The Adverse Inference for Spoliation of Evidence

by John P. McCahey

The spoliation doctrine provides federal courts with broad discretion to sanction those parties who destroy or fail to preserve relevant evidence for trial.[1] This discretionary authority derives from the court's inherent authority to manage its own affairs, as well as from the Federal Rules of Civil Procedure.[2] When exercising their discretion, courts usually seek to impose those sanctions as may be warranted both to level the evidentiary playing field and to punish improper conduct.[3] The scope of discretionary sanctions for spoliation ranges from the entry of judgment to the imposition of monetary fines against the offending party.[4]

Among the potentially more severe sanctions is the spoliation inference, which allows the fact finder to draw a negative inference against the party responsible for the spoliation of evidence relevant to an issue at trial.[5] Federal courts have generally agreed as to the factors that should be considered in deciding to allow the fact finder to determine whether or not a negative inference from the spoliation may be drawn. Spoliation, however, occurs "along a continuum of fault-ranging from innocence through degrees of negligence to intentionality,"[6] and courts do not always agree on the relative weight to be afforded these factors or the level of proof sufficient to warrant a spoliation inference.

The Spoliation Inference

Spoliation has been defined as the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.[7] The spoliation inference allows evidence at trial of the spoliation and permits the trier of fact to infer therefrom that the spoliated evidence would have been unfavorable to the spoliator's case.[8] This adverse inference may also be drawn as a sanction under Fed. R. Civ. P. 37 for a party's abuse of the discovery process.[9] The inference is permissive, not mandatory, and the jury (or the trial judge in a bench trial) is free to reject any negative inference against the spoliator from the spoliation of evidence.[10] In diversity suits, most circuit courts have concluded that the spoliation inference is governed by federal, not state, law.[11]

The scope of the adverse inference that may be drawn and its potential impact upon the ultimate outcome at trial will depend upon the nature of the spoliated evidence and its perceived relevance to the claims and defenses at issue.[12] One court has noted, however, that merely allowing a jury to consider the spoliation inference by itself often ends litigation because it creates too high a hurdle for the spoliator to overcome on the merits.[13] While evidence of a moving party's spoliation of evidence ordinarily will not by itself suffice to defeat a well-supported motion for summary judgment, such spoliation may warrant the motion's denial in "borderline" cases.[14]

The spoliation inference is a rule of evidence that may be traced back to eighteenth century English jurisprudence.[15] It is premised on the commonsense notion that a party that destroys or fails to preserve evidence that it knows is relevant to existing or reasonably foreseeable litigation is more likely than not to have done so out of fear that the evidence is harmful to its case.[16] Permitting a negative inference from spoliation is sometimes said to serve the threefold purpose of: (1) deterring the destruction of evidence; (2) placing the risk of an erroneous evaluation of the content of spoliated evidence on the party that destroyed or failed to preserve it; and (3) restoring the party harmed by the unavailability of evidence helpful to its case to where it would have been absen the spoliation.[17]

While it is for the jury ultimately to decide whether or not to draw a negativ inference from the spoliation evidence, is for the trial judge in the first instance to determine whether a sufficient basis has been established at trial from which a jury could reasonably draw such an inference. Generally, the trial judge has broad discretion in deciding whether or not to put the spoliation inference befor the jury.[18] The court must always consid er, however, whether lesser sanctions will suffice to address the spoliation or whether a greater sanction (e.g., judgment against the spoliator) is necessary.[19] The exercise of this discretion will be reviewed on appeal for abuse.[20]

In deciding whether a spoliation inference could reasonably be drawn by the jury, a trial judge generally weighs both the blameworthiness of the spoliator and the nature of the spoliated evidence. The factors typically considered by trial judges include: (1) whether the spoliator had control over the evidence and an obligation or duty to preserve it; (2) whether the evidence was destroyed or lost by the spoliator with a "culpable state of mind"; and (3) whether the destroyed or lost evidence was "relevant" to the opposing party's claim or defense such that it would support that claim or defense.[21] The party seeking to have the spoliation inference drawn will need to lay an evidentiary foundation as to the grounds for the inference, and the spoliator will have the opportunity to show why no adverse inference is appropriate.[22]

Duty. The spoliation inference is usually not appropriate unless the spoliator

had a duty to preserve relevant evidence within its control at the time of such evidence's destruction or loss.[23] Such a duty usually arises once litigation has been commenced.[24] It may also arise in advance of litigation when it can be shown that the spoliator knew, or reasonably should have known, that the destroyed evidence would likely be relevant to reasonably foreseeable litigation.[25] Even when litigation is not foreseeable, the spoliator's destruction of evidence in violation of a regulation that requires its retention may satisfy the duty requirement in a later-commenced litigation if the party seeking the inference was within the class entitled to protection by the regulation.[26]

Culpability. Courts are in general agreement that a party's bad faith destruction of evidence constitutes blameworthiness or a culpable state of mind sufficient to support the spoliation inference.[27] Bad faith, for purposes of the inference, usually requires a showing that the party's actions were motivated by a desire to hide or suppress evidence.[28] Courts are not in agreement, however, whether a spoliation inference is appropriate where the spoliation was the result of something less than the spoliator's bad faith.

For some courts, the crucial element for the spoliation inference is not that evidence was destroyed or lost, but rather the reason for its destruction or loss.[29] These courts usually will only permit a spoliation inference upon a showing from the totality of circumstances that the spoliation was the consequence of "bad faith" or "bad conduct."[30] They often point to the evidentiary rationale for the inference—that a party that destroys evidence knowing that it is relevant to litigation is more likely than not to have done so because it perceived the evidence as harmful to its case. Unless evidence is unavailable because of the spoliator's conscious conduct, these courts reason that no basis exists for a fact finder to infer that the evidence was spoliated because the spoliator believed the evidence to be harmful to its case.[31]

To other courts, the spoliator's "bad faith" is not a talisman.[32] These courts will permit the inference to be drawn where the spoliator's culpability is something less than bad faith.[33] They sometimes point to the remedial purpose of the spoliation inference, and note that it makes little difference to a party prejudiced by the spoliation of potentially helpful evidence whether the spoliator acted with bad faith or some lesser level of culpability. In either case, the spoliator should not benefit from the destruction or loss of relevant evidence and properly should bear the risk and consequences that result from the evidence's unavailability.[34]

> The prejudiced party must produce evidence suggesting the spoliated evidence would have substantiated or refuted a claim of defense.

Those courts that do not limit the spoliation inference to bad faith spoliation typically will still require some level of culpability on the spoliator's part to support such an inference. Some courts suggest that more than the spoliator's mere negligence is required.[35] Others find or intimate that the spoliator's negligence is sufficient.[36] At least one court has concluded that once a duty to preserve evidence has arisen, the loss or destruction of that evidence for any reason not outside a party's control constitutes negligence sufficient to support a spoliation inference.[37]

Relevance. Relevance in the context of the spoliation inference means something more than that the spoliated evidence was sufficiently probative to satisfy Fed. R. Evid. 401.[38] Rather, it requires a showing from which the fact finder could reasonably infer that the contents of the spoliated evidence would have favored the case of the spoliator's adversary.[39] How the spoliated evidence will be shown to have aided the spoliator's adversary and the extent of the adverse inference that can be drawn from its absence will depend in each case upon the particular facts and the nature of the spoliated evidence. One court has cautioned, however, that the prejudiced party should not be held to an overly strict standard of proof regarding the likely contents of the spoliated evidence so as not to subvert the purposes of the inference and allow spoliators to profit from their destruction of evidence.[40] The prejudiced party nonetheless needs to produce at least some evidence suggesting that the spoliated evidence would have substantiated or refuted a claim or defense at issue.[41]

The spoliated evidence's relevance usually may be shown through circumstantial evidence.[42] Some courts conclude that the spoliation of evidence that naturally would have been admissible at trial to elucidate a fact at issue alone may be sufficient to show its relevance.[43] Many courts agree that evidence of bad faith spoliation also suffices without more to show the relevance of the spoliated evidence.[44] Finally, the destruction of evidence in violation of a record-retention regulation may suffice to establish relevance of the spoliated evidence.[45]

Proposed Rule 37(f)

The pending amendments to the Federal Rules of Civil Procedure include proposed Rule 37(f), which will provide limited protection against sanctions (including the spoliation inference) for a party's failure to provide electronic evidence. Under that rule and absent exceptional circumstances, sanctions cannot be imposed for the loss of electronically stored information resulting from the routine and good faith operation of an electronic information system.[46] This rule, if it becomes effective as planned on December 1, 2006, undoubtedly will be the subject of much scrutiny by the courts as they define what constitutes the good faith and routine destruction of electronic evidence, as well as when exceptional circumstances exist warranting the imposition of sanctions.

In exercising their discretion whether or not to allow a spoliation inference as

a spoliation sanction, some courts place great emphasis on the spoliator's level of culpability for the spoliation. Other courts attempt to strike a balance between the spoliator's culpability and the potential prejudice to the spoliator's adversary from the spoliation. It does appear, however, that the discretion of all courts is broad enough to allow them to invoke the spoliation inference as a spoliation sanction based upon the particular facts and circumstances of each case. ■

Endnotes

1. *See* Hartford Ins. Co. of the Midwest v. Am. Automatic Sprinkler Sys., Inc., 23 F. Supp 2d 623, 626 (D. Md. 1998), *aff'd*, 201 F.3d 538 (4th Cir. 2000); Nation-Wide Check Corp., Inc. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218 (1st Cir. 1982).

2. *See* Flurry v. Daimler Chrysler Corp., 427 F.3d 939, 943 (11th Cir. 2005); West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1998); FED. R. CIV. P. 37.

3. *See* Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 107 (2d Cir. 2001).

4. *See* Mosaid Techs., Inc. v. Samsung Elecs., Co., Ltd., 348 F. Supp. 2d 332, 335 (D.N.J. 2004).

5. *See* Testa v.Wal-Mart Stores, Inc., 144 F.3d 173, 177 (1st Cir. 1998); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

6. Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988).

7. *See West*, 167 F.3d at 779.

8. *See* Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3d Cir. 1993); *Nation-Wide Check Corp.*, 692 F.2d at 217-18.

9. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106-07 (2d Cir. 2002); FED. R. CIV. P. 37(b)(2) and (c)(1).

10. *See* Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996); *Testa*, 144 F.3d at 177.

11. *See Flurry*, 427 F.3d at 943-44 (discussing majority and minority values).

12. *See* Kronisch v. United States, 150 F.3d 112, 126-28 (2d Cir. 1998); *Nation-Wide Check Corp.*, 692 F.2d at 218.

13. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 219-20 (S.D.N.Y. 2003).

14. *See Hartford Ins. Co. of the Midwest*, 201 F.3d at 543-44; *Kronisch*, 150 F.3d at 128.

15. *See* Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004); *Welsh*, 844 F.2d at 1246 (citing Armory v. Delamirie, 1 Strange 505 (1722)).

16. *See* Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995); Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 217-18 (1st Cir. 1982).

17. *Byrnie*, 243 F.3d at 107; *see also Nation-Wide Check Corp.*, 692 F.2d at 217-18.

18. *See* Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 306 F.3d 806, 824 (9th Cir. 2002); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995).

19. *See* Flurry v. Daimler Chrysler Corp., 427 F.3d 939, 944-45 (11th Cir. 2005); West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1998).

20. *See* Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1993).

21. *See Residential Funding Corp.*, 306 F.3d at 107; *see also* Testa v.Wal-Mart Stores, Inc., 144 F.3d 173, 177 (1st Cir. 1998); Mosaid Techs., Inc. v. Samsung Elecs., Co., Ltd., 348 F. Supp. 2d 332, 336 (D.N.J. 2004).

22. *See* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 750 (8th Cir. 2004); *Testa*, 144 F.3d at 176-78.

23. *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998); *Brewer*, 72 F.3d at 334.

24. *See Testa*, 144 F.3d at 177; *Kronisch*, 150 F.3d at 126.

25. *See Silvestri*, 271 F.3d at 591; *Kronisch*, 150 F.3d at 126-27; Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.N.J. 2000).

26. *See* Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 108-09 (2d Cir. 2001).

27. *See* Penalty Kick Mgmt., Ltd. v. Coca-Cola, Inc., 318 F.3d 1284, 1294 (7th Cir. 2003); *Kronisch*, 150 F.3d at 126; *Brewer*, 72 F.3d at 339.

28. *See Stevenson*, 354 F.3d at 746; Rummery v. Illinois Bell Tel. Co., 250 F.3d 553, 558 (7th Cir. 2001).

29. *See* S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co., 695 F.2d 253, 258 (7th Cir. 1983).

30. *See, e.g.*, Condrey v. Suntrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005); Johnson v. Ready Mixed Concrete Co., 424 F.3d 806, 811 (8th Cir. 2005); Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997); Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997).

31. *See, e.g.*, Estate of Trentadue *ex rel.* Aguilar v. United States, 397 F.3d 840, 863 (10th Cir. 2005); Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 306 F.3d 806, 824 (9th Cir. 2002); *S.C. Johnson & Son*, 695 F.2d at 258.

32. *See* Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 219 (1st Cir. 1982).

33. *See, e.g.*, Reilly v. Natwest Mkt. Group, Inc., 181 F.3d 253, 267-68 (2d Cir. 1999), *cert. denied*, 528 U.S. 119 (2000); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993); Welsh v. United States, 844 F.2d 1239, 1247 n.2 (6th Cir. 1988).

34. *See Residential Funding Corp.*, 306 F.3d at 108 (citing Turner v. Hudson Transit Lines, 142 F.R.D. 68, 75 (S.D.N.Y. 1991)).

35. *See, e.g.*, Blinzler v. Marriott Int'l, Inc., 81 F.3 1148, 1159 (1st Cir. 1996); *Vodusek*, 71 F.3d at 156

36. *See, e.g.*, Byrnie v. Town of Cromwell Bd. Educ., 243 F.3d 93, 109 (2d Cir. 2001); *Glover*, 6 F.3d at 1329; *Welsh*, 844 F.2d at 1247 n.2.

37. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 221 (S.D.N.Y. 2003); *cf. Glover*, 6 F.3d at 1329.

38. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002).

39. *See* Groves v. Cost Planning & Mgmt. Int'l, Inc., 372 F.3d 1008, 1010 (8th Cir. 2004); *Zubulake*, 220 F.R.D. at 221.

40. *Kronish*, 150 F.3d at 128.

41. *See Byrnie*, 243 F.3d at 108; *Blinzler*, 81 F.3 at 159.

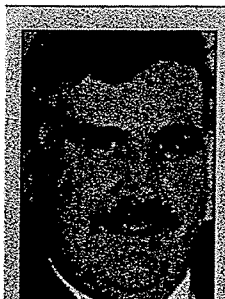
42. *See Blinzler*, 81 F.3d at 1159; *Scott*, 196 F.R.D. at 249.

43. *See Vodusek*, 71 F.3d at 156; *Nation-Wide Check Corp.*, 692 F.2d at 217-18; *Mosaid Techs., Inc.*, 348 F. Supp. 2d at 332.

44. *See, e.g., Residential Funding Corp.*, 306 F.3d at 109; Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1134 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988); *Nation-Wide Check Corp.*, 692 F.2d at 217-19.

45. *See Byrnie*, 243 F.3d at 108-09; Hicks v. Gates Rubber Co., 833 F.2d 1406, 1419 (10th Cir. 1987).

46. Proposed FED. R. CIV. P. 37(f) and Advisory Committee note.



John P. McCahey

John P. McCahey is a litigation partner at Hahn & Hessen LLP, New York City.