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Legal Update

Spoliation of Electronic Evidence†

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I. INTRODUCTION

1. "Spoliation" of evidence refers to the "intentional destruction of evidence."[1] Although courts are only now considering extending tort liability to spoliation of evidence, "the destruction of evidence has concerned courts for centuries."[2] Indeed, a long line of both British and American cases have addressed spoliation of evidence.[3] The concept of spoliation of evidence originates from the legal principle *omnia praesumuntur contra spoliatorem*, meaning "all things are presumed against a wrongdoer."[4] The modern legal doctrine addressing spoliation of evidence began in 1959.[5] Further development of the doctrine continued in 1973,[6] with California

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[1] BLACK'S LAW DICTIONARY 1401 (6th ed. 1990).

[2] Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 637 (1998).

[3] *See, eg.*, Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087 n.4 (1987) (citing, among other cases, The Pizarro, 15 U.S. (2 Wheat.) 91 (1817); Pomeroy v. Benton, 77 Mo. 64 (1882); Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722), Rex v. Arundel, 80 Eng. Rep. 258 (1617)).

[4] *Id.* at 1087. *See also* Wilhoit, *supra* note 2, at 637 (defining *omnia praesumuntur contra spoliatorem* as meaning "all things are presumed against the destroyer or wrongdoer").

[5] *See* Wilhoit, *supra* note 2, at 638 (citing Agnew v. Parks, 343 P.2d 118, 124 (Cal. Dist. Ct. App. 1959) (declining to recognize a spoliation cause of action based on a criminal code violation)).

[6] *See id.* at 638-39 (citing Pirocchi v. Liberty Mutual Ins. Co., 365 F. Supp. 277, 281-82 (E.D. Pa. 1973)).

courts shaping the spoliation doctrine.[7] The modern doctrine protects "two important goals of the judicial system – truth and fairness."[8]

2. The spoliation doctrine manifests itself in both criminal and civil areas of law.[9] In the criminal system, obstruction of justice statutes address the destruction of evidence.[10] However, prosecution for spoliation of evidence under criminal obstruction of justice statutes is not as common as the destruction itself.[11] Some courts have expressed concern that obstruction of justice statutes do not adequately prevent the destruction of evidence.[12] These shortcomings in the criminal system suggest that additional layers of civil deterrents are needed.[13]

3. The spoliation tort, a recently developed cause of action is one of three separate civil legal doctrines that serve to prevent spoliation of evidence.[14] Traditionally, courts applied the two civil doctrines of spoliation inference and civil discovery sanctions to deter the destruction of evidence.[15] Recently, courts have crafted the emerging spoliation tort.[16] Courts have begun to apply the spoliation doctrine in less traditional circumstances, imposing penalties on litigants for destroying electronic evidence.[17] Recent developments have affected how these legal doctrines apply to electronic evidence. This update will focus on the

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[7] *See id.* at 639 (citing Coleman v. Eddy Potash, Inc., 905 P.2d 185, 188 (N.M. 1995) (noting that California was the first jurisdiction to recognize a tort for intentional spoliation of evidence)); *e.g.*, Solum & Marzen, *supra* note 3, at 1100-01.

[8] Solum & Marzen, *supra* note 3, at 1138.

[9] *See* Wilhoit, *supra* note 2, at 649-51 (contrasting civil and criminal safeguards against destruction of evidence); *see also* Solum & Marzen, *supra* note 3, at 1108 (identifying obstruction of justice as the "primary tool" for protecting evidence in criminal cases). Although criminal safeguards exist, this update will focus on the civil aspects of the spoliation of evidence.

[10] *See* Wilhoit, *supra* note 2, at 650.

[11] *See, e.g., id.* at 651 ("It appears that prosecutors are unlikely to pursue obstruction of justice claims against spoliators.").

[12] *See id.* at 650 (citing Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Ct. App. 1984), *overruled by* Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 521 (Cal. 1998)).

[13] *See id.* at 650-51.

[14] *See* Solum & Marzen, *supra* note 3, at 1087.

[15] *See id.* at 1087-99.

[16] *See id.* at 1100.

[17] *See, e.g.,* Matthew J. Bester, Note, *A Wreck on the Info-Bahn: Electronic Mail and the Destruction of Evidence*, 6 COMMLAW CONSPECTUS 75, 76 (1998) (noting that courts have applied the spoliation doctrine to the destruction of electronic records) (citing American Fundware, 133 F.R.D. 166, 170 (D.Colo. 1990); Wm. T. Thompson Co. v. General Nutrition Centers, Inc., 593 F. Supp. 1443, 1450 (C.D. Cal. 1984)).

application of the spoliation doctrines to electronic evidence in civil actions and how courts are shaping these concepts to meet the challenges of electronic media.

II. SPOLIATION INFERENCE

4. Courts have long applied the spoliation inference.[18] Under such circumstances, when an individual destroys evidence, the court will infer or presume that the individual (the spoliator) is guilty and that the evidence destroyed would have weighed towards that individual's guilt.[19] This early common law incarnation of the doctrine existed as early as 1722,[20] yet the exact elements remain vague because jurisdictions lack uniformity.[21] There are, nonetheless, general elements to the spoliation inference.[22] Before a court will allow a fact finder to draw the adverse inference, the destruction must have been intentional.[23] Furthermore, most court's allow the spoliator to rebut the inference of guilt by providing explanations sufficient to demonstrate a lack of bad faith, or irrelevance of the evidence.[24] Furthermore, the inference does not arise against a third party who is not a party to the action.[25] Generally, courts will allow any evidence that tends to mitigate the inference, particularly evidence relating to destruction's timing.[26] For example, evidence that the destruction occurred before the beginning of the litigation, or that the victim of the destroyed evidence could have, but failed to, prevent the destruction might prevent the adverse inference.[27]

5. In a recent case, *Procter & Gamble Co. v. Haugen*,[28] a federal district court in Utah applied the spoliation inference doctrine. The defendant Amway, a competitor corporation, circulated "false and defamatory written and oral

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[18] *See* Wilhoit, *supra* note 2, at 637.

[19] *See* Solum & Marzen, *supra* note 3, at 1088.

[20] *See* Wilhoit, *supra* note 2, at 637-38 (citing Armory v. Delamirie, 93 Eng. Rep. 664 (K.B. 1722) (allowing jury to make adverse inference when defendant failed to produce evidence needed to calculate damages)).

[21] *See* Solum & Marzen, *supra* note 3, at 1088.

[22] *See id.* at 1088-91.

[23] *See id.* at 1088-89.

[24] *See id.* at 1089-90.

[25] *See id.* at 1090.

[26] *See id.* at 1090-91.

[27] *See id.* at 1091 (citing Moore v. General Motors Corp., 558 S.W.2d 720, 736 (Mo. Ct. App. 1977).

[28] 179 F.R.D. 622 (D. Utah 1998).

statements regarding Plaintiff," Procter & Gamble ("P & G").[29] Amway claimed that P & G had a discovery duty to preserve its corporate e-mail, and that its failure to do so constituted a breach.[30] Under the spoliation inference doctrine, "the bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction."[31] The court noted that the destruction or loss of a piece of evidence that results from mere negligence was insufficient to infer the spoliator's awareness of the potential damage to their case.[32] In order to draw an adverse inference, a plaintiff must demonstrate bad faith on the part of the spoliator.[33]

6. Amway argued that the court should infer the requisite bad faith from P & G's actions.[34] Specifically, Amway contended that P & G had a duty to preserve its e-mail communications because P & G had itself insisted that Amway retain its storage tapes containing copies of its corporate e-mail.[35] The court declined to infer a general duty to preserve e-mail records, but did find a more narrowly defined duty to preserve specific corporate e-mails.[36] P & G had identified five individuals who had information relevant to the litigation.[37] Therefore, P & G was on notice that these individuals' e-mails could be relevant, and the subsequent failure to retain those e-mail communications was a breach of discovery duty.[38] Thus, while courts apparently will be reluctant to find a general duty to preserve all corporate e-mail records, parties may need to undertake further steps before their duties to preserve such evidence are discharged. When its clear, for example, that certain e-mail records may contain relevant information, the court may not discharge the duty to preserve evidence.

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[29] Proctor & Gamble Co. v. Haugen, 947 F. Supp. 1551, 1553 (D. Utah 1996).

[30] *See Procter & Gamble*, 179 F.R.D. at 631.

[31] *Id.* (quoting Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997)).

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.* at 631-32.

[37] *See id.* at 632.

[38] *See id.*

III. CIVIL DISCOVERY SANCTIONS

7. A court may draw upon two sources of authority for imposing civil discovery sanctions for spoliation of evidence.[39] First, Rule 37 of the Federal Rules of Civil Procedure provides authority to impose sanctions.[40] However, the court will only impose such sanctions if one party has failed to comply with an existing court order, which has put that party on notice of its discovery duty.[41] Yet, despite the "pre-existing order" requirement, courts have liberally construed what constitutes a "pre-existing order" as an attempt to help litigants who have made adequate efforts to discover evidence.[42]

8. Second, in addition to the limited powers under Rule 37, courts may rely on their inherent powers to impose sanctions.[43] In contrast to their Rule 37 authority, courts relying on their inherent powers have the discretion to impose sanctions in the absence of a court order.[44] After litigation begins, the victim of spoliation may bring the underlying claim for evidence spoliation before the court.[45] The court would have inherent power to sanction destruction of evidence that occurred before litigation started.[46]

9. For example, the *Procter & Gamble* court relied on its inherent powers to impose sanctions.[47] It held that even in the absence of a court order, P & G was on notice that certain evidence would be relevant to the litigation.[48] The company had a duty to preserve the stored e-mail of five individuals,[49] employees that P & G

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[39] *See* Wilhoit, *supra* note 2, at 649.

[40] *See* FED. R. CIV. P. 37; Wilhoit, *supra* note 2, at 649.

[41] *See* FED. R. CIV. P. 37(b); Solum & Marzen, *supra* note 3, at 1094-95.

[42] Solum & Marzen, *supra* note 3, at 1094-95 (citing Professional Seminar Consultants v. Sino Am. Tech. Exch. Council, 727 F.2d 1470, 1474 (9th Cir. 1984) (holding that an court need not base an order on a Rule 37 motion, nor make the order in writing)).

[43] *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (finding that courts are invested with inherent powers "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases") (quoting Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962)).

[44] *See* Wilhoit, *supra* note 2, at 649.

[45] *See id.*

[46] *See id.*

[47] Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 631 (D. Utah 1998).

[48] *See id.* at 632.

[49] *See id.*

itself had identified during discovery as having relevant information relevant.[50] Having failed to preserve the e-mails, the court sanctioned P & G a total of $10,000.[51]

10. Courts have not limited sanctions for spoliation of electronic evidence to e-mail. In *Gates Rubber Co. v. Bando Chemical Industries* the court sanctioned the defendant corporation, Bando Chemical Industries, for the deletion of word processing files.[52] Although the court reluctantly imposed the sanctions, it still assessed ten percent of the plaintiff's fees and costs as damages.[53]

11. The spoliation doctrine has limitations. In *McGuire v. Acufex Microsurgical, Inc.*, for example, the court found that the defendant in a sexual harassment suit was on notice of pending litigation, and, thus, under a general duty to preserve potential evidence.[54] The evidence involved in *McGuire* was the original, unedited version of a personnel evaluation.[55] Even though the evidence qualified for protection, the court declined to order sanctions fearing that it would be announcing an overly broad duty to preserve evidence.[56] Moreover, the recovery of the deleted portion of the evaluation cured any risk of prejudice.[57] Thus, merely allowing evidence to spoil will not be a *per se* basis for sanctions. Recalling the two main goals of the judicial system, truth and fairness,[58] it seems that the spoliation victim's injury must coincide with a harm to these two goals. In *McGuire*, since the evidence was recovered, there was no harm to either truth or fairness.

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[50] *See id.*

[51] *See id.* ("P & G is hereby sanctioned $2,000 for each of the five referenced individuals.").

[52] 167 F.R.D. 90, 113 (D. Colo. 1996).

[53] *See id.* at 112-13. The court noted that the loss of potential evidence was due in part to the incompetence of Plaintiff's expert in searching a computer hard drive. *See id.* at 112.

[54] 175 F.R.D. 149, 154 (D. Mass. 1997).

[55] *See id.* at 150.

[56] *See id.* at 155-56 ("To hold otherwise would be to create a new set of affirmative obligations for employers, unheard of in the law – to preserve all drafts of internal memos, perhaps even to record everything no matter how central to the investigation, or gratuitous.").

[57] *See id.* at 157.

[58] *See* Solum & Marzen, *supra* note 3, at 1138.

IV. SPOLIATION TORT

12. Given the seemingly broad powers that courts possess,[59] it may not be readily apparent why a spoliation tort is needed. However, a court's remedial powers are "severely limited when the spoliation is discovered after final judgment is entered or when the spoliation is done by a nonparty over whom the court has no jurisdiction."[60] This limitation has led some courts to recognize intentional and negligent spoliation torts as independent causes of action.[61] The spoliation tort is the newest of the spoliation doctrines, and is still developing.[62] Two cases have substantially shaped the modern spoliation tort.[63] *Smith v. Superior Court* established one form of the tort, intentional spoliation of evidence.[64] *Velasco v. Commercial Building Maintenance Co.* established the other form, negligent spoliation of evidence.[65]

13. The standards for these torts are somewhat amorphous, yet general elements have been established by scattered state court decisions.[66] Kansas, New Jersey, New Mexico, and Ohio courts have identified the following elements of intentional spoliation of evidence: "(1) pending or probable civil litigation, (2) spoliator's knowledge that litigation is pending or probable, (3) willful destruction of evidence, (4) intent to interfere with the victim's prospective civil suit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages."[67] In states that recognize intentional spoliation, it seems that the bad faith spoliator will face potential liability. Victims are better off if they can demonstrate intentional spoliation because they can then recover additional damages. Since this tort requires intent,[68] a good faith mistake is a defense.

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[59] *See* McGuire, 175 F.R.D. at 153 ("[T]he Court's inherent powers . . . are indeed broad . . . .") (citations omitted).

[60] Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 HOFSTRA L. REV. 1003, 1005 (1998).

[61] *See id.* at 1005-06.

[62] *See, e.g.*, Wilhoit, *supra* note 2, at 644-47.

[63] *See id.* at 643.

[64] 198 Cal. Rptr. 829, 837 (Ct. App. 1984).

[65] 215 Cal. Rptr. 504, 506 (Ct. App. 1985).

[66] *See, e.g.*, Wilhoit, *supra* note 2, at 644-45 (discussing the continued evolution of the spoliation tort).

[67] *Id.* at 644.

[68] *See id.*

14. In *Continental Insurance Co. v. Herman*,[69] the court identified the requisite elements for negligent spoliation of evidence. These elements are: "(1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages."[70] The first element of negligent spoliation, "existence of a potential civil action,"[71] appears to widen the possible situations in which a spoliator might incur liability. A civil action need not be probable, just potential. Further, since knowledge is not an element, good faith mistakes are not defenses.

15. There are, however, many ambiguities surrounding the spoliation tort. Jurisdictions have not uniformly resolved whether the underlying civil claim may be tried concurrent with the spoliation tort, what level of causation to require, or how to quantify damages.[72] Given this uncertainty, it is not surprising that only a few jurisdictions have expressly adopted some form of the spoliation tort.[73] Meanwhile, other jurisdictions have avoided adopting the tort, sometimes because the specific facts presented in a case did not merit its adoption.[74] A few jurisdictions have outright rejected the tort or refused to allow it as it was proposed.[75] In light of this division among jurisdictions, it is not surprising that as of the writing of this update, no reported cases had yet applied the spoliation tort to cases involving electronic evidence.

V. CONCLUSION

16. Spoliation of evidence is not a completely new concept,[76] but its boundaries have yet to gain sharp definition. The failure of courts to adopt uniform legal standards makes it uncertain how this developing doctrine, in each of its forms, will apply to electronic evidence. The issue is likely to become more prevalent with the increased computerization of society. While the tort is currently

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[69] 576 So.2d 313, 315 (Fla. Dist. Ct. App. 1990).

[70] *Id.*

[71] *Id.*

[72] *See* Wilhoit, *supra* note 2, at 645-47.

[73] *See id.* at 634. The states that have adopted the tort are Alaska, California, Florida, Indiana, New Jersey, New Mexico, and Ohio. *See id.*

[74] *See id.* at 635. These states are Alabama, Arizona, Arkansas, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Missouri, Pennsylvania, Oklahoma, Texas, and West Virginia. *See id.* at 635-36.

[75] *See id.* at 636. The states in this category include Georgia, Maryland, and New York. *See id.*

[76] *See id.* at 637.

in a state of development, that development is gradual.[77] An increased occurrence of spoliation claims involving electronic evidence, however, would likely change the rate of this deliberate development. Amidst the vagueness of the spoliation doctrine, one aspect is certain: electronic evidence, though unique, enjoys no special exemption.

[77] *See generally id.* at 644 ("Though courts discussed a general tort of spoliation as early as 1973 . . . , the contours of the tort still remain vague and undetermined.") (citation omitted).