



## Spoliation Torts

Lexington Insurance has developed an innovative new coverage enhancement designed to provide a solution for legal liability arising out of spoliation, defined as the unintentional destruction, alteration, or loss of property that serves as material evidence in a legal proceeding.

Spoliation Insurance, available by endorsement, protects a variety of professionals exposed to spoliation torts, including forensic engineers, lawyers, accountants, plus testing and storage facilities, against claims involving legal liability even when negligence is not alleged. The legal liability arises out of the failure to preserve property of evidentiary value belonging to others that is in the care, custody, and control of the insured.

Please join us as we listen to Nancy D. Adams share her expertise on spoliation. Nancy will identify the states recognizing spoliation as a separate actionable tort and she will highlight techniques to manage the risk of spoliation for those professionals that could be exposed. Nancy is a member in the Litigation Section at Mintz Levin, practicing in the Boston, MA office. She is an active member of the firm's Insurance/Reinsurance Group, Insurance/Bankruptcy Group, Product Liability and Complex Tort Litigation Group.

### **Nancy, what is spoliation and can you provide an example?**

People often ask, what is spoliation? and very simply, it is the destruction or alteration of some sort of evidence in the context of a lawsuit.

If someone is trying to go up a ladder and he falls or she falls as a result of an alleged manufacturing or design defect of that ladder, it would be important for that person, that claimant or plaintiff to actually have the ladder so that they could conduct testing and they could use the ladder in the course of their lawsuit. If the owner of the ladder removes the ladder, throws it away, or otherwise loses or destroys the ladder, it again makes it very difficult for the claimant in order to prove some sort of product liability lawsuit.

So, when you think about what happens when this evidence is lost, the remedy is generally two-fold. One, the plaintiff or the claimant may be entitled to an adverse inference during the course of the trial. So, if in the context of the ladder, the claimant is suing the manufacturer of the ladder and, in fact, it was the manufacturer of the ladder who destroyed or altered it in some way, the plaintiff would be entitled to an adverse inference that, one, it's rebuttable, but one that the ladder was, in fact, defective. The second way, remedy or second way to address this situation is to bring an independent tort claim for spoliation and there are a handful of states that recognize that separate tort.

### **Under what circumstances might a spoliation tort be an appropriate remedy?**

For the most part, the majority rule is that a separate tort is not going to be recognized given that assuming that the spoliator is a party to the litigation, the plaintiff has an adequate remedy vis-à-vis the adverse inference. The question arises, however, what happens if the spoliator is not

a party to the lawsuit? This makes it all the more difficult because the defendant in the lawsuit is not the spoliator of the evidence and as such it's very unlikely that a plaintiff is going to be entitled to an adverse inference because the party they would be seeking it against, of course, is not a party to the litigation. What plaintiffs have then attempted to do is to bring a separate claim against a third party, the person who is not a party to the lawsuit, who actually destroyed or altered the evidence making the case more difficult for the plaintiff.

There are a few states which have recognized this particular tort claim, one of which, for example, is Florida. In Florida, the courts have found that a plaintiff may establish a separate independent cause of action for spoliation against a third party if they can show six particular criteria. First, the existence of a potential civil action and that action wouldn't necessarily be against the third party, it would be against some other party that they were trying to bring a lawsuit against. A legal or contractual duty to preserve the evidence, which is relevant to that litigation. Third, that there was, in fact, destruction of the evidence, fourth that as a result of the destruction it impaired their ability to prove the lawsuit, so not having a ladder makes it difficult, for example to prove that the ladder was, indeed, defective. Five, a causal relationship between the evidence destruction and the inability to prove the lawsuit. Again, if you don't have the ladder it's going to be very difficult for the plaintiff to prove that it was, in fact, defective and the defendant may take the position that the plaintiff has produced no evidence or has no expert to demonstrate the defective nature of the ladder given that nobody has it or has been able to test it. And then six, damages, and in this context damages would be the inability to have brought the claim or prevailed, actually, in the lawsuit, so the inability of the plaintiff to prevail in a lawsuit against the manufacturer of the ladder because they no longer have the ladder.

It is not until the underlying tort lawsuit is resolved that the plaintiff then brings this party complaint. Now, this makes sense because until the plaintiff actually loses the case, and we understand why the plaintiff has lost the case, or that it has suffered some sort of damage as a result of the inability to introduce or provide evidence regarding again the ladder, you don't know what the damages are going to be unless it would be premature.

### **Nancy who is exposed, and is this already covered in standard insurance policies?**

Given the fact that this third party spoliation claim is, in fact, a possibility one has to think who actually is exposed in this context. And there are a number of different professionals and third parties who are exposed to this type of a spoliation tort.

For example, forensic engineers, if you have retained an expert to examine and I'll stay with the ladder; to look at the ladder and your expert has lost the ladder or destroyed the ladder for whatever reason, not only does the defendant face an issue with respect to the trial but there may be a claim against the forensic engineer for failing to actually preserve the property and that can be a claim brought by either the plaintiff because they're no longer able to prove their case and an adverse inference may or may not be enough and secondly the defendant him or herself who can now no longer prove that the ladder was not defective because the forensic engineer as a result of their negligence or even a fire in the building and no longer has the evidence.

Attorneys are another category. Attorneys often hold parts or hold some sort of product in the context of a product liability matter. They may hold medical records, an original set of medical records and it's important for whatever reason that the original set be produced in the context of litigation. Warehouse storage facilities; any of these types of facilities that hold or can hold

evidence are potentially exposed in those states where a independent claim for spoliation is permitted.

### **Is there existing professional liability insurance coverage for spoliation torts?**

Recognizing that there's a potential exposure, architects, forensic engineers, and others will, of course, turn to their professional liability insurance policies for potential coverage in these matters. Unfortunately, more likely than not these matters are not going to be covered given that the loss did not result from the firms negligence. It is more appropriately characterized as a loss that arose out of something other than their providing of professional services to a particular claimant or defendant. There are very few policies in the marketplace that actually provide coverage for spoliation. Because, again most professional liability policies provide coverage for the actual provision of those services. Spoliation of evidence does not fall arguably does not fall within the definition of professional services that you would see under most, if not all professional liability policies. If, however, you were to obtain a policy which provided that professional services also included any type of legal liability arising from spoliation, you arguably would then have the type of coverage that would be required to cover this particular exposure.

So, for example Lexington has an endorsement available on its A & E form which actually provides coverage for spoliation, explains what it is, and what the coverage is extended to pay for. So, for example, the policy provides coverage for evidentiary value of a loss that in insured would become legally liable to pay for direct physical loss to property here that would be the evidence of any type of a customer and that could either be the plaintiff or the defendant because there was some sort of occurrence arising during a policy period that in some way altered or destroyed the evidence that you were holding onto at that time. There are certain conditions, of course, that must be triggered in order to provide coverage for these types of claims but for the most part those conditions parallel what we are seeing in for example Florida and other states with respect to the criteria that a plaintiff has to satisfy or a defendant has to satisfy in order to bring a spoliation claim against a third party.

### **What kind of coverage is available if I am merely "storing" property that may be used as evidence in a lawsuit?**

In another context with respect to your warehouse storage, typically those policies provide that, and again going back to the ladder, that if the ladder is destroyed as a result of a fire or some sort of other negligence of the owner, that the owner's entitled to actual cash value or ACV of that particular ladder. Now in the circumstances that I've described the value of the ladder is not the ladder itself, it's not going out and buying another ladder for \$20.00 or \$49.99, rather the value of the ladder is actually the value it brings to a piece of litigation.

A plaintiff who is trying to allege a product liability claim against the manufacturer of a ladder who no longer has the ability to test that ladder or bring that ladder into the courtroom as a result of the negligence of some warehouse storage facility, the value of that claim is not just the ladder. The value is the inability arguably for the plaintiff to establish that there was, in fact, some sort of manufacturing or design defect in the ladder. The value of that case is much, much larger potentially than the ACV of the ladder itself. If the plaintiff suffered severe damages, if there was some sort of death, if there are ongoing medical damages, loss of wages, all of that would be wrapped up into the value of this ladder.

Absent some sort of endorsement on a warehouse legal liability policy, you are not going to have the ability to make a claim for the actual value that that ladder provided to the piece of

litigation. A way to address that is to purchase an endorsement; Lexington has one, in order to provide a coverage enhancement where your valuation is shifting from your ACV of the ladder to what the damages actually are for your inability to produce that ladder.

In sum, as we continued to retain experts and as we continue to test and become more sophisticated, frankly, in from the plaintiff and the defendant's prospective, in litigating product liability cases, in particular, we are going to see a greater exposure for the evidence that is being tested and stored for it to be in some way destroyed or altered or lost. As such, it's critically important that the organizations and the entities holding or who have responsibility for holding that particular evidence, not only have proper risk management tools in place in order to decrease some sort of claim or some sort of loss to the particular piece of evidence, but these organizations may want to look at their own insurance policies to determine whether or not there is coverage in the event a piece of evidence is destroyed and it is done so in a state that recognizes this independent tort of spoliation.

This, in all likelihood, is going to necessitate going into the marketplace and attempting to purchase endorsements or coverage enhancements such as those offered by Lexington in order to provide coverage in an area where coverage did not exist before and, frankly in part, because these are new claims and new theories of liability that courts are beginning to adopt to address the situation of what happens when the evidence is lost.

Nancy, thank you for sharing your expertise on this very timely and complex topic.

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