidistrict litigation, and conducted the depositions of all adverse expert witnesses regarding statistical, design, and engineering issues. Mr. Barnes presented a significant portion of the defense's case in a five-day summary jury trial held before The Honorable S. Arthur Spiegel in the United States District Court for the Southern District of Ohio. Mr. Barnes was also on the team that defeated certification of the proposed personal injury and medical monitoring class in Zinser v. Accufix Research Institute, Inc., 253. F.3d 1180 (9th Cir. 2001), request for rehearing and rehearing en banc, denied, 273 F.3d 1266 (9th Cir. 2001). Currently, Mr. Barnes is the principal advisor to the company for ongoing regulatory and medical/scientific legal issues. In addition, Mr. Barnes is currently responsible for the defense of the client in all non-pacemaker lead litigation in the United States and for advising the company on regulatory matters and foreign claims.

Education

- Western Maryland College (B.A., magna cum laude, 1977) Honors: Omicron Delta Kappa, Pi Gamma Mu
- Georgetown University Law Center (J.D., cum laude, 1981) Editor, American Criminal Law Review