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My Building is Evidence? The Line Between Repairs and Spoliation of Evidence

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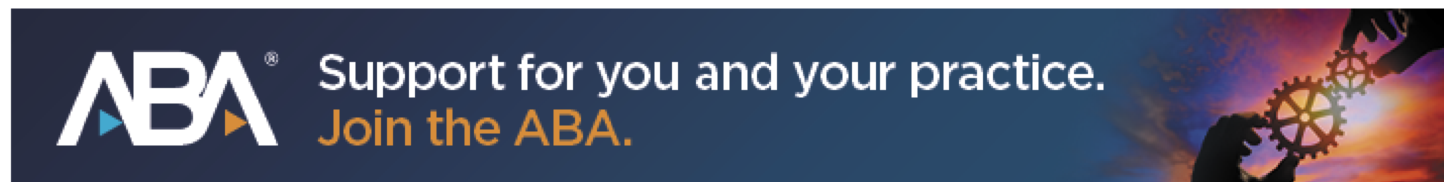
When lawyers talk about spoliation of evidence in the year 2019, they most often talk about ESI. Electronic data is certainly important, but sticks and bricks in the field are the heart of most construction cases. This article surveys recent case law on the issue of spoliation of evidence when work in place is demolished, replaced, or repaired. The cases teach that even though the best, physical evidence may have been lost, spoliation sanctions are not automatic. Rather, the inquiry depends heavily on questions of notice, the availability of evidence from other sources, and whether there has been bad faith.



How Does this Problem Arise?

Most owners do not want a building with defects. When defects (actual or perceived) are discovered, an owner typically asks the contractor who performed the work to repair the defects. But there may be disagreements over the existence of or responsibility for defects. The contractor may be unable to secure the cooperation of its subcontractors. Repairs may be beyond the contractor's financial capacity. Or maybe the parties just fail to communicate or cooperate. Any of these situations may lead to the owner hiring another contractor to perform the repairs and suing for the repair cost.

Most owners probably do not think they are destroying evidence by performing repairs. For an owner, a building is a home or place of business. Repairs are simply a matter of necessity to ensure proper functioning or appearance. Repairs seem nothing like the Enron shredding debacle.

From a contractor's perspective, its work in place may be the best evidence to show the work was performed properly or that any claimed defects are not as severe or pervasive as claimed. Once a contractor's work in place has been removed or altered no longer, the as-built condition is no longer available for inspection or demonstration.

The situation becomes more complicated because of the number of parties who may be involved in the eventual lawsuit. A defect lawsuit is likely to involve the owner, contractor, one or more subcontractors, and maybe even design- or construction-management professionals, materialmen, and product manufacturers. It is not uncommon for parties to be added who were not originally in the case or who may not have even been aware of the initial dispute.

Moreover, construction disputes and litigation evolve as more information is learned, parties are added to the case, new expert reports come out, new allegations are made, or positions change with the evidence. It is not uncommon for parties to want to re-inspect a building multiple times throughout the case.

Law on Spoliation of Evidence

Most courts recognize the availability of sanctions for spoliation of evidence, which is the failure to preserve relevant evidence. As a general rule, a party has a duty to take reasonable steps to preserve evidence that is or may be relevant to foreseeable litigation. [1] The available sanctions range from awards of attorneys' fees and costs to dismissal of a claim or defense, although this harsh sanction is reserved for the most extreme cases. [2] In some states, spoliation of evidence is an independent cause of action, but the concept is most often used as a basis to seek some sort of sanction against litigation opponents.

Spoliation of Evidence in Construction Cases

A number of courts have addressed spoliation of evidence based on the destruction, repair, or reconstruction of work in place in construction cases. The two most prominent recent cases are probably *Robertet Flavors, Inc. v. Tri-Form Construction, Inc.* and *Miller v. Lankow*. These cases are discussed in some detail below, followed by shorter summaries of other recent construction cases addressing spoliation of evidence based on demolition, repair, or reconstruction.

Read together, the cases teach that it is critical for an owner to provide advance notice before any demolition, repair, or reconstruction of a contractor's work. However, deficient notice does not

necessarily warrant spoliation sanctions, especially when it comes to harsh sanctions like dismissal or default.

A. *Robertet Flavors, Inc. v. Tri-Form Construction, Inc.*

Perhaps the most notable case to address spoliation in the construction context is *Robertet Flavors, Inc. v. Tri-Form Construction, Inc.*, [3] a case arising out of a leaky strip-window system. The case involved fairly striking spoliation (during the lawsuit, the owner completely replaced the contractor's work without telling any of the parties), but the New Jersey Supreme Court still concluded dismissal of the owner's claim was too harsh.

In *Robertet Flavors*, the owner, who acted as its own general contractor, sued the glazing subcontractor who installed the strip-window system and the construction manager. After filing suit, the owner performed destructive testing, removed and replaced the strip-window system, and removed and replaced the mold-damaged property without informing counsel for the glazing subcontractor and construction manager. The trial court precluded the owner's expert from testifying, the plaintiff withdrew certain claims, and then later the trial court granted summary judgment to the glazing subcontractor and construction manager.

On appeal, the New Jersey Supreme Court reversed the sanctions as to the glazing subcontractor, but affirmed as to the construction manager. The court reasoned the glazing subcontractor had pre-litigation notice of the leaky windows, had inspected the site, and presumably had access to records of the work it performed. However, the construction manager had been given no notification of the window leaks and so the court reached a different conclusion.

In its opinion, the court explained that "[t]he ordinary business practices in commercial construction projects therefore lend themselves to creative ways of leveling the playing field if something is lost." [4] The court listed a number of factors unique to the construction arena that should be considered when weighing spoliation sanctions:

- The need to timely correct the defect;
- Whether the defect threatens the integrity of the building;
- The non-spoiling party's responsibility (i.e., failing to make records when called to a project to evaluate a defect);

- The available records of the contractor performing the work, such as purchase orders, logs, meeting minutes, and time records;
- The existence of plans, shop drawings, and as-builts; and
- Whether there are photographs and video documenting the construction and its progress.

The court observed that "[i]n the construction litigation context, it will often be the case that a sanction for spoliation" should be less severe than dismissal of a claim. [5]

B. Miller v. Lankow

Miller v. Lankow [6] is another opinion recognizing that spoliation sanctions may not be warranted even where an owner performs repairs without providing adequate notice. The case involved a lawsuit by a home purchaser against the seller and various construction professionals hired by the seller. The purchaser claimed mold and water intrusion as a result of defective construction.

Before filing suit, the purchaser notified the seller and construction professionals about the mold and water-intrusion problems, and met with them on site to show them the problems. The construction professionals offered to perform repairs at a "fairly good price" but did not perform the repairs or, apparently, document the condition of the home. The purchaser's attorney then sent a demand letter to the seller and construction professionals and offered to make the home available for inspection. Some of the construction professionals inspected the house again, but others did not. A year later, the purchaser's attorney sent a letter to the seller and construction professionals advising that the purchaser intended to commence repairs, although the stucco may have been removed before the date stated in the letter. On these facts, the trial court granted summary judgment for the seller and construction professionals as a sanction for spoliation of evidence.

The Minnesota Supreme Court reversed the trial court's dismissal of the purchaser's claim and remanded for determination of whether the purchaser "provided notice sufficient to enable the respondents to protect themselves by inspecting the relevant evidence." [7] The court declined to adopt a rule requiring the party possessing evidence to provide actual notice of the nature and timing of any act that might lead to the loss of evidence. Instead, the court adopted the rule that the obligation is only to "provide sufficient notice and a full and fair opportunity to inspect the evidence so that the noncustodial parties can protect their interests with respect to the relevant

evidence that may be destroyed." [8] The court reasoned that if "noncustodial parties had sufficient knowledge to protect their interests, but nonetheless failed to inspect important evidence," that should not "deprive the custodial party of an otherwise valid claim or defense." [9] The court did provide some valuable guidance: "A meeting or a letter indicating the time and nature of any action likely to lead to destruction of the evidence, and offering a full and fair opportunity to inspect will usually be sufficient...." [10]

C. Other Cases Tend to Conclude Spoliation Sanctions Are Proper.

Robertet Flavors and *Miller* represent one side of the case law spectrum on spoliation of evidence in the construction context. Below are a number of other recent construction cases, all of which imposed some form of spoliation sanction—either dismissal, the preclusion of evidence, or an adverse inference—even though in none of the cases did the court find a bad faith attempt to deny access to evidence.

- *Kinder v. Heritage Lower Salford, LP* [11] affirmed summary judgment against the owner on spoliation grounds. Two years after filing suit, the owner repaired the defects without telling his counsel or the adverse parties and before the contractor and subcontractors had performed an expert inspection.

- *Scholastic, Inc. v. Pace Plumbing Corp.* [12] concluded that an adverse inference instruction might be appropriate if, at trial, the contractor proved that the owner's repairmen and cleaning crew negligently disposed of the plumbing coupling at issue while trying to repair the plumbing after a pipe burst.

- *Miner Dederick Constr., LLP v. Gulf Chemical & Metallurgical Corp.* [13] reversed a trial court's refusal to grant summary judgment against an owner for spoiling evidence. The owner failed to inform the contractor about destructive testing and ignored the contractor's requests to observe the repair work.

- *Aktas v. JMC Dev. Co.* [14] gave the defendants an adverse inference instruction when the owner locked the contractor out of a home-remodel project and removed most of the contractor's work by the time the owner gave notice of claim to the contractor.

- *Fines v. Ressler Enters., Inc.* [15] dismissed the owner's claim for defective siding installation because the owner removed the siding from her house. The only notice provided by the owner

was a fax to the contractor's counsel on a Friday afternoon advising the siding would be removed the following Monday, which was a holiday.

- *Harborview Office Center, LLC v. Camosy, Inc.* [16] dismissed the owner's complaint as a sanction for repairing V-grooves in EIFS system the owner determined were contributing to water leaks without providing notice to the contractor.
- *Story v. RAJ Properties, Inc.* [17] affirmed summary judgment for the contractor, subcontractor, and manufacturer on spoliation grounds where the owner removed and replaced the allegedly defective stucco system after filing a lawsuit, but without informing defendants.
- *Manorcare Health Services, Inc. v. Osmose Wood Preserving, Inc.* [18] precluded an owner from using evidence obtained during removal and replacement of the roof because the owner failed to provide notice to the defendant plywood manufacturer despite the manufacturer's written request for notice. The court concluded dismissal would be improper because the manufacturer inspected plywood on a previous occasion.

Conclusion

Repairing defects can create serious spoliation-of-evidence problems, even if repairs are performed innocently. There are plenty of reasons why harsh spoliation sanctions such as dismissal would be disfavored in construction litigation, particularly because there are often various other sources of information to document the construction. Nevertheless, many courts seem to view the destruction/replacement of a contractor's work in place as being inherently prejudicial—and thus appropriate for spoliation sanctions. Because so many cases seem to come down on the side of sanctioning the owner for spoliation, owners and their counsel should be especially careful to provide advance notice of any demolition, repair, or reconstruction.

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Endnotes

1. Rimkus Consulting Group, Inc. v. Cammarata, 688 F.Supp.2d 598, 612-13 (S.D. Tex. 2010); Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).
2. Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).
3. 1 A.3d 658 (N.J. 2010).
4. Id. at 675-76.
5. Id. at 676.
6. 801 N.W.2d 120 (Minn. 2011).
7. Id. at 134.
8. Id.
9. Id.
10. Id. at 132.
11. 2017 WL 2333765 (Pa. Super. 2017).
12. 129 A.D.3d 75 (N.Y. App. 2015).
13. 403 S.W.3d 451 (Tex. App. 2013).
14. 877 F.Supp.2d 1 (N.D.N.Y. 2012).
15. 820 N.W.2d 688 (N.D. 2012).
16. 2006 WL 335500 (Wis. App. 2006).
17. 909 So.2d 797 (Ala. 2005).
18. 764 A.2d 475 (N.J. App. 2001).

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