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# **A JURISPRUDENTIAL SURVEY OF THE TORT OF SPOILIATION OF EVIDENCE: RESOLVING THIRD-PARTY INSURANCE COMPANY AUTOMOBILE SPOILIATION CLAIMS**

STEVEN PLITT<sup>1</sup> AND JORDAN R. PLITT<sup>2</sup>

## I. INTRODUCTION: THE ISSUE OF THE SPOILIATION TORT

Thousands of automobile accidents occur on public roadways each year, leaving behind totally and partially damaged cars, trucks, motorcycles and other motor vehicles. Personal injuries and property damage arising from each accident have the potential to produce a lawsuit. The potential lawsuits encompass a myriad of parties, claims, and cross-claims which may or may not be known and/or foreseeable. Against this vast expanse of potential litigation, the following question arises: what is the duty of an insurance company that may possess or control one of the totally or partially damaged vehicles or vehicle components to preserve that evidence for future potential litigation involving lawsuits brought by insureds against alleged tortfeasors?

Part II of this Article provides a general background of the spoliation of evidence tort along with the current trend of adopting the tort amongst the states. Part III provides insight into the numerous approaches courts have employed in fixing the spoliation problem. The problematic issues that arise with imposing an independent tort on third parties, specifically insurance companies, are analyzed in Part IV. Part V offers recommendations for the future to resolve the spoliation tort dilemma efficiently and effectively.

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## II. OVERVIEW-THE SPOILIATION OF EVIDENCE TORT IN GENERAL

### A. THE NATURE OF THE SPOILIATION TORT

The spoliation tort emerged in reaction to widespread discovery abuse where litigants render discoverable evidence permanently unavailable to both the court and the adverse party.<sup>3</sup> “Spoliation” has been defined as the “failure to preserve property for another’s use in pending future litigation.”<sup>4</sup> Derived from the Latin phrase “*contra spoliatores omnia praesumuntur*,” or “all things presumed against the destroyer,”<sup>5</sup> spoliation encompasses the loss, destruction, or material alteration of evidence.<sup>6</sup> This goes beyond concealment or suppression of evidence because the evidence

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<sup>3</sup> See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principle Problems and Abuses*, AM. B. FOUND. RES. J. 787, 829 (1980) (noting that it is “difficult to exaggerate the pervasiveness of evasive tactics” including spoliation); Edward J. Imwinkelried, *A New Antidote for an Opponent's Pre-Trial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponents Case*, BYU L. REV. 793, 794 (1993) (“[D]eliberate destructionism is common place.”); Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZAL REV. 793, 795 (1991) (overwhelming incentive exists for spoliation because it is unlikely that an opponent would discover either the spoliated evidence or the act of spoliation itself).

<sup>4</sup> *Solano v. Delancy*, 264 Cal. Rptr. 721, 724 (Cal. App. 1989); see also *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999) (defining spoliation 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”); *Powers v. S. Family Markets of Eastman, LLC.*, 740 S.E.2d 214 (Ga. Ct. App. 2013) (“Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.”); *Kroger Co. v. Walters*, 735 S.E.2d 99 (Ga. Ct. App. 2012) (reiterating that “[s]poliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation).

<sup>5</sup> *Goff v. Harold Ives Trucking Co. Inc.*, 27 S.W.3d 387, 389 (Ark. 2000); *Armory v. Delamirie* (1722) 93 Eng. Rep. 664 (KB).

<sup>6</sup> *Foster v. Lawrence Mem'l Hosp.*, 809 F. Supp. 831, 836 (D. Kan. 1992) (citing BLACK’S LAW DICTIONARY 1401 (6th ed. 1990)) (“‘Spoliation’ has been defined as the intentional destruction or alteration of evidence.”).

is lost.<sup>7</sup> The spoliation tort is an interference tort involving protected expectancies<sup>8</sup> with prospective civil action through the destruction of evidence. This tort “is based on the premise that the destroyed evidence is adverse to the spoliation<sup>9</sup> and that a party who has negligently or intentionally lost or destroyed evidence known to be relevant to an upcoming

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<sup>7</sup> *Nix v. Hoke*, 139 F.2d 125, 135 (D.D.C. 2001) (observing that concealment and alteration are within the definition of “willful destruction of evidence”).

<sup>8</sup> The California Court of Appeals became the first to explicitly recognize spoliation of evidence as an independent tort in, *Smith v. Super., Ct.* 198 Cal. Rptr. 829 (Cal. Ct. App. 1984), *overruled by Cedars-Sinai Med. Ctr. v. Super. Ct.*, 954 P.2d 511 (Cal. 1998). In this case, the plaintiff suffered injuries after an oncoming truck’s wheel disengaged causing a collision. Shortly after, the truck was towed to a dealer who had previously customized it with deep-dish mag wheels. The dealer agreed with plaintiffs’ attorney to preserve the evidence including the wheel and related parts for an expert to examine and inspect them for the plaintiff. The dealer disposed of the evidence knowing how critical the parts were to the plaintiffs’ case. Noting that “[t]he common thread woven into all torts is the idea of unreasonable interference with the interests of others,” the Court analogized spoliation to the tort of intentional interference with prospective business advantage. As such, the California Court of Appeals created the intentional tort of spoliation, holding that a potential products liability case is a valuable probable expectancy justifying legal protection from interference. *Id.* at 836-837; *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 140-41 (5th ed. 1984) (explaining courts’ recognition of spoliation as another noncommercial expectancy that deserves protection).

<sup>9</sup> *See also* *Sullivan v. General Motors Corp.*, 772 F. Supp. 358, 360 (N.D. Ohio 1991) (discussing that “[a]t common law, it was proper to presume that evidence which had been destroyed, or ‘spoliated,’ could be construed against the party responsible of the destruction of that evidence.”); *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha*, 102 F.2d 450, 453 (2d Cir. 1939), *modified*, 103 F.2d 430 (2d Cir. 1939) (“When a party is once found to be fabricating, or suppressing, documents, the natural . . . conclusion is that he has something to conceal, and is conscious of guilt.”).

legal proceeding should be held accountable for any unfair prejudice that results.”<sup>10</sup>

The willful<sup>11</sup> and bad faith destruction of evidence threatens the integrity of a trial, undermining a party’s opportunity for justice.<sup>12</sup> In the absence of such relevant evidence, a party’s ability to prove a valid claim or defense is dramatically diminished.<sup>13</sup> Spoliation of evidence, whether intentional and/or negligent, has consequential effects on the public’s

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<sup>10</sup> *Keene v. Brigham and Women’s Hosp. Inc.*, 786 N.E.2d 824 (Mass. 2003).

<sup>11</sup> *See also Greenleaf Nursery v. E. I. Dupont De Nemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) (explaining that spoliation is not the equivalent to the concealment or suppression of evidence); Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY’S L.J., 351, 408 (1994) (noting that the distinction lies within the fact that evidence may still be produced at trial with concealment or suppression).

<sup>12</sup> *See Boldt v. Sanders*, 111 N.W.2d 225, 228 (Minn. 1961) (“It is essential to the achievement of justice that all of the admissible evidence be brought . . . for trial or settlement with full knowledge of the facts.”). *See also Viviano v. CBS, Inc.*, 597 A.2d 543, 550 (N.J. Super. Ct. App. Div. 1991) (noting that the “destruction of evidence manifests a shocking disregard for orderly judicial procedures and offends traditional notions of fair play.”); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn. 1990) (finding that destruction of evidence disregards judicial procedures and offends notions of fair play); *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1319 (Ill. App. Ct. 1986) (“This state’s system of civil litigation is founded in large part on a litigant’s ability, under the authority of the Supreme Court rules, to investigate and uncover evidence after filing suit. Destruction of evidence known to be relevant to pending litigation violates the spirit of liberal discovery.”); *Wichita Royalty Co. v. City Nat’l Bank of Wichita Falls et al.*, 109 F.2d 299, 302 (5th Cir. 1940) (defining spoliation as being “synonymous with pillaging, plundering and robbing”).

<sup>13</sup> *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 128 (S.D. Fla. 1987) (noting that a defendant “having purposefully, willfully, and in bad faith destroyed” relevant documents injured the plaintiff’s “right to a full and fair adjudication of its claims on the merits.”); *Cedars-Sinai*, 954 P.2d 511 (Cal.1998) (stating “[t]he intentional destruction of evidence is a grave affront to the cause of justice and deserves our unqualified condemnation.”)

confidence in the judicial system.<sup>14</sup> Courts have recognized that the “preservation of ... [potential] evidence ... presumably increase[s] the likelihood of a true and just verdict;”<sup>15</sup> therefore, preservation of evidence warrants legal protection as an injury to a property interest.<sup>16</sup>

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<sup>14</sup>See *Kammerer v. Sewerage Water Board of New Orleans*, 93-1232 (La. App. 4 Cir. 3/15/94); 633 So. 2d 1357, 1362; Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1138 (1987) (“Destruction of evidence undermines two important goals of the judicial system – truth and fairness”).

<sup>15</sup> *Edwards v. Louisville Ladder Co.*, 89-1697-LC (W.D. La. 6/19/92); 796 F. Supp. 966, 969 (“It is obvious that the preservation of items which might be relevant evidence in either prospective or ongoing litigation is desirable.”). See also *Kammerer v. Sewerage Water Board of New Orleans*, 93-1232 (La. App. 4 Cir. 3/15/94); 633 So. 2d 1357, 1362 (Justice Waltzer concurring) (“The process itself is fair and the result presumably just where the parties have open opportunity to plead, discover, present and impeach evidence and argue alternative theories of the case. Where material evidence has been lost, the veracity and justice of the ultimate decision will of necessarily suffer.”).

<sup>16</sup> See *Ortega v. Trevino*, 938 S.W.2d 219, 223 (Tex. Ct. App. 1997) (“[A] claim for money damages in a civil lawsuit is an interest in property belonging to the plaintiff. By destroying the plaintiff’s ability to prove his claim, the spoliator has destroyed a property interest which [the] law would otherwise protect and recognize as a valuable asset belonging to the plaintiff.”). See also *Coca-Cola Bottling Co. v. Super. Ct. of San Bernardino County*, 286 Cal. Rptr. 855, 864 (Cal. Ct. App. 1991) (noting that spoliation of evidence in civil litigation constitutes an injury to a property interest); *Augusta v. United Service Automobile Ass’n.*, 16 Cal. Rptr. 2d 400, 404 (Cal. Ct. App. 1993) (discussing that a cause of action for spoliation of evidence involves an injury to property interest); *Jablonski v. Royal Globe Insurance Co.*, 251 Cal. Rptr. 160, 168-69 (Cal. Ct. App. 1988) (noting that the injury that results from one’s inability to present relevant evidence due to its destruction); *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1119 (N.J. Super. Ct. Law Div. 1993) (“The spoliation tort protects a litigant’s interest in bringing a prospective cause of action.”); *Smith v. Superior Ct.*, 198 Cal. Rptr. 829, 836-37 (Cal. Ct. App. 1984) (“[W]e conclude that a prospective civil action . . . is a valuable ‘probable expectancy’ that the court must protect from . . . interference . . .”); *St. Mary’s Hosp., Inc. v. Brinson*, 685 So. 2d 33, 35 (Fla. Dist. Ct. App. 4th Dist.

The issues surrounding the spoliation of evidence and how to remedy the loss of relevant evidence has been vetted thoroughly throughout the commentary.<sup>17</sup> Commentators and courts have furnished various

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1996) ("[A] prospective civil action... is a valuable probable expectancy that the court must protect from interference.").

<sup>17</sup> See, e.g., Imwinkelried, *supra* note 3 at 793; Terry R. Spencer, *Do Not Fold, Spindle or Mutilate: The Trend Towards the Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37 (1993); Nesson, *supra* note 3 at 793; Jeffrey S. Kinsler & Anne R. Keys MacIver, *Demystifying Spoliation of Evidence*, 34 TORT & INS. L.J. 761 (1999); David A. Dell, Margaret M. Koesel & Tracy L. Turnbull, *Let's Level The Playing Field: A New Proposal for Spoliation of Evidence Claims in Pending Litigation*, 29 ARIZ. ST. L.J. 769 (1997); Mary K. Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 30 LITIG. 24, 69 (2003); Johnathan Judge, Comment, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441 (2001); Phoebe L. McGlynn, *Spoliation in the Products Liability Context*, 27 U. MEM. L. REV. 663 (1997); Shannon D. Hutchings, *Tortious Liability for Spoliation of Evidence*, 24 AM. J. TRIAL ADVOC. 381 (2000); Nolte, *supra* note 11 at 351; Margaret O. Frossard & Neal S. Gainsberg, *Spoliation of Evidence in Illinois: The Law After Boyd v. Traveler's Insurance Co.*, 28 LOY. U. CHI. L.J. 685 (1997); Mark D. Robbins, *Computers and the Discovery of Evidence – A New Dimension to Civil Procedure*, 17 J. COMPUTER & INFO. L. 411 (1999); Patrick Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary?*, 14 J. COMPUTER & INFO. L. 523 (1996); Bart S. Wilhoit, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631 (1998); Maria A. Losavio, *Synthesis of Louisiana Law on Spoliation of Evidence – Compared to the Rest of the Country, Did we Handle it Correctly?*, 58 LA. L. REV. 837 (1998); Robert D. Peltz, *The Necessity of Redefining Spoliation of Evidence, Remedies in Florida*, 29 FLA. ST. U.L. REV. 1289 (2002); Cecelia Hallinan, *Balancing The Scales after Evidence is Spoiled: Does Pennsylvania's Approach Efficiently Protect the Injured Party?*, 44 VILL. L. REV. 947 (1999); Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831 (1991); Jay E. Rivlin, *Recognizing an Independent Tort Action will spoil a Spoliator's Splendor*, 26 HOFSTRA L. REV., 1003, 1017 (1998); James T. Killelea, *Spoliation of Evidence Proposals for New York State*, 70 BROOK. L. REV. 1045 (2005); John K. Stipanovich, *The Negligent Spoliation of Evidence: An Independent*

explanations as to why recognition of an independent spoliation tort acts as an essential beneficial component within the judicial system: (1) the probable expectation of a favorable judgment or defense in future civil litigation are safeguarded by the tort;<sup>18</sup> (2) traditional evidentiary remedies are not deterred by the spoliator of evidence;<sup>19</sup> and (3) testimonial candor is preserved by the tort.<sup>20</sup> However, the majority of jurisdictions that have

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*Tort Action may be the Only Acceptable Alternative*, 53 OHIO ST. L.J. 1135 (1992); Lawrence Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085 (1987); David H. Canter, *The Missing or Altered Product: Nightmare or Dream?*, 26 SW. U.L. REV. 1051 (1997); John McArthur McGuire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226 (1935); Sean R. Levine, *Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth?*, 104 W. VA. L. REV. 419 (2002); Paul Gary Kekorian, *Negligent Spoliation of Evidence: Skirting the 'Suit within a Suit' Requirement of Legal Malpractice*, 41 HASTINGS L.J. 1077 (1990); Charles B. Renfrew, *Discovery Sanctions: A Judicial Prospective*, 67 CAL. L. REV. 264 (1979); R. Laird Hart, Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979); Andrea H. Rowse, *Comment, Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191 (1985); Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destructions of Relevant Documents*, 61 TEX. L. REV. 1185 (1983); Anthony C. Casamassina, *Comment, Spoliation of Evidence in Medical Malpractice*, 14 PACE L. REV. 235 (1995); Robert W. Thompson, *To The Prevailing Party Goes the Spoils: An Overview of an Emerging Tort in California*, 18 W. ST. U. L. REV. 223 (1990); Monica L. Klug, *Torts—Arizona Should Adopt the Tort of Intentional Spoliation of Evidence—La. Raia v. Superior Court*, 19 ARIZ. ST. L.J. 371 (1987).

<sup>18</sup> *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 464 (Alaska 1986).

<sup>19</sup> Steve E. Couch, *Spoliation of Evidence: Is One Man's Trashing Another Man's Treasure*, 62 TEX. B.J. 242, 243, n. 4 (1999); *See also* Wilhoit, *supra* note 17, at 669 (1998).

<sup>20</sup> *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1319 (Ill. App. Ct. 1986) (“This state's system of civil litigation is founded in large part on a litigant's ability, under the authority of the Supreme Court Rules, to investigate and uncover evidence after filing suit... Any duty to preserve



examined the issue have rejected the recognition of a spoliation tort. Those states that have recognized and created the tort of spoliation in some form, limit such an action to spoliation of evidence related to actual litigation.

Courts are in disagreement on what constitutes spoliation and vary on how to apply the tort when the spoliator is a third-party, who is not a party to the underlying civil action. This divergence has produced a variety of approaches to the spoliation of evidence dilemma.

#### B. THE CURRENT JUDICIAL LANDSCAPE OF THE SPOLIATION OF EVIDENCE TORT

Initially, the tort was not embraced by the courts.<sup>21</sup> However, the spoliation issue has recently attracted greater attention.<sup>22</sup> A current split exists between those jurisdictions that recognize a secondary cause of action for spoliation of evidence and those that reject the tort altogether. Because of this split, the outcomes of such actions can be diverse depending on the state and the law it applies. Four possible varieties of the tort of spoliation of evidence exist: (1) intentional spoliation of evidence by an adverse party;<sup>23</sup>

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such items would undoubtedly be tempered by what a reasonable person would expect to be sought as evidence.”).

<sup>21</sup> *Edwards v. Louisville Ladder Co.*, 89-1697(W.D. La. 6/19/1992), 796 F. Supp. 966, 968 (citing *Pirocchi v. Liberty Mutual Ins.*, 365 F.Supp. 277 (E.D. Pa. 1973) (“Despite the fact that the origins of a tort for spoliation of evidence trace back to at least 1973 no general consensus has developed as to the basis, essential elements, or even existence of such a tort.”); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995) *overruled on other grounds by Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001) (“In general ... the tort of spoliation of evidence has not been widely adopted in other jurisdictions, nor has much agreement emerged on its contours and limitations.”).

<sup>22</sup> *See Henderson v. Tyrrell*, 910 P.2d 522, 531 (Wash. Ct. App. 1996) (“[d]estruction or loss of potentially relevant evidence is a long-standing problem, but it has attracted increased attention in the past . . .”).

<sup>23</sup> While the elements of a prima facie case for intentional spoliation of evidence by a defendant vary from state to state due to each states’ public policy considerations, as a general rule the tort requires: (1) pending or probable litigation involving the plaintiff; (2) knowledge by the defendant of the existence or likelihood of the litigation; (3) intentional acts of spoliation by the defendant designed to disrupt the plaintiff’s case; (4) disruption of the plaintiff’s case; and (5) damages proximately caused by the defendant’s

(2) intentional spoliation by a disinterested third party;<sup>24</sup> (3) negligent spoliation of evidence by an adverse party;<sup>25</sup> and (4) negligent spoliation of evidence by a disinterested third party.<sup>26</sup> Spoliation of evidence committed by an adverse party to a lawsuit, is referred to as “first-party spoliation.”<sup>27</sup> When committed by a non-party, it is called “third-party spoliation.”<sup>28</sup> Regardless of whether classified as intentional or negligent, the elements of these iterations of the tort are very similar<sup>29</sup> with the main difference seen in the level of culpability.

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acts. *See, e.g.*, *Nye v. CSX Transp.*, 437 F.3d 556 (6th Cir. 2006) (applying Ohio law); *Traylor v. Awwa*, 899 F. Supp. 2d 216 (D. Conn. 2012) (applying Connecticut law).

<sup>24</sup> *See, e.g.*, *Hannah v. Heeter*, 584 S.E.2d 560, 572 (W. Va. 2003) (adopting both first-party and third-party intentional spoliation of evidence and discussing the elements of the tort).

<sup>25</sup> While the elements of negligent spoliation of evidence also vary, the general consensus delineated for a cause of action for negligent destruction of evidence are as follows: (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. *See, e.g.*, *Continental Ins. Co. v. Herman*, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1991); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 851-54 (D.C. 1998).

<sup>26</sup> *See, e.g.*, *Velasco v. Commercial Bldg. Maint. Co.*, 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985) (establishing tort of negligent spoliation); *See also Smith v. Atkinson*, 771 So. 2d 429 (Ala. 2000).

<sup>27</sup> *See Johnson v. United Serv.’s Auto Assn.*, 67 Cal. App. 4th 626, 628 (Cal. Ct. App. 1998) (explaining that a first party spoliator is a party to the litigation in which the spoliation evidence is deemed relevant).

<sup>28</sup> *See Cole Vision Corp. v. Hobbs*, 714 S.E.2d 537 (S.C. 2011); *Superior Boiler Works, Inc. v. Kimball*, 259 P.3d 676 (Kan. 2011); *Lips v. Scottsdale Healthcare Corp.*, 229 P.3d 1008 (Ariz. 2010).

<sup>29</sup> *Compare Reilly PPA v. D'Errico*, 1994 WL 547671, at \*2, \*6 (Conn. Super. Ct. Sept. 21, 1994), *and Foster v. Lawrence Mem. Hosp.*, 809 F. Supp. 831, 836 (Kan. 1992), *with Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995).

### 1. Intentional Spoliation

The intentional form of the tort requires that the evidence be willfully destroyed by the spoliator.<sup>30</sup> A small minority of states (seven) have recognized an independent tort for intentional spoliation.<sup>31</sup> Of those states that have recognized a tort for intentional spoliation, most of them permit the tort in both a first-party and third-party context.<sup>32</sup> A couple of

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<sup>30</sup> See, e.g., *Coleman*, 905 P.2d at 189.

<sup>31</sup> The following states recognize an intentional spoliation of evidence causes of action for first-party and third-party actors: Alaska - *Hazen v. Mun. of Anchorage*, 718 P.2d 456 (Alaska 1986), *Nichols v. St. Farm Fire & Casualty Co.*, 6 P.3d 300, 304 (Alaska 2000), *Hibbits v. Sides*, 34 P.3d 327, 328 (Alaska 2001); Connecticut - *Rizzuto v. Davidson Ladders*, 905 A.2d 1165 (Ct. 2006) (the Court recognized first party intentional spoliation, but declined to address whether third party spoliation was legally cognizable); Kansas - *Foster v. Lawrence Memorial Hosp.*, 809 F.Supp. 831, 838 (Kan. 1992) (intentional spoliation recognized where defendant commits spoliation for its own advantage); Louisiana - *Guillory v. Dillard's Dep't Store, Inc.*, 2000-190 (La. Ct. App. 10/11/2000), 777 So.2d 1; New Mexico - *Coleman*, 905 P.2d 185 (N.M. 1995) *overruled by Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (2001); Ohio - *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); West Virginia - *Hannah v. Heeter*, 584 S.E.2d 560 (W.V. 2003).

<sup>32</sup> Alaska - *Hazen v. Mun. of Anchorage*, 718 P.2d 456 (Alaska 1986), *Nichols v. State Farm Fire & Casualty Co.*, 6 P.3d 300, 304 (Alaska 2000), *Hibbits v. Sides*, 34 P.3d 327, 328 (Alaska 2001); Connecticut - *Rizzuto v. Davidson Ladders*, 905 A.2d 1165 (Conn. 2006) (the court recognized first party intentional spoliation, but declined to address whether third party spoliation was legally cognizable); Kansas - *Foster v. Lawrence Mem'l Hosp.*, 809 F.Supp. 831, 838 (Kan. 1992) (intentional spoliation recognized where defendant commits spoliation for its own advantage); Louisiana - *Guillory v. Dillard's Dep't Store, Inc.*, 777 So. 2d 1 (La. Ct. App. 2000); New Mexico - *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995), *overruled by Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001); Ohio - *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); West Virginia - *Hannah v. Heeter*, 584 S.E.2d 560 (W.V. 2003).

states permit intentional spoliation as an independent tort in the third-party context, but not the first party context.<sup>33</sup>

## 2. Negligent Spoliation

The majority of states (23) that have considered the question of spoliation as a tort have rejected negligent spoliation claims.<sup>34</sup> Many states

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<sup>33</sup> See, e.g., *Indiana - Gribben v. Wal-Mart Stores*, 824 N.E.2d 349, 355 (Indiana 2005) (not permitted in first party context); *Glotzbach v. Froman*, 854 N.E.2d 337, 341 (Indiana 2006) (recognized in third party spoliation), *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998) (recognized in third party context); *Montana - Oliver v. Stimson Lumber Co.*, 993 P.2d 11 (Montana 1999) (recognized in the third-party context. However, first party spoliation can be addressed by rules of civil procedure).

<sup>34</sup> The following states have rejected an independent spoliation claim based on negligence: *Alabama - Christian v. Kenneth Chandler Construction Co.*, 658 So. 2d 408, 413 (Ala. 1995); *Arkansas - Goff v. Harold Ives Trucking Co.*, 27 S.W.3d 387, 391 (Ark. 2000); *Arizona - Souza v. Fred Carries Contracts Co.*, 955 P.2d 3, 6 (Ariz. Ct. App. 1997), *Tobel v. Travelers Ins.*, 988 P.2d 148, 156 (Ariz. Ct. App. 1999); *California - Forbes v. Cty. of San Bernardino*, 101 Cal. App. 4th 48, 57 (Cal. Ct. App. 2002); *Colorado - Moore v. United States Dept. of Agric. Forest Serv.*, 864 F. Supp. 163 (Dist. Colo. 1994); *Connecticut - Massaro v. Yale New Haven Hosp.*, 34 Conn. L. Rptr. 609 (Conn. Super. Ct. 2003); *Delaware - Lucas v. Christiana Skating Ctr., Ltd.*, 722 A.2d 1247 (Del. Super. Ct. 1998); *Iowa - Meyn v. State*, 594 N.W.2d 34 (Iowa 1999); *Kansas - Koplín v. Rosel Well Perforators, Inc.*, 734 P.2d 1177 (Kan. 1987) (must have special circumstances or relationship to create the duty to preserve evidence); *Kentucky - Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997); *Louisiana - Louis v. Albertsons*, 935 So. 2d 771, 775 (spoliation claim can be brought under traditional negligence theory); *Maine - Butler v. Mooers*, No. Civ. A. CV-00-737, 2001 WL 1708836 (Me. Super. Ct. June 13, 2001), *Gagne v. D.E. Jonsen, Inc.*, 298 F. Supp. 2d 145, 147 (D. Me. 2003); *Maryland - Miller v. Montgomery Cty*, 494 A.2d 761 (Md. Ct. Spec. App. 1985); *Massachusetts - Fletcher v. Dorchester Mutual Ins.*, 773 N.E.2d 420 (Mass. 2002); *Michigan - Panich v. Iron Wood Prod. Corp.*, 445 N.W.2d 795 (Mich. Ct. App. 1989); *Minnesota - Federated Mutual Ins. v. Litchfield Precision Components, Inc.* 456 N.W.2d 434, 436-37 (Minn. 1990); *Missouri - Baugher v. Gates Rubber Co.*, 863 S.W.2d 905 (Mo. Ct. App. 1993);

have rejected the concept of negligent spoliation under ordinary negligence principles, *i.e.*, the duty to preserve evidence, breach of that duty, causation, and injury.<sup>35</sup> A small minority of jurisdictions (9 states) have allowed claims for negligent spoliation.<sup>36</sup> Of this small handful of jurisdictions recognizing negligent spoliation under ordinary negligence principles, only four recognize negligent spoliation for both first-party and third party claims.<sup>37</sup>

### 3. Spoliation by Third Parties

Within the tort of spoliation is the controversy of whether to impose a duty when the spoliator is not a party to the underlying litigation. Of the nine states recognizing negligent spoliation under general negligence principles, only five states permit negligent spoliation claims to be brought against third parties.<sup>38</sup>

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Mississippi - *Richardson v. Sarah Lee Corp.*, 847 So. 2d 821, 823-24 (Miss. 2003); Nevada - *Timber Tech Engineered v. Home Ins.*, 55 P.3d 952 (Nev. 2002); New York - *Ortega v. City of New York*, 876 N.E.2d 1189, 1197 (N.Y. 2007); Ohio - *Drawl v. Comicelli*, 706 N.E.2d 849, 851-52 (Ohio Ct. App. 1997) (however, Ohio recognizes the tort of interference with or destruction of evidence requiring a showing of a willful (wrongful) destruction, alteration or concealment of evidence); Utah - *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415 (Utah Ct. App. 1994); Virginia - *Austin v. Consolidated Coal Co.*, 501 S.E.2d 161 (Va. 1998); Wisconsin - *Johnston v. Metropolitan Prop. & Cas. Ins.*, 288 Wis.2d 658.

<sup>35</sup> See cases cited *supra* note 34.

<sup>36</sup> See *infra* note 37 (Illinois, New Jersey, New Mexico, and Pennsylvania); *infra* note 38 (Alabama, Florida, Indiana, Montana, and West Virginia).

<sup>37</sup> The following are states that recognize negligent spoliation for both first-party and third-party claims under ordinary negligence principles: Illinois - *Boyd v. Travelers Ins.*, 652 N.E.2d 267 (Ill. 1995); New Jersey - *Rosenblit v. Zimmerman*, 766 A.2d 749, 756 (N.J. 2001), *Swick v. New York Times, Co.*, 815 A.2d 508, 512 (N.J. Super. Ct. App. Div. 2003); New Mexico - *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995), *overruled on other grounds* by *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001); Pennsylvania - *Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65 (Pa. Super. Ct. 1998).

<sup>38</sup> The following states recognize negligent spoliation under general negligence principle against third-parties: Alabama - *Smith v. Atkinson*, 771 So. 2d 429 (Ala. 2000) (negligence permitted against a third party who was

#### 4. Policy Considerations

Liability for spoliation of evidence arises from a party's duty to preserve evidence.<sup>39</sup> Whether a duty is owed is a legal question, decided by the court.<sup>40</sup> The duty element of the spoliation tort has perplexed the majority of courts, especially in the context of third-parties.<sup>41</sup> There exists an amorphous body of negligent spoliation of evidence law that determines when a third-party can be liable in civil litigation. Therefore, where adopted, the outcomes of such actions can be diverse depending on the state and the law applied. As an example, a duty to preserve evidence before allowing spoliation claims under general concepts of negligence is required in three

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the proximate cause of the plaintiff's inability to file or win the underlying lawsuit); Florida - *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005) (first party spoliation claim not recognized), *Kimball v. Publix Super Mkt., Inc.*, 901 So. 2d 293, 296 (Fla. Dist. Ct. App. 2005) (third party spoliation recognized), *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 846 (Fla. Dist. Ct. App. 2004) (third party spoliation requires duty to preserve evidence)); Indiana - *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005) (first party spoliation not recognized), *Glotzbach v. Froman*, 854 N.E.2d 337, 341-42 (Ind. 2006) (third party spoliation recognized); Montana - *Oliver v. Stimson Lumber Co.*, 993 P.2d 11 (Mont. 1999); West Virginia - *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003).

<sup>39</sup> *See, e.g.*, *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 27-28 (Fla. Dist. Ct. App. 1990).

<sup>40</sup> *Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc.*, 764 A.2d 475, 479 (N.J. Super. Ct. App. Div. 2001) (holding the duty to preserve evidence is a question of law for the court).

<sup>41</sup> *See, e.g.*, *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 424-25 (Mass. 2002) ("Persons who are not themselves parties to litigation do not have a duty to preserve evidence for use by others. Nonparty witnesses may have evidence relevant to a case – documents, photographs, tape recordings, equipment parts, or any other tangible objects – and may know of its relevance, but that knowledge, by itself, does not give rise to a duty to cooperate with litigants."); *See Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 753 N.Y.S.2d 272 (N.Y. App. Div. 2002) (holding spoliator's knowledge of a potential or current lawsuit did not impose a duty to preserve evidence). *But see*, *Mace v. Ford Motor Co.*, 653 S.E.2d 660 (W. Va. 2007).

states.<sup>42</sup> One court found that a duty to preserve evidence existed where the duty arose out of “agreement, contract, statute, special circumstance, or voluntary undertaking” and required an objective foreseeability element where a reasonable person could have foreseen that the evidence in question was material to a potential civil action.<sup>43</sup>

Absent clear legislative direction in determining whether a cognizable duty should exist, courts have focused on a variety of policy considerations for refusing to recognize an independent spoliation tort, such as: (1) the fact that remedies are already in place to rectify the problem;<sup>44</sup> (2) the damages produced are inherently speculative;<sup>45</sup> (3) adjudicated matters

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<sup>42</sup> See *Florida - Royal & Sun Alliance*, 877 So.2d at 846 (third party spoliation requires a duty to preserve evidence); *Illinois - Dardeen v. Kuehling*, 821 N.E.2d 227, 231 (Ill. 2004) (duty to preserve evidence required); *New Mexico - Coleman*, 905 P.2d (special circumstances must exist under which there is a duty to preserve the evidence).

<sup>43</sup> See *Dardeen*, 821 N.E.2d at 231.

<sup>44</sup> See *Reynolds v. Bordelon*, 172 So. 3d 589 (La. 2015).

<sup>45</sup> “It seems likely that in a substantial proportion of spoliation cases the fact of harm will be irreducibly uncertain. In these cases, ‘there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim’s favor.’ The elements of causation and damages, therefore, in the continuing absence of the spoliated evidence, would be nearly impossible to prove, and permitting a cause of action that necessarily would be based upon speculation and conjecture could burden the courts with claims that may be peculiarly productive of arbitrary and unreliable verdicts.” *Temple Cmty. Hosp. v. Super. Ct. of Los Angeles*, 976 P.2d 223, 228 (Cal. 1999) (citing *Cedars-Sinai Med. Ctr. v. Super. Ct. of Los Angeles*, 954 P.2d 511 (Cal. 1998)). See also *Smith v. Super. Ct. of Los Angeles*, 198 Cal. Rptr. 829, 833-34 (Cal. Ct. App. 1984), *overruled by Cedars-Sinai Med. Ctr.*, 954 P.2d (recognizing that the damages for spoliation tort were inherently speculative because, in order to state a claim, the relevant evidence must be missing but finding it would be a great injustice to prevent an injured party from recovering at all, then to reduce the certainty of damages requirements); *Reilly PPA v. D’Errico*, No. CV93 0346095S, 1994 WL 547671, at \*6 (Conn. Super. Ct. Sept. 21, 1994) (Stating that “the inherently speculative nature of the spoliation tort militates against adopting such a cause of action”); *Larison v. City of Trenton*, 180 F.R.D. 261, 265-66 (D.N.J. 1998) (failing to adopt an independent spoliation tort partly because the court was unwilling “to

may need to be re-litigated;<sup>46</sup> (4) there is the potential for jury confusion and inconsistency;<sup>47</sup> and, (5) there is always the possibility of interfering with a person's private property rights.<sup>48</sup> However, the bulk of the case law on this subject focuses upon the availability of alternative remedies to rectify the spoliation problem.<sup>49</sup>

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engage in speculation and conjecture” in regards to the damages requirement).

<sup>46</sup> See, e.g., *Temple Cmty. Hosp.*, 976 P.2d at 228 (Cal. 1999) (“[I]f the spoliation claim were brought after the conclusion of the underlying litigation, the result would be ‘duplicative proceedings’ involving a ‘retrial within a trial’ and carrying the potential for inconsistent results.”).

<sup>47</sup> See *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 971 (W.D. La. 1992); *Murphy v. Target Prods.*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991); *Trevino v. Ortega*, 969 S.W.2d 950, 957 (Tex. 1998); *Cedars-Sinai Med. Ctr.*, 954 P.2d 511; *Id.* at 518. (“Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action.”); *Reilly*, 1994 WL 547671, at \*6; *Reynolds*, 172 So. 3d at 598 (a spoliation tort “could create confusion for fact-finders, particularly juries, inasmuch as it allows a trial within a trial.”); *Temple Cmty. Hosp.*, 976 P.2d at 228 (“if the spoliation claim were tried concurrently with the underlying litigation, there would be ‘a significant potential for jury confusion and inconsistency’ ...”).

<sup>48</sup> See, e.g., *id.* at 228 (Cal. 1999) (“[T]he threat of liability might cause individuals and entities to engage in unnecessary and expensive record-retention policies.”); *Louisville Ladder Co.*, 796 F. Supp. at 970 (“[C]ourts must also be concerned with interference with a person's right to dispose of his own property as he chooses.”); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1183 (Kan. 1987) (recognizing an independent spoliation tort would cause “[T]he unwarranted intrusion on the property rights of a person who lawfully disposes of his own property.”).

<sup>49</sup> See, e.g., *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1319 (Ill. App. Ct. 1996) (discussing that sanctions for spoliation of evidence in violation of discovery rules promote orderly judicial procedures and fair play); *Cedars-Sinai*, 954 P.2d 511 (emphasizing that sanctions within the original proceeding, disciplinary and penal sanctions are preferable in derivative litigation).



### III. DIFFERENT APPROACHES TO DISINCENTIVIZING THE SPOILIATION OF EVIDENCE

Although some jurisdictions have begun to recognize a new, independent tort for the spoliation of evidence in civil litigation, a majority of courts have found the adoption of an independent tort is unnecessary due to a variety of existing non-tort remedies and sanctions already in place acting as effective measures in addressing the misconduct of spoliation.<sup>50</sup> Traditionally, courts utilized adverse inferences, presumptions, and other actions as the main deterrents in preventing a party from destroying evidence.

Finding that the additional benefits of a tort remedy are not great in comparison to the significant burdens it would create, various courts have employed a myriad of traditional remedies to combat spoliation.<sup>51</sup> Any remedy a court imposes should serve one of three purposes: deterrence, punishment, or remediation<sup>52</sup> and the evidence allegedly lost or destroyed must be relevant to a material fact in the litigation.<sup>53</sup> To fix pre-litigation spoliation, state courts have relied on their inherent power to control the

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<sup>50</sup> See, e.g., *Miller v. Montgomery Cty.*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985) (“In either event, the remedy for the alleged spoliation would be appropriate jury instructions as to permissible inferences, not a separate and collateral action.”).

<sup>51</sup> See, e.g., *Telecom Int'l America, Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189 (S.D.N.Y. 1999) (noting that dismissal may be an appropriate remedy where a party demonstrates bad faith in the destruction of evidence); See *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 128 (S.D. Fla. 1987) (entering a default judgment when documents were willfully destroyed causing prejudice to the case); *Metropolitan Dade County v. Bermudez*, 648 So. 2d 197, 200 (Fla. Dist. Ct. App. 1994) (weighing the willfulness and extent of prejudice in deciding the appropriate sanctions for the destruction of evidence); *Farley Metals, Inc. v. Barber Colman Co.*, 645 N.E.2d 964, 968 (Ill. App. Ct. 1994) (holding that where critical information is destroyed, the prejudice to the non-offending party is the courts focus for imposing sanctions).

<sup>52</sup> See, e.g., *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (“[T]he most severe in the spectrum of sanctions ... must be available ... not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”).

<sup>53</sup> *Gath v. M/A-COM, Inc.*, 802 N.E.2d 521, 528 (Mass. 2003).

judicial process in litigation<sup>54</sup> and to sanction parties for the spoliation of evidence.<sup>55</sup> Courts have broad discretion in imposing sanctions for the

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<sup>54</sup> *Chambers v. Nasco Inc.*, 501 U.S. 32; *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993) (finding that court has inherent power in excluding plaintiff's experts' testimony where the expert failed to preserve evidence); *Unigard Security Insurance Co. v. Lakewood Eng. & Manuf. Corp.*, 982 F.2d 363 (9th Cir. 1992) (excluding testimony of plaintiff's expert without showing of bad faith was proper use of court's inherent powers); *Northern Assurance Co. v. Ware*, 145 F.R.D. 281 (D. Me. 1993).

<sup>55</sup> The following states have the inherent power to sanction parties for the spoliation of evidence: Alabama - *Story v. RAJ Prop., Inc.*, 909 So. 2d 797, 802-03 (Ala. 2005); Arizona - *Souza v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. Ct. App. 1997); Arkansas - *Goff v. Harold Ives Trucking Co.*, 27 S.W.3d 387, 391 (Ark. 2000); California - *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 954 P.2d 511, 517 (Cal. 1998); Colorado - *Pfantz v. KMart Corp.*, 85 P.3d 564, 567 (Colo. App. 2003); Connecticut - *Beers v. Bayliner Marine Corp.*, 675 A.2d 829, 832 (Conn. 1996); Delaware - *Burris v. Kay Bee Toy Stores*, No. 96C-01-036, 1999 WL 1240863 at \*1 (Del. Super. Ct. Sept. 17, 1999); Florida - *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342, 347 (Fla. 2005); Georgia - *Chicago Hardway & Fixture Co. v. Letterman*, 510 S.E.2d 875 (Ga. Ct. App. 1999); Hawaii - *Stender v. Vincent*, 992 P.2d 50 (Haw. 2000); Idaho - *Courtney v. Big O Tires*, 87 P.3d 930, 933 (Idaho 2003); Illinois - *Adams v. Bath & Body Works, Inc.*, 830 N.E.2d 645, 652 – 53 (Ill. App. Ct. 2005); Indiana - *Glottzbach v. Froman*, 827 N.E.2d 105, 112 (Ind. Ct. App. 2005); Iowa - *Mayn v. State*, 594 N.W.2d 31, 34 (Iowa 1999); Kansas - *Shay v. State Dept. of Transp.*, 959 P.2d 849, 851 (Kan. 1998); Kentucky - *Morten v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353, 360 (Ky. Ct. App. 1999); Louisiana - *Smith v. Jitney Jungle of Am.*, 802 So. 2d 988, 992 (La. Ct. App. 2001); Maine - *Driggin v. Am. Sec. Alarm Co.*, 141 F. Supp.2d 113 (D. Me. 2000); Maryland - *Klupt v. Krongard*, 728 A.2d 727, 736 (Md. Ct. Spec. App. 1999); Massachusetts - *Gath v. M/A-Comm, Inc.*, 802 N.E.2d 521 (Mass. 2003); Michigan - *Bloemendaal v. Town & Country Sports Ctr., Inc.*, 659 N.W.2d 684 (Mich. Ct. App. 2002); Minnesota - *Patton v. Newmar Corp.*, 538 N.W.2d 116 (Minn. 1995); Mississippi - *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1127 (Miss. 2002); Montana - *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 17-18 (Mont. 1999); Nebraska - *In re Estate of Schindler*, 582 N.W.2d 369, 379 (Neb. Ct. App. 1998); Nevada - *Banks ex. rel. Banks v. Sunrise Hosp.*, 102 P.3d 52, 58 (Nev. 2004); New Hampshire - *Mayes v. Black & Decker (U.S), Inc.*, 931 F. Supp. 80, 83 (D.N.H. 1996); New Jersey - *Jerista v. Murray*, 883 A.2d

spoliation of evidence.<sup>56</sup> Federal District Courts have relied on their inherent authority to impose sanctions to help combat spoliation.<sup>57</sup> However, the United States Supreme Court has cautioned District Courts to exercise restraint in the use of their inherent power for imposing sanctions.<sup>58</sup>

The most commonly utilized sanction is an adverse inference jury instruction to attempt to cure prejudice involving spoliated evidence.<sup>59</sup> Many

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350 (N.J. 2005); New Mexico - *Segura v. K-Mart Corp.*, 62 P.3d 283, 286 (N.M. Ct. App. 2002); New York - *Kirkland v. New York City Hous. Auth.*, 666 N.Y.S.2d 609, 611 (N.Y. App. Div. 1997); North Carolina - *Bumgarner v. Reneau*, 422 S.E.2d 686, 689 (N.C. 1992); North Dakota - *Bachmeier v. Wallwork Truck Centers*, 544 N.W.2d 122, 124 (N.D. 1996); Ohio - *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344 (Ohio Ct. App. 2007); Oklahoma - *Barnett v. Simmons*, 197 P.3d 12 (Okla. 2008); Pennsylvania - *Schroeder v. Pa. Dep't. of Transp.*, 710 A.2d 23, 27 (Pa. 1998); Rhode Island - *Farrell v. Connetti Trailer Sales, Inc.*, 727 A.2d 183, 187 (R.I. 1999); South Carolina - *Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 396 S.E.2d 369, 372 (S.C. 1990); South Dakota - *State v. Engesser*, 661 N.W.2d 739, 754 (S.D. 2003); Tennessee - *Thurman-Bryant Elec. Supply Co. v. Unisys Corp.*, No. 03A01-CV00152, 1991 WL 222256 (Tenn. Ct. App. 1991); Texas - *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998); Virginia - *Gentry v. Toyota Motor Corp.*, 471 S.E.2d 485, 488 (Va. 1996); Washington - *Henderson v. Tyrrell*, 910 P.2d 522 (Wash. Ct. App. 1996); West Virginia - *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003); Wisconsin - *Garfoot v. Fireman's Fund Ins. Co.*, 599 N.W.2d 411, 422 – 23 (Wis. Ct. App. 1999); Wyoming - *Abraham v. Great W. Energy, LLC*, 101 P.3d 446, 456 (Wyo. 2004).

<sup>56</sup> See *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1126 (N.J. Super. Ct. Law Div. 1993) (“[A] district court has wide discretion in imposing discovery sanctions...”).

<sup>57</sup> See, e.g., *Carlucci v. Piper Air Craft Corp.*, 775 F.2d 1440, 1447 (11th Cir. 1985); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D. Minn. 1989).

<sup>58</sup> *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

<sup>59</sup> The following states provide for an adverse jury instruction: Alabama - *Vesta First Ins. v. Milam & Co. Constr., Inc.*, 901 So. 2d 84, 93 (Ala. 2004); *Smith v. Atkinson*, 771 So. 2d 429, 438 (Ala. 2000); Alaska - *Sweet v. Sisters of Providence in Washington*, 895 P.2d 484 (Alaska 1995); Arizona - *Smyser v. City of Peoria*, 160 P.3d 1186 (Ariz. Ct. App. 2007); Arkansas - *Goff v. Harold Ives*, 27 S.W.3d at 391; California - *Cedars-Sinai*, 954 P.2d at 514; Colorado - *Alloi v. Union Pac. RR Corp.*, 129 P.3d 999, 1003 (Colo. 2006); Connecticut - *Bayliner Marine Corp.*, 675 A.2d at 832; Delaware - *Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980); *Lucas v. Christiana Skating Ctr., Ltd.*, 722 A.2d

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1247 (Del. Super. Ct. 1998); Florida - Martino, 908 So. 2d at 347; Georgia - Baxley v. Hakiel Inds., Inc., 647 S.E.2d 29, 30 (Ga. 2007); Hawaii - *Stender*, 992 P.2d 50; Idaho - *Big O Tires*, 87 P.3d at 933, 933; Illinois - R.J. Mgmt. Co. v. SRLB Dev. Corp., 806 N.E.2d 1074, 1081 (Ill. App. Ct. 2004); Indiana - Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005); Iowa - Lynch v. Sadler, 656 N.W.2d 104 (Iowa 2003); Kansas - In Re Grisell's Estate, 270 P.2d 285 (Kan. 1954); Kentucky - Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997), *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989); Louisiana - Desselles v. Jefferson Par. Hosp. Dist., No. 2, 887 So.2d 524, 534 (La. Ct. App. 2004); Maine - *Driggin*, 141 F. Supp. 2d; Maryland - Miller v. Montgomery Cty., 494 A.2d 761 (Md. Ct. Spec. App. 1985), *Anderson v. Litzenberg*, 694 A.2d 150 (Md. Ct. Spec. App. 1997); Massachusetts - *M/A-Com*, 802 N.E.2d 521; Michigan - Ward v. Consol. Rail Corp., 693 N.W.2d 366, 371-72 (Mich. 2005); Minnesota - Federated Mutual Insurance Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 436 – 37 (Minn. 1990); Mississippi - Richardson v. Norfolk Southern Ry Co., 923 So.2d 1002, 1015-16 (Miss. 2006); Missouri - Baldrige v. Dir. of Revenue, State of Missouri, 82 S.W.3d 212, 223 (Mo. Ct. App. 2002); Montana - Livingston v. Isuzu Motors Ltd., 910 F. Supp. 1473 (D. Montana 1995); Nebraska - State v. Davlin, 639 N.W.2d 631, 648 (Neb. 2002); Nevada - Bass-Davis v. Davis, 134 P.3d 103 (Nev. 2006) (En Banc); New Hampshire - Murray v. Dev. Serv. of Sullivan Cty., 818 A.2d 302, 309 (N.H. 2003); New Jersey - Jerista v. Murray, 883 A.2d 350 (N.J. 2005); New Mexico - Torres v. El Paso Electric Co., 987 P.2d 386 (N.M. 1999) (*overruled on other grounds by* *Herrera v. Quality Pontiac*, 73 P.3d 181 (N.M. 2003)); New York - Laffin v. Ryan, 162 N.Y.S.2d 730, 736 (N.Y. App. Div. 1957), *DiDomenico v. C & S Aeromatik Supplies*, 682 N.Y.S.2d 452, 495 (NY App. Div. 1998); North Carolina - Red Hill Hosier Mill, Inc. v. Magna Tek, Inc., 530 S.E.2d 321 (NC Ct. App. 2000), *McLain v. Taco Bell Corp.*, 527 S.E.2d 712 (N.C. Ct. App. 2000); North Dakota - Krueger v. North American Creameries, 27 N.W.2d 240, 244 (N.D. 1947); Ohio - Bright v. Ford Motor Co., 578 N.E.2d 547, 549 (Ohio Ct. App. 1990); Oklahoma - Manpower, Inc. v. Brawdy, 62 P.3d 391, 392 (Okla. Civ. App. 2002); Oregon - Whitney v. Canadian Bank of Commerce, 374 P.2d 441 (Or. 1962), *Steffens v. Bohlman*, 909 P.2d 208, 211 (Or. Ct. App. 1996); Pennsylvania - *Schroeder*, 710 A.2d at 28; Rhode Island - *Connetti Trailer Sales*, 727 A.2d at 187; South Carolina - *U.S. Gypsum Co.*, 396 S.E.2d 369; South Dakota - First Premier Bank v. Kolcraft Enter., Inc., 686 N.W.2d 430, 448 (S.D. 2004); Tennessee - Bronson v. Umphries, 138 S.W.3d 844, 854 (Tenn. Ct. App. 2003); Texas - Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998); Vermont - F.R. Patch Mfr. Co. v. Protection Lodge No. 215, Int'l SASS's

states have pattern jury instructions that address spoliation of evidence.<sup>60</sup> All of the Federal Circuit Courts of Appeals have permitted adverse inference jury instructions.<sup>61</sup>

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of Machinists, 60A. 74, 84 (Vt. 1909); Virginia - *Wolfe v. Virginia Birth-Related Neurological Injury Comp Program*, 580 S.E.2d 467 (Va. Ct. App. 2003); Washington - *Henderson*, 910 P.2d); West Virginia - *Heeter*, 584 S.E.2d 560; Wisconsin - *Jagmin v. Simonds Abrasive Co.*, 211 N.W.2d 810, 821 (Wis. 1973), *Estate of Neumann ex. rel. Rodli v. Neumann*, 626 N.W.2d 821, 842 (Wis. Ct. App. 2001); Wyoming - *Great Western Energy, LLC*, 101 P.3d at 456).

<sup>60</sup> See, e.g., Alabama - ALABAMA PRACTICE SERIES, ALABAMA PATTERN JURY INSTRUCTIONS – Civil §§ 15.12, 15.13 (3d ed. 2016); Arkansas - ARK. MODEL JURY INSTRUCTION CIV. AMI106, <https://courts.arkansas.gov/content/arkansas-model-jury-instructions-civil> (last visited Oct. 13, 2017); California CAL. EVID. CODE § 413; CAL. CIVIL JURY INSTRUCTIONS, CACI § 204: Willful Suppression of Evidence (Oct. 2004), <https://www.justia.com/trials-litigation/docs/caci/200/204.html>; and CALIFORNIA CIVIL JURY INSTRUCTIONS, BAJI § 2.03 [https://1.next.westlaw.com/Document/118a11ba3f99011db8d9185e38c2a1528/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/118a11ba3f99011db8d9185e38c2a1528/View/FullText.html?transitionType=Default&contextData=(sc.Default))); Delaware - DEL. PATTERN JURY INSTRUCTION §23.17, <http://courts.delaware.gov/forms/download.aspx?id=85928>) (2006); Illinois - Ill. Pattern Jury Instructions, Civil, No. 5.01 (4th ed. 2017); Indiana - 1-500 Ind. Model Civil Jury Instructions 535 (2016); Kansas - Kan. Pattern Jury Instruction 3d, § 1.02.73; Maryland - MPJI-Cv. 1:8 (2017); Michigan - WILLIAM B. MURPHY & JOHN VANDENHOMBERGH, MICHIGAN NONSTANDARD CIVIL JURY INSTRUCTIONS §§ 3:3, 3:4 (Lawyers Cooperative Publishing, 2017); M Civ. JI 2d 6.01(c) and (d); Minnesota (4 Minn. Prac., Jury Instr. Guides--Civil CIVJIG 12.35 (6th ed.); New Mexico - NMRA, Civ. UJI 13-1650, 1651); New York - ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, COMMITTEE ON PATTERN JURY INSTRUCTIONS, NEW YORK PATTERN JURY INSTRUCTIONS-CIVIL 1:77 (Lawyers Cooperative Publishing, 2017 ed. 2016); Ohio - OHIO CIVIL JURY INSTRUCTIONS Cv. 437.01 (LexisNexis, 2009); Pennsylvania - Pa. SSJI (Civ) 5.60 (2008); Tennessee - COMMITTEE ON PATTERN JURY INSTRUCTIONS, TENNESSEE PATTERN JURY INSTRUCTIONS – CIVIL 2.04 (Thomas West, 17th ed. 2017). Two States indicate no jury instruction should be given. See, Colorado - The Supreme Court of Colorado, Colorado Jury Instructions – Civil 3:13 (LexisNexis 4th ed. 2016) (no instruction to be given; Oklahoma - OUJI 3d (Rev. 2009) § 3.11) (no instruction should be given).

<sup>61</sup> First Circuit - *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998), *Nation-wide Check Corp. v. Forest Hills Distrib., Inc.*, 692 F.2d 214, 217 (1st Cir. 1982); Second Circuit - *Residential Funding Corp. v.*

Other deterrents exist to ensure that relevant evidence is available at trial. While appellate courts have provided guidance to the trial court as to when a sanction for spoliation of evidence is appropriate,<sup>62</sup> the imposition of sanctions is often left to the discretion of the trial court.<sup>63</sup>

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DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002), *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001); Third Circuit - *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994), *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995); Fourth Circuit - *Horton v. Synthes*, 148 F. App'x 145, 156 (2005 WL 1240346 \*1 (4th Cir. May, 25, 2005), *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004); Fifth Circuit - *King v. Illinois Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003); Sixth Circuit - *Rogers v. T.J. Samson Cmty. Hosp.*, 276 F.3d 228, 232 (6th Cir. 2002); Seventh Circuit - *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002) (*see also* 7th Cir. Pattern Jury Instruction 1.20); Eighth Circuit - *Johnson v. Reddy Mixed Concrete Co.*, 424 F.3d 806, 811 (8th Cir. 2005); Ninth Circuit - *Milbourn v. Marriott*, No. 94-35142, 1995 WL 555722, at \*3 (9th Cir. Sept. 15, 1995); Tenth Circuit - *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1409 (10th Cir. 1997); Eleventh Circuit - *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003).

<sup>62</sup> *See, e.g.*, *Fleury v. Biomet, Inc.*, 865 So. 2d 537, 539 (Fla. Dist. Ct. App. 2003) (“[T]he appropriate sanction varies according to the willfulness or bad faith, if any, of the party who lost the evidence, the extent of the prejudice suffered by the other party, and what is required to cure the prejudice.”); *Bachmeier v. Wallwork Truck Centers*, 544 N.W.2d 122, 124-25 (N.D. 1996); *American States Insurance Co. v. Tokai-Seiki (H.K.), Ltd.*, 704 N.E.2d 1280, 1283 (1997); *Farrell v. Connetti Trailer Sales, Inc.*, 727 A.2d 183, 187 (RI 1999); *Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage Dist.*, 502 N.W.2d 881, 884 (Wis. Ct. App. 1993); *Henderson v. Tyrrell*, 910 P.2d 522 (Wash. Ct. App. 1996); *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003).

<sup>63</sup> *See, e.g.*, *Chicago Hardware & Fixture Co. v. Letterman*, 510 S.E.2d 875 (Ga. Ct. App. 1999); *Stender v. Vincent*, 992 P.2d 50 (Haw. 2000); *Morton v. Bank of the Bluegrass & Tr. Co.*, 18 S.W.3d 353, 360 (Ky. Ct. App. 1999); *Kirkland v. New York City Hous. Auth.*, 666 N.Y.S.2d 609, 611 (N.Y. App. Div. 1997); *Thurman-Bryant Elec. Supply Co., Inc. v. Unisys Corp., Inc.* No. 03A01-CV-00152, 1991 WL 222256 (Tenn. Ct. App. 1991).

As an alternative to bringing an independent case for negligent spoliation of evidence, some courts have permitted a party to pursue discovery sanctions for the spoliation of evidence within a pending lawsuit.<sup>64</sup> In addition to discovery sanctions, the trial court can order dismissal of the case,<sup>65</sup> enter a default judgment,<sup>66</sup> strike pleadings,<sup>67</sup> grant summary

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<sup>64</sup> See, e.g., *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 289 (Ill. 1998); *Adams v. Bath & Body Works*, 830 N.E.2d 645, 654 (Ill. App. Ct. 2005).

<sup>65</sup> See, e.g., *Souza v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 5-6 (Ariz. Ct. App. 1997); *Cedars Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 517 (Cal. 1998); *Burris v. Kay Bee Toy Stores No. 96C-01-036*, 1999 WL 1240863 at \*1 (Del. Sup. Ct. September 17, 1999); *Adams v. Bath & Body Works, Inc.*, 830 N.E.2d 645, 652-653 (Ill. App. Ct. 2005); *Driggin v. American Security Alarm Co.*, 141 F. Supp. 2d 113 (Dist. Me. 2000); *Gath v. M/A-Com, Inc.*, 802 N.E.2d 521 (Mass. 2003); *Bloemendaal v. Town & Country Sports Ctr., Inc.*, 659 N.W.2d 684 (Mich. Ct. App. 2002); *Banks ex. rel Banks v. Sunrise Hosp.*, 102 P.3d 52, 58 (Nev. 2004); *Hirsch v. General Motors Corp.*, 628 A.2d 1108, 1128 (N.J. Super. Ct. Law Div. 1993); *Kirkland*, 666 N.Y.S.2d at 611; *Barnett v. Simmons*, 197 P.3d 12 (Okla. 2008); *Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 396 S.E.2d 369, 372 (S.C. 1990); *Morrison v. Rankin*, 738 N.W.2d 588 (Wis. Ct. App. 2007); *Abraham v. Great Western Energy, LLC*, 101 P.3d 446, 456 (Wyo. 2004).

<sup>66</sup> See, e.g., *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984) (entry of default judgment against defendant who intentionally destroyed relevant documents); *Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629, 630 (Fla. Dist. Ct. App. 1995) (holding that a default judgment against a civil defendant who intentionally destroyed evidence essential to the plaintiff's case was appropriate); *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983) (“[D]eliberate and contumacious disregard of the court's authority will justify [the striking of pleadings or entering a default], as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness.”); *Rockwell Int'l. Corp. v. Menzies*, 561 So. 2d 677, 679 (Fla. Dist. Ct. App. 1990) (finding no bad faith in the defendant's intentional destruction of evidence, however still affirming a default judgment against the defendant).

<sup>67</sup> See, e.g., *Kirkland*, 666 N.Y.S.2d at 611; *Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 396 S.E.2d 369, 372 (S.C. 1990).

judgment,<sup>68</sup> grant continuances,<sup>69</sup> issue contempt orders,<sup>70</sup> order evidence preclusion,<sup>71</sup> order expert witness preclusion,<sup>72</sup> award attorneys' fees,<sup>73</sup> allow punitive damages,<sup>74</sup> allow awards of the compensatory damages that would have been available if the claimant had won at trial,<sup>75</sup> make referrals for

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<sup>68</sup> See, e.g., *Story v. RAJ Properties, Inc.*, 909 So.2d 797, 802-803 (Ala. 2005); *Beers v. Bayliner Marine Corp.*, 675 A.2d 829, 831-34 (Conn. 1996); *Burriss v. Kay Bee Toy Stores*, No. 96C-01-036 1999 WL 1240863 at \*1 (Del. Sup. Ct. September 17, 1999); *Bachmeier v. Walwork Truck Ctrs.*, 544 N.W.2d 122, 124 (N.D. 1996); *Creazzo v. Medtronic, Inc.*, 903 A.2d 24, 29 (Pa. Sup. Ct. 2006); *Abraham v. Great Western Energy, LLC*, 101 P.3d 446, 456 (Wyo. 2004).

<sup>69</sup> See, e.g., *Bumgarner v. Reneau*, 422 S.E.2d 686 (N.C. 1992).

<sup>70</sup> See, e.g., *Cedars-Sinai Med. Ctr.* 954 P.2d 511, 517 (Cal. 1998); *Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1127 (Miss. 2002).

<sup>71</sup> See, e.g., *Cincinnati Ins. Co. v. Synergy Gas, Inc.*, 585 So. 2d 822, 826-28 (Ala. 1991); see also *Cedars-Sinai*, 954 P.2d at 517; *Driggin v. American Sec. Alarm Co.*, 141 F. Supp. 2d 113, 120 (Dist. Me. 2000); *Gath v. M/A-Com, Inc.*, 802 N.E.2d 521, 527 (Mass. 2003); *Bloemendaal v. Town & Country Sports Ctr., Inc.*, 959 N.W.2d 684 (Mich. Ct. App. 2002); *In Re Estate of Schindler*, 582 N.W.2d 369, 379 (Neb. Ct. App. 1998); *Bumgarner*, 422 S.E.2d at 689.

<sup>72</sup> See, e.g., *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118-19 (Minn. 1995); *Loukinas v. Roto-Router Serv. Co.*, 167 Ohio App. 3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, at ¶ 13; *Holm-Waddle v. William D. Hawley, M.D., Inc.*, 1998 OK 53, ¶¶ 6-10, 967 P.2d 1180, 1182; *Abraham*, 2004 WY at ¶ 21-22, 101 P.3d at 456 (Wyo. 2004).

<sup>73</sup> See, e.g., *Grubbs v. Knoll*, 870 A.2d 713, 719-21 (N.J. Super. Ct. App. Div. 2005); *In Re Prudential Ins. Co. Sales Prac. Litig.*, 169 F.R.D. 598, 617 (D.N.J. 1997).

<sup>74</sup> See, e.g., *Smith v. Atkinson*, 771 So. 2d 429, 438 (Ala. 2000); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 344 (Ohio 1994); *Hannah v. Heeter*, 584 S.E.2d 560, 573 (W. Va. 2003).

<sup>75</sup> See, e.g., *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165 (Conn. 2006) (intentional first party spoliation); *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986) (“Assuming that it is impossible to know what the spoliated evidence would have shown, perhaps the plaintiff should be awarded the full measure of damages that he would have obtained had he won the underlying lawsuit.”).



criminal prosecution,<sup>76</sup> issue criminal penalties,<sup>77</sup> and make a referral for attorney disciplinary action.<sup>78</sup> Courts that have declined to recognize an independent spoliation tort have found the foregoing options sufficiently effective to deter potential spoliation.<sup>79</sup> However, proponents of the

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<sup>76</sup> See, e.g., *Downen v. Redd*, 242 S.W.3d 273, 275 (Ark. 2006); *Goff v. Harrold Ives Trucking Co.*, 27 S.W.3d 287, 391 (Ark. 2000); *Cedars-Sinai Med. Ctr.*, 954 P.2d at 517.

<sup>77</sup> The following states have statutes in which courts can impose criminal penalties for spoliation of evidence: Alabama - ALA. CODE § 13A-10-129 (2004); Alaska - ALASKA STAT. § 11.56.610 (2004); Arizona - ARIZ. REV. STAT. § 13-2809 (2003); Arkansas - ARK. CODE ANN. §§ 5-53-110 and 5-53-111 (2014); California - CAL. PENAL CODE § 135 (West 2016); Colorado - COLO. REV. STAT. § 18-8-610 (2017); Connecticut - CONN. GEN. STAT. § 53A-155 (2015); Delaware - DEL. CODE ANN. tit. 11, § 1269 (2) (2004); Florida - FLA. STAT. § 918.13 (2017); Georgia - GA. CODE ANN. § 16-10-50(a) (2017); Hawaii - HAW. REV. STAT. § 710-1076 (2003); Idaho - IDAHO CODE § 18-2603 (2017); Illinois - 720 ILL. COMP. STAT. 5/31-4 (2013); Indiana - IND. CODE § 35-44-3-4 (2004) (repealed 2012); Iowa - IOWA CODE § 719.3(1) (2013); Kentucky - KY. REV. STAT. ANN. § 524.100 (West 2017); Louisiana - LA. STAT. ANN. § 14:130.1 (2016); Maine - ME. STAT. tit. 17-A § 455 (2016); Maryland - MD. CODE ANN. CRIM. LAW § 9-307 (LexisNexis 2017); Minnesota - MINN. STAT. § 609.63(7) (2017); Mississippi - MISS. CODE ANN. § 97-9-125 (2000); Missouri - MO. REV. STAT. § 575.100 (2004); Montana - MONT. CODE ANN. § 45-7-207 (2015); Nebraska - NEB. REV. STAT. § 28-922(1) (2017); Nevada - NEV. REV. STAT. § 199.220 (2017); New Hampshire - N.H. REV. STAT. ANN. § 641:6 (2017); New Jersey - N.J. STAT. ANN. § 2C:28-6 (West 2017); New Mexico - N.M. STAT. ANN. § 30-22-5 (2017); New York - N.Y. PENAL LAW § 215.40 (McKinney 2017); North Carolina - N.C. GEN. STAT. § 14-221.1 (2017); Ohio - OHIO REV. CODE § 2921.12 (West 2017); Oklahoma - OKLA. STAT. tit. 21, § 454 (2003); Oregon - OR. REV. STAT. § 162.295 (2015); Pennsylvania - 18 PA. CONS. STAT. § 5105 (2017) (not applicable in civil cases); South Dakota - S.D. CODIFIED LAW § 19-7-14 (2003); Tennessee - TENN. CODE ANN. § 39-16-503 (2017); Texas - TEX. PENAL CODE ANN. § 37.09 (West 2017); Utah - UTAH CODE ANN. § 76-8-510.5 (LexisNexis 2017); Virginia - VA. CODE ANN. § 18.2-260.1 (2017); Washington - WASH. REV. CODE § 9A.72.150 (2017); West Virginia - W.VA. CODE § 61-5-27(b)(4) (2016); Wisconsin - WIS. STAT. § 946.60 (2017); Wyoming - WYO. STAT. ANN. § 6-5-202 (2004).

<sup>78</sup> See, e.g., *Cedars-Sinai*, 954 P.2d at 518; *Dowdle Butane Gas Co. v. Moore*, 2000-IA-01884-SCT (¶ 8) (Miss. 2002), 831 So. 2d 1124, 1127.

<sup>79</sup> See, e.g., *Reynolds v. Bordelon*, 172 So. 3d 589 (La. 2015).

independent tort's recognition criticize these traditional remedies arguing that they fail to adequately address willful spoliation and the suppression of evidence impacts the proper adjudication of claims.<sup>80</sup> One commentator has argued, "traditional procedural and nonprocedural remedies are flawed by their limited scope, their inadequate preventive effect, and their failure to provide the victim with just compensation."<sup>81</sup>

Where the spoliator is not a party in the underlying suit,<sup>82</sup> court sanctions do little to deter spoliation. Adverse inferences, default judgments and stricken pleadings do not apply to third-party spoliators.<sup>83</sup>

Despite the continuing efforts of parties seeking an adequate remedy for spoliation problems, courts are struggling with the question of whether there should be a tort for third-party spoliation of evidence, and, if so, what the scope of the tort should be. While legal scholars fervently debate over the proper methodology to resolve these conflicts, courts have developed a body of case law discussing the issues relating to the adoption of an independent spoliation of evidence tort claim on third-parties.

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<sup>80</sup> *Barker v. Bledsoe*, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979). *See also* Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 862 (1991) (arguing that the interest in proper adjudication outweighs the suppression of evidence).

<sup>81</sup> Nolte, *supra* note 11, at 355.

<sup>82</sup> *See, e.g.*, *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998) (discussing situations in which the spoliator is a third party) ("[A]dverse inference against the spoliator would serve no purpose."); *Elias v. Lancaster Gen. Hosp.*, 710 A.2d 65 (Pa. Super. Ct. 1998) ("[T]raditional remedies would be unavailing, since the spoliator is not a party to the underlying litigation."). *But see* *Temple Cmty. Hosp. v. Sup. Ct.*, 976 P.2d 223, 232 (Cal. 1999) ("We do not believe that the distinction between the sanctions available to victims of first party and third party spoliation should lead us to employ the burdensome and inaccurate instrument of derivative tort litigation in the case of third party spoliation.").

<sup>83</sup> *See Cedars-Sinai*, 954 P.2d at 521 n.4 (Cal. 1998) (declining to address whether the independent tort for the intentional spoliation of evidence against a third party the underlying civil litigation should also be struck); *Holmes*, 710 A.2d at 848 (D.C. 1998); *Callahan v. Stanley Works*, 703 A.2d 1014, 1017 (N.J. Super. Ct. Law Div. 1997) (stating that recognition of the tort would signal "acceptable societal behavior."); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 189 (N.M. 1995).

#### IV. INSURANCE COMPANIES ACTING AS A THIRD-PARTY IN THE NEGLIGENT SPOILIATION OF EVIDENCE CONTEXT

Third-party spoliators are oftentimes insurance companies entrusted with the investigation of evidence related to the underlying action.<sup>84</sup> Recently, insurance companies have come into the crosshairs of claimants who argue that insurance companies should owe independent duties to policyholders/insureds and be held liable to policyholders/insureds for negligent spoliation of evidence. Courts and practitioners have wrestled with spoliation of evidence in the context of civil litigation when the alleged spoliator is an insurance company. Acting as a third party, an insurance company is placed in a unique position when it comes to the negligent spoliation of evidence tort. As an example, insurance companies regularly modify or destroy potential evidence every time a vehicle is repaired. Insurance companies frequently acquire title to an insured's vehicle after the vehicle has been totaled in an accident, and will either re-sell the vehicle with a salvage title or have the vehicle parted-out. This is appropriate and allowed by the insurance policy.<sup>85</sup>

##### A. THE PROBLEMATIC ISSUES IN IMPOSING A DUTY TO PRESERVE EVIDENCE ON A THIRD-PARTY INSURANCE COMPANY

To date, the general rule is that a third-party insurance company does not owe a general duty to preserve evidence, and therefore cannot be held liable to the insured for negligence as a matter of law.<sup>86</sup> Courts that have

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<sup>84</sup> Michael D. Starks, *Spoliation or Destruction of Evidence and the "Duty to Cooperate" with Third Party Claims*, 10 Fla. Prac., Worker's Comp. with Forms § 22c:6 (2014 ed.).

<sup>85</sup> See, e.g., *Johnson v. United Servs.' Auto. Ass'n.*, 79 Cal. Rptr. 2d 234 (Cal. Ct. App. 1998).

<sup>86</sup> See, e.g., *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (finding that no duty exists in the absence of a special relationship); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1179 (Kan. 1987) (stating that no duty for a third party to preserve evidence exists "[a]bsent some special relationship or duty arising by reason of an agreement, contract, statute, or other special circumstances.") *Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003); *But see Smith v. Atkinson*, 771 So. 2d 429, 433 (Ala. 2000) (With a few exceptions, there is no general duty to preserve evidence) ("[R]ecogniz[ing] the doctrine that one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for

held insurance companies to a duty to preserve evidence have differed in choosing when to attach the duty element leading to a divergence of numerous combinations of circumstances within the reported cases. The courts are split on the test they apply; however, in some jurisdictions a duty to preserve evidence may arise in relation to a third-party spoliator where: (1) the spoliator voluntarily undertakes to preserve the evidence and a person reasonably relies on that undertaking to his detriment; (2) the spoliator entered into an agreement to preserve the evidence; (3) there has been a specific request to the spoliator to preserve the evidence; or (4) there is a duty to do so based upon a contract, statute, regulation, or some other special circumstance/relationship.<sup>87</sup> Each element will be considered in turn.

1. The Spoliator Voluntarily Undertakes to Preserve the Evidence and Detrimental Reliance

Alabama has recognized that a duty to preserve evidence may arise when “one who volunteers to act, though under no duty to do so, is thereafter charged with the duty of acting with due care and is liable for negligence in connection therewith.”<sup>88</sup> This principle “applies to insurance companies and their agents.”<sup>89</sup> With a voluntary assumption of a duty, a third party has knowledge of potential or pending litigation and accepts responsibility for evidence to be used in that litigation and thus could be found liable for damages for the loss or destruction of the evidence.<sup>90</sup>

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negligence in connection therewith.”); *id.* at 433 n.3 (stating “[t]his Court has held that this principle applies to insurance companies and their agents.”) (citation omitted).

<sup>87</sup> See *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 20 (Mont. 1999); See also *Smith*, 771 So. 2d at 433 (“[L]imiting the usual duty in third-party negligent spoliation to an agreement to preserve, or a voluntary undertaking with reasonable and detrimental reliance, or a specific request, ensures that such a spoliator has acted wrongfully in a specifically identified way.”).

<sup>88</sup> *Smith*, 771 So.2d at 433 (quoting *Dailey v. City of Birmingham*, 378 So. 2d 728, 729 (Ala. 1979)). See, e.g., *Beasley v. MacDonald Eng’g Co.*, 249 So. 2d 844, 846-47 (Ala. 1971); *U.S. Fid. & Guar. Co. v. Jones*, 356 So. 2d 596, 598 (Ala. 1977); *Dailey*, 378 So. 2d at 729.

<sup>89</sup> *Smith*, 771 So. 2d at 433 n.3 (citation omitted).

<sup>90</sup> *Id.* at 433.

## 2. Specific Request to the Spoliator to Preserve the Evidence

An appellate court in California held as a matter of law, “in the absence of a specific request by either the insureds or plaintiffs, defendants had no duty to preserve [a] vehicle part.”<sup>91</sup> Alabama has recognized an additional condition to a specific request in that “[t]he specific request to preserve must be accompanied by an offer to pay the cost or otherwise bear the burden of preserving. We do not think a tort duty to preserve should be created simply by someone specifically requesting a third party to preserve something.”<sup>92</sup>

## 3. Duty Based Upon an Agreement, a Contract, Statute, Regulation, or Some Other Special Circumstance/Relationship

### *a) The Spoliator Entered Into an Agreement or Contract*

In a Massachusetts case, the Court stated “[a] third-party witness may also agree to preserve an item of evidence and thereby enter into an enforceable contract.”<sup>93</sup> A California court determined that when an

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<sup>91</sup> Reid v. State Farm Mut. Auto. Ins., 218 Cal. Rptr. 913, 927 (Cal. Ct. App. 1985). See also Dunham v. Condor Ins. Co., 66 Cal. Rptr. 2d 747, 749 (Cal. Ct. App. 1997) (“[I]n the absence of a specific request by either the insureds or plaintiffs, defendants had no duty to preserve the vehicle part.”).

<sup>92</sup> See *Smith*, 771 So. 2d at 433; see also *Johnson v. United Serv. Auto. Ass’n*, 79 Cal. Rptr. 2d 234, 239 (Cal. Ct. App. 1998), *abrogated by* *Lueter v. California*, 115 Cal. Rptr. 2d 68 (Ct. App. 2002). But see *Oliver*, 993 P.2d at 20 (“We see no need to require the requesting party to include an offer to pay reasonable costs of preservation in the request. ... [P]articularly where the evidence is small in size and manageable, there will be no costs associated with the preservation.”). The *Oliver* court contended that the third party may demand the costs but ultimately it will be left to the requesting party to decide if he or she wants to incur those costs. *Id.*

<sup>93</sup> See *Fletcher v. Dorchester Mut. Ins.*, 773 N.E.2d 420, 425 (Mass. 2002) (recognizing a duty to preserve evidence by reason of agreement, contract, statute, or other special circumstance) (“Remedies for

insurance company made a promise to preserve the evidence, a duty was imposed on that insurance company.<sup>94</sup> The insurance company's promise may create a contract to preserve. While there may be no tort duty to preserve evidence, that situation "does not preclude the existence of a duty based on contract."<sup>95</sup> In general, "an action in contract differs from an action in tort in that the former is based on the breach of a duty imposed by agreement while a tort action is based on the breach of a duty imposed by law."<sup>96</sup> Another court has held that where a party anticipates litigation, a contract can be created with a duty to preserve evidence whereby contractual remedies will be available with a breach.<sup>97</sup> In a Florida case, the court determined it would not create a contractual duty absent an explicit agreement providing that such a duty exists.<sup>98</sup>

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breach of such an agreement are found in contract law, not in tort law. ... [W]here the source of a nonparty's duty to preserve evidence is one that already states a cause of action and provides its own remedies, we will not invent a separate, duplicate cause of action in tort.").

<sup>94</sup> See *Cooper v. State Farm Mut. Auto. Ins.*, 99 Cal. Rptr. 3d 870, 882 (Cal. Ct. App. 2009) ("[T]he duty to preserve evidence was independently assumed by State Farm when it made the promise to preserve the tire and plaintiff relied thereon."). Cf. *Lueter*, 115 Cal. Rptr. 2d at 1288-89 (determining there was no tort duty for defendant to preserve evidence because there was no promise to preserve the evidence upon which the plaintiff relied nor any independent statutory duty to preserve the evidence).

<sup>95</sup> *Coprigh v. Super. Ct.*, 95 Cal. Rptr. 2d 884, 891 (Cal. Ct. App. 2000).

<sup>96</sup> *Miller v. Allstate*, 573 So. 2d 24, 27 (Fla. Dist. Ct. App. 1990) (citation omitted). See also *Lueter*, 115 Cal. Rptr. 2d at 79 n.3 (stating in cases addressing the question of a cause of action in torts a statute must impose a remedy but a cause of action in contract is not foreclosed) ("The decisional authorities do not foreclose an action in contract where the defendant is under a contractual obligation to preserve evidence.") (citation omitted). Cf. *Coprigh*, 95 Cal. Rptr. 2d at 891 ("While the existence of a tort duty in certain circumstances depends on policy considerations, those policy considerations do not negate the existence of a contractual obligation created by mutual agreement or promissory estoppel.") (citations omitted).

<sup>97</sup> *Reynolds v. Bordelon*, 172 So. 3d 589, 600 (La. 2015).

<sup>98</sup> See, e.g., *Silhan v. Allstate Ins.*, 236 F. Supp. 2d 1303, 1310 n.10 (N.D. Fla. 2002) (distinguishing *Miller*, 573 So. 2d 24, where there was an explicit agreement, whereas in *Silhan* there was not an explicit agreement between parties) ("Allstate had a contractual duty to preserve the

*b) Statute/Regulation*

The United States District Court for Florida found that there must be “a legal duty for the insurance company to conduct a reasonable investigation, [and/or] a duty to preserve potential evidence.”<sup>99</sup> In addition, a frequency of actions to indicate a general business practice, may give rise to a statutory violation.<sup>100</sup> Another California court determined that “a duty

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vehicle as evidence that was essential to Miller's anticipated civil litigation.”). *Cf.* *Timber Tech Engineered Bldg. Prods. v. The Home Ins.*, 55 P.3d 952, 954-55 (Nev. 2002) (declining to recognize an independent tort for first or third party spoliation of evidence but recognizing the preservation of evidence agreement created contractual rights and obligations between the parties but the court declined to reach the merits because the plaintiff failed to plead a breach of contract claim or raise the issue). *See also Coprich*, 95 Cal. Rptr. 2d at 891 (“A contractual remedy may give rise to some of the same burdens and costs as would a spoliation tort remedy, but we cannot negate a contractual obligation based on policy considerations other than specific grounds such as illegality and unconscionability.”).

<sup>99</sup> *Silhan*, 236 F. Supp. 2d at 1311 (N.D. Fla. 2002) (noting the statute in this particular case did not “explicitly say this”) (“Instead, the statutes allow an insured to maintain a civil action against the insured's insurance company for denying claims without conducting a reasonable investigation.”). *See also Lueter*, 115 Cal. Rptr. 2d at 79:

[T]he tort of negligent spoliation of evidence cannot be recognized against a private party [and it] follows that any liability for spoliation against a public entity and its employees must be created statutorily rather than judicially. In order to find a statutorily based cause of action for negligent spoliation, it is not enough to find that the public entity had a legal duty with respect to property. Even though a person may have a duty to preserve evidence, countervailing considerations dictate against an expansive, speculative tort of spoliation.

*Id.*

<sup>100</sup> *Silhan*, 236 F. Supp. 2d at 1311 (citing FLA. STAT. § 626.9541(1)(i) (“*Unfair claim settlement practices*. 3. [c]ommitting or performing with such frequency as to indicate a general business practice any of the following: (a) [f]ailing to adopt and implement standards for the proper investigation of claims; (b) [m]isrepresenting pertinent facts

to preserve evidence should be addressed through other means, such as effective sanctions devised by the Legislature or by regulatory bodies [and] it follows that in order to establish a tort for spoliation of evidence, a statute must expressly impose a spoliation remedy.”<sup>101</sup>

*c) Special Circumstance/Relationship*

Under common law, there is generally no duty for a third party to preserve evidence.<sup>102</sup> However, a special relationship may give rise to a duty to preserve evidence.<sup>103</sup> A Florida appellate court has reiterated there is no general duty to preserve in a third-party situation absent the above stated factors. The Court noted that when a plaintiff establishes the existence of a special relationship between the parties, a duty to preserve the evidence is

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or insurance policy provisions relating to coverages at issue; (c) [f]ailing to acknowledge and act promptly upon communications with respect to claims; (d) [d]enying claims without conducting reasonable investigations based upon available information.”).

<sup>101</sup> *Lueter*, 115 Cal. Rptr. 2d at 79. *Cf. Cooper*, 99 Cal. Rptr. 3d at 882-83 (providing general principles of tort law when considering a tort remedy for spoliation of evidence) (“A tort, whether intentional or negligent, involves a violation of a *legal duty*, imposed by statute, contract or otherwise, owed by the defendant to the person injured.”). *Cf. Temple Cmty. Hosp. v. Super. Ct.*, 976 P.2d 223, 232 (Cal. 1999) (“We observe that to the extent a duty to preserve evidence is imposed by statute or regulation upon the third party, the Legislature or the regulatory body that has imposed this duty generally will possess the authority to devise an effective sanction for violations of that duty.”).

<sup>102</sup> *See supra* note 53.

<sup>103</sup> *See, e.g., Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990) (explaining that in the absence of a special relationship, the general rule is that one party does not need to preserve possible evidence for another party's future lawsuit against a third party); *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966, 969 (W.D. La. 1992) (explaining that unless a special relationship exists between the parties, there is no duty to preserve possible evidence for future litigation). *See generally Reid v. State Farm Mut. Auto. Ins.*, 218 Cal. Rptr. 913, 922-25 (Cal. Ct. App. 1985) (discussing the development of the special relationship doctrine); *Harpole v. Arkansas Dep't of Human Serv.*, 820 F.2d 923, 926 (8th Cir. 1987) (describing the special relationship doctrine's evolution).



established.<sup>104</sup> A special relationship exists by a “special circumstance” where parties have knowledge that evidence is relevant to future litigation.<sup>105</sup> Additionally, a special circumstance may arise where a defendant possesses the evidence, the plaintiff asks a defendant to preserve the evidence, and the defendant complies with this request.<sup>106</sup>

In Illinois, courts have applied a two-prong test to any of the foregoing factors<sup>107</sup> in determining whether a duty to preserve evidence exists.<sup>108</sup> Under the first prong, if a plaintiff shows a duty was established by any of the foregoing factors, the first prong is satisfied, then the plaintiff must show that the duty extends to the evidence at issue “if a reasonable person in the defendant’s position should have foreseen that the evidence

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<sup>104</sup> See *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998) (defining the circumstances of a special relationship “[w]hen negligence is the basis of the suit alleging an economic injury resulting from the destruction of evidence, a duty on behalf of the defendant arising from the relationship between the parties or some other special circumstance must exist in order for the cause of action to survive.”) (quoting *Koplin v. Rosel Well Perforators*, 734 P.2d 1177, 1179 (Kan. 1987)). See also *Cooper*, 99 Cal. Rptr. 3d at 892 (finding State Farm “entered into a special relationship with its insured to preserve the [Continental] tires [and] violated its contractual and fiduciary obligations to plaintiff by losing, destroying, disposing of and/or failing to preserve the [Continental] tires [because] [p]laintiff reasonably relied to his detriment upon [State Farm’s] voluntary undertaking to preserve the [Continental] tires.”).

<sup>105</sup> *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 271 (Ill. 1995), *as modified on denial of reh’g* (June 22, 1995). In *Boyd*, the Court determining there was a special relationship when the employees of Travelers Insurance went to Plaintiff’s home telling Fannie that they needed the heater to investigate Boyd’s workers’ compensation claim. The heater belonged to Boyd. The employees knew that the heater was evidence relevant to future litigation. Under these alleged circumstances, Travelers assumed a duty to preserve Boyd’s property.

<sup>106</sup> See *Dardeen v. Kuehling*, 821 N.E.2d 227, 232 (Ill. 2004).

<sup>107</sup> A duty to preserve evidence may arise through voluntary assumption of a duty to preserve the evidence by affirmative conduct, an agreement, a contract, a statute or another special circumstance.

<sup>108</sup> *Boyd*, 652 N.E.2d at 270-71; *Dardeen*, 821 N.E.2d at 231; *Jones v. O’Brien Tire & Battery Serv. Ctr., Inc.*, 871 N.E.2d 98, 105 (Ill. App. Ct. 2007).

was material to a potential civil action.”<sup>109</sup> If both prongs are not satisfied, there is no duty to preserve the evidence at issue.<sup>110</sup>

*d) Control and Rebuttable Presumption*

In determining liability in a third-party spoliation case, the Alabama Supreme Court announced a three-part test (“*Smith* test”) where, in addition to proving a duty, a breach, proximate cause, and damage, the plaintiff must also show: “(1) that the defendant spoliator had actual knowledge of pending or potential litigation; (2) that a duty was imposed upon the defendant through a voluntary undertaking, an agreement, or a specific request; and (3) that the missing evidence was vital to the plaintiff’s pending or potential action.”<sup>111</sup> The Alabama Supreme Court determined by “[l]imiting the usual duty in third-party negligent spoliation to an agreement to preserve, or a voluntary undertaking with reasonable and detrimental reliance, or a specific request, ensures that such a spoliator has acted wrongfully in a specifically identified way.”<sup>112</sup>

When a plaintiff establishes the third party had notice and knowledge of a potential or underlying action, meaning “the third party assumed control over the evidence, and that the lost or destroyed evidence was ‘vital’ to his claim in the underlying action or potential action, a rebuttable presumption arises in favor of the plaintiff.”<sup>113</sup> Under the *Smith* test, a rebuttable presumption arises once all three elements are satisfied for which the defendant must overcome or subsequently be liable for damages.<sup>114</sup> The defendant may rebut this presumption by “producing evidence showing that the plaintiff would not have prevailed in the underlying action even if the lost or destroyed evidence had been available.”<sup>115</sup>

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<sup>109</sup> *Boyd*, 652 N.E.2d at 271.

<sup>110</sup> *Id.*

<sup>111</sup> *Smith v. Atkinson*, 771 So. 2d 429, 432 (Ala. 2000).

<sup>112</sup> *Id.* at 433.

<sup>113</sup> *Id.* at 435.

<sup>114</sup> *Id.* See also *Hannah v. Heeter*, 584 S.E.2d 560, 573 (W. Va. 2003) (“[o]nce the [elements of the tort of intentional spoliation of evidence] are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation.”).

<sup>115</sup> *Smith*, 771 So.2d at 435.

The duty element of the tort has proved particularly troublesome for courts and commentators. Courts have increasingly been confronted with the same question in addressing the issue: what duty should be imposed on an alleged third-party spoliator who possesses or controls one of these totally or partially damaged vehicles?

In total loss situations, insurance companies acquire possession of the motor vehicle retaining exclusive control over the motor vehicle. In total loss situations, many vehicles are damaged beyond the extent of reasonable repair. In total loss situations, an insurance company compensates the policyholder for what their coverage allows and subsequently sells the vehicle to automobile wholesalers or distributors for re-sale with branded titles or to salvage the remaining usable parts to assist in the loss recovery. This process helps ensure that insured customer's policy premiums can remain low in the growing demands of our economy. This orderly process of logging the true cost of losses (payout minus salvage recovery) in the year incurred would be greatly disrupted if third-party spoliation claims against insurance companies were liberally allowed. It is impractical for insurance companies to store each potential item that might lead to litigation in the future.<sup>116</sup> To do so would impose high costs on insurance companies to acquire storage space to preserve various evidence at least for as long as the applicable statute of limitations period for a multitude of possible causes of actions.<sup>117</sup> Despite the statute of limitation periods, an additional element

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<sup>116</sup> See *Dowdle Butane Gas Co., Inc. v. Moore*, 831 So. 2d 1124, 1131 (Miss. 2002) (quoting *Cedars-Sinai Med. Ctr. v. Super. Ct.*, 954 P.2d 511, 519 (Cal. 1998) (discussing the implications on a third party if the court were to require it to “preserve for an indefinite period things of no . . . value solely to avoid the possibility of spoliation liability in future litigation.”)).

<sup>117</sup> Only a few courts have addressed the issue of the applicable statute of limitations to spoliation of evidence claims providing for a two-year - *Gicking v. Joyce Intern., Inc.*, No. 93-00434, WL 942114 at \*4 (Pa. Com. PL. Mar. 22, 1996) (two years from the date plaintiff should have recognized a cause of action); *Vedder v. Zakib*, 618 S.E.2d 537 (W. Va. 2005). *Cf.* *Wofford v. Tracy*, 48 N.E.3d 1109, 1117-119 (Ill. App. Ct. 2015), *appeal denied*, 48 N.E.3d 678 (Ill. 2016) (disagreeing with Plaintiffs' argument that the five-year limitations in the Code applies because a spoliation action arises from a destruction in property, not personal injuries. The Court disagreed concluding the two-year limitations period for personal injuries applied because the “Plaintiffs' underlying negligence claims are the proper focus and, in those counts, plaintiffs seek recovery only for personal injuries.”); three-year - *Daoust v. McWilliams*, 716 A.2d 922, 925-

within the spoliation tort should be applied before imposing liability on an insurance company: a notice requirement.

#### B. NOTICE REQUIREMENTS

Courts have considered various other factors in the determination of when it can be appropriate to place a duty to preserve evidence on a third party involved in spoliation.<sup>118</sup> In one case, the Supreme Court of Wisconsin held:

[A] party or potential litigant with a legitimate reason to destroy evidence discharges its duty to preserve relevant evidence within its control by providing the opposing party or *potential* litigant:

- (1) Reasonable notice of a possible claim;
- (2) The basis for that claim;

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27 (Conn. App. Ct. 1998) (discussing application period for intentional spoliation), and five-year limitation period before a civil action claim is barred. *Schusse v. Pace*, 779 N.E.2d 259, 267 (Ill. App. Ct. 2002) (noting a five year statute of limitations beginning from the time the evidence is destroyed). In determining the accrual date for the statute of limitations, courts vary. After the plaintiff should have recognized a cause of action for spoliation, on the one hand (*Gicking*, WL 942114 at \*4), and when a cause of action does not accrue until the underlying action in the third party context was completed or the other. *See, e.g., Lincoln Ins. Co. v. Home Emergency Serv., Inc.*, 812 So.2d 433 (Fla. Dist. Ct. App. 2001).

<sup>118</sup> In *Pirocchi v. Liberty Mutual Insurance Co.*, 365 F. Supp. 277 (East. Dist. Pa 1973), the plaintiff, a hotel employee, sustained injury when a chair in which he was sitting, collapsed. Liberty Mutual took possession of the chair so that it could conduct an investigation as to whether there were possible manufacturing defects in the chair. When the chair was returned to the hotel, it disappeared, precluding the plaintiff from pursuing the manufacturing tortfeasor. The plaintiff then brought a lawsuit against Liberty Mutual for failing to tag or mark the chair properly, failing to obtain a receipt following its delivery back to the hotel, and by failing to place the chair with the proper supervisor. *Id.* at 279. The Court denied Liberty Mutual's motion for summary judgment concluding that factual issues existed regarding Liberty Mutual's duty with respect to the chair. *Id.* at 282.

- (3) The existence of evidence relevant to the claim; and
- (4) Reasonable opportunity to inspect that evidence.<sup>119</sup>

Unfortunately, no uniform pattern of decisions has emerged from these cases. In addressing the first element in the *Smith* test, one focus is upon whether the third party possessed actual notice of the pending litigation or the potential for litigation.<sup>120</sup> In determining what is sufficient notice, “[t]he textbook definitions of ‘actual’ and ‘constructive’ knowledge and notice are helpful guides in assessing the state of a third party’s knowledge and notice of pending or potential litigation.”<sup>121</sup>

### 1. Actual Notice

Generally, when a lawsuit is served, a party has actual knowledge that litigation has begun and, thereby, may be obligated to preserve all discoverable evidence.<sup>122</sup> Therefore, the duty to preserve evidence from spoliation can affect third parties who may be required to retain evidence in the event they are given proper notice of possible litigation.<sup>123</sup> Absent notice

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<sup>119</sup> *Am. Family Mut. Ins. Co. v. Golke*, 768 N.W.2d 729, 737 (Wis. 2009).

<sup>120</sup> *Smith*, 771 So. 2d at 433 (“When a third party has knowledge of a pending or potential lawsuit and accepts responsibility for evidence that would be used in that lawsuit, it should be held liable for damage resulting from the loss or destruction of that evidence.”); *County of Solano v. Delancy*, 264 Cal. Rptr. 721, 729 (Cal. Ct. App. 1989); *Mace v. Ford Motor Co.*, 653 S.E.2d 660, 665 (W. Va. 2007) (providing that actual knowledge is a “direct and explicit notice” of a potential lawsuit).

<sup>121</sup> *Mace*, 653 S.E.2d at 666.

<sup>122</sup> *See Valentine v. Mercedes-Benz Credit Corp.*, No. 98 Civ. 1815, 1999 U.S. Dist. LEXIS 15378, at \*9 (S.D.N.Y. Sept. 30, 1999); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991). *See also Scott v. IBM Corp.*, 196 F.R.D. 233, 249 (D.N.J. Nov. 29, 2000) (“While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.”).

<sup>123</sup> *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997), *rev’d on other grounds*, 133 F.3d 225 (3d Cir. 1998) (insurer was sanctioned where company’s top management recognized the company’s obligation to preserve documents that were

of litigation, an insurance company and others generally possess the right to dispose of ones' own property without facing liability.<sup>124</sup> However, some

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related with particular lawsuits but failed to actively formulate or implement a document retention policy). *See also* Willard v. Caterpillar, Inc., 48 Cal. Rptr. 2d 607, 625-26 (Cal. Ct. App. 1995) (noting that some courts impose discovery sanctions only if a party is on notice that documents are potentially relevant); *Baliotis v. McNeil*, 870 F. Supp. 1285, 1290 (M.D.Pa. 1994) (quoting *Fire Ins. Exch. v. Zenith Radio Corp.*, 747 P.2d 911, 914 (Nev. 1987)) (“[L]itigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.”). *Cf.* *Killings v. Enter. Leasing Co.*, 9 So. 3d 1216, 1223 (Ala. 2008) (finding leasing company was given notice that process could take several years when it assumed duty to preserve evidence) (“[I]t is ultimately of no import that approximately two and a half years passed between the date of the accident and the date the [evidence] was sold.”).

<sup>124</sup> *See, e.g.*, *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Ut. Ct. App. 1994); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (“[I]t goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it.”); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185, 191 (N.M. 1995) (“[A] property owner has no duty to preserve or safeguard his or her property for the benefit of other individuals in a potential lawsuit” without the existence of a duty to preserve evidence). *See also* *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988); *Indem. Ins. Co. of N. Am. v. Liebert Corp.*, No. 96 CIV. 6675 (DC), 1998 WL 363834 at \*3 (S.D.N.Y. June 29, 1998); *Smith v. Superior Court*, 198 Cal. Rptr. 829, 832-33 (Cal. Ct. App. 1984). *See Reid v. State Farm Mut. Auto. Ins. Co.*, 218 Cal. Rptr. 913, 927 (Cal. Ct. App. 1985) (holding that without specific request, insurance company has no duty to preserve evidence); *Mace*, 653 S.E.2d at 666 (“[I]n order for a plaintiff to successfully pursue a claim against a third party for negligent spoliation of evidence, the plaintiff must show that the third party had actual knowledge, from whatever source, of the plaintiff’s pending or potential lawsuit.”). *Cf. American Family*, 768 N.W.2d at 737 (“[A] party or potential litigant with a legitimate reason to destroy evidence discharges its duty to preserve relevant evidence within its control by providing the opposing party or potential litigant: (1) reasonable notice of a possible claim; (2) the basis for that claim; (3) the existence of evidence relevant to the claim; and (4) reasonable opportunity to inspect that evidence.”).

courts have found a third party liable without notice.<sup>125</sup> Another factor in determining whether a duty exists in the absence of actual notice is foreseeability of harm caused to the plaintiff as a result of the spoliation.<sup>126</sup> A duty can arise if it's reasonably foreseeable that a lawsuit will ensue and evidence will be discoverable in connection with that lawsuit.<sup>127</sup>

For example, in *Reid v. State Farm Mutual Automobile Insurance Co.*,<sup>128</sup> the notice and foreseeability factors were discussed at great length in the context of a third-party spoliator.<sup>129</sup> In *Reid*, the plaintiff was injured in

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<sup>125</sup> See, e.g., *Indem. Ins. Co. of N. Am.*, 1998 WL 363834, at \*3. See also *Lewy*, 836 F.2d at 1112 (discussing that actual notice is not required to impose a duty to preserve evidence) ("[I]f the corporation knew or should have known that the [it] would be material at some point in the future then such documents should have been preserved.").

<sup>126</sup> *County of Solano v. Delancy*, 264 Cal. Rptr. 721, 729 (Cal. Ct. App. 1989). See *Velasco v. Commercial Bldg. Maint. Co.*, 215 Cal. Rptr. 504 (Cal. Ct. 1995) (where a janitor disposed of a piece of evidence in a paper bag, the Court found that there was no foreseeability of potential harm caused by discarding the evidence). See also *Mathias v. Jacobs*, 197 F.R.D. 29, 37 (S.D.N.Y. 2000) ("[D]uty to preserve arises when a party . . . anticipates litigation.").

<sup>127</sup> *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Kalumetals, Inc. v. Hitachi Magnetics Corp.*, 21 F. Supp. 2d 510, 520 (W.D. Pa. 1998); *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D. Pa. 1996); *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y. 1996); *Moyers v. Ford Motor Co.*, 941 F. Supp. 883, 884 (E.D. Mo. 1996). See *Baliotis*, 870 F. Supp. at 1290 (providing where the courts have imposed sanctions for conduct that has arisen before the litigation when the spoliator either knew or should have known about the potential or imminent litigation); *WM. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1445 (D.C. Cal. 1984); *id.* at 372 (quoting *Dillon v. Nissan Motor Co. Ltd.*, 986 F.2d 263, 267 (C.A. 8th Cir. 1993)); *Am. Family Ins. v. Vill. Pontiac GMC, Inc.*, 585 N.E.2d 1115, 1118 (Ill. App. Ct. 1992); *Applegate v. Seaborn*, 477 N.E.2d 74, 76 (Ill. App. Ct. 1985) (Webber, J. dissenting). See also *Thompson ex rel. Thompson v. Owensby*, 704 N.E.2d 134, 137 (Ind. Ct. App. 1998) ("[T]he relationship between the carrier and a third party claimant could warrant recognition of a duty if the carrier knew or should have known of the likelihood of litigation and of the claimant's need for the evidence in the litigation.").

<sup>128</sup> *Reid*, 218 Cal. Rptr. 913 (Cal. Ct. App. 1985).

<sup>129</sup> *Id.*

a vehicle accident that damaged his car. Subsequently the insurance company settled the property damage claim, and it sold the car to an auto body company causing the plaintiff to be unable to bring a products liability suit against the manufacturer.<sup>130</sup> Nineteen months after the accident, the plaintiff learned of the car's destruction and sued the insurer.<sup>131</sup> Applying the special relationship doctrine<sup>132</sup>, the Court of Appeals emphasized that the foreseeability requirement was necessary to establish a special relationship and impose a duty on the insurer.<sup>133</sup> The insurance company "had no actual knowledge of any unreasonable risk of harm to [the plaintiff] by disposing of the totaled [car] in the ordinary course of processing the claims ...."<sup>134</sup> When "[the insurance company] sold the wreckage of the car, it simply did not know of any potential claims by or risk of harm to [the plaintiff]."<sup>135</sup> The Court concluded that no such duty had been shown because the insurance company lacked actual knowledge of the potential claims and as a result could not foresee that selling the car could interfere with plaintiff's interest in a prospective lawsuit.<sup>136</sup> Therefore, the Court held "as a matter of law that, in the absence of a specific request by either [the insured] or [plaintiff], [the insurer] had no duty to preserve the . . . vehicle."<sup>137</sup> However, even

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<sup>130</sup> *Id.* at 917-18.

<sup>131</sup> *Id.*

<sup>132</sup> A special relationship may give rise to a duty to preserve evidence, *see* sources cited *supra* note 103.

<sup>133</sup> *Reid*, 218 Cal. Rptr. at 923.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 922.

<sup>137</sup> In *Reid*, 218 Cal. Rptr. at 927, it is established that a defendant charged with negligent spoliation has no duty to preserve evidence for the plaintiff's use against a third party absent a "specific request" from the plaintiff to do so. The few published California decisions analyzing the tort of spoliation have held that "[b]oth negligent and intentional spoliation require the loss or destruction of physical evidence that a defendant had *promised to preserve*". *Anderson v. Rinaldo*, No. C93-2213 WHO, 1994 WL 46728, at \*7 (N.D. Cal. Feb. 2, 1994). *See Dunham v. Condor Ins. Co.*, 66 Cal. Rptr. 2d 747, 749 (Cal. Ct. App. 1997), where a plaintiff cannot establish detrimental reliance without first requesting preservation of the evidence (quoting *Reid*, 218 Cal. Rptr. at 927). *See also* *Murphy v. Target Prods.*, 580 N.E.2d 687, 688-89 (Ind. App. 1991) (holding that an employer owes an employee no duty to preserve possible evidence for the employee



where the third party spoliator has both notice of the pending lawsuit and foreseeability, courts may still find that a duty to preserve evidence has ended under the specific facts of the case.<sup>138</sup>

## 2. Constructive Notice

Some courts have employed a constructive notice approach in imposing a duty on a defendant to preserve evidence.<sup>139</sup> Following the constructive notice theory, these courts find an obligation to preserve evidence is imposed once the plaintiff threatens the defendant with filing a

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which may be used by employee in some future legal action against a third party absent an agreement between the parties, a contract between the parties, a special relationship between the parties, or a statute). *See also* Dunham, 66 Cal. Rptr. 2d at 750 (concluding absence of a specific request the defendants had no duty to take any steps to preserve the vehicle part and “there cannot be liability for spoliation where the defendant never had possession or control over the evidence and was not the one who destroyed it.”).

<sup>138</sup> *See* Murray v. Farmers Ins. Co., 796 P.2d 101, 103 (Idaho 1990) (duty to preserve the evidence ended when one year had passed since the promise to preserve the evidence had been made to the plaintiff’s attorney, and plaintiff’s attorney did not respond to the salvage yard’s notification that the evidence would be destroyed unless it received a request for an extension.). *See id.*, where the plaintiff was involved in a single vehicle accident when a new Chrysler failed to negotiate a curve. The insurance company had the car towed to a salvage yard, but postponed salvaging it, because the plaintiff’s attorney requested time to have the car examined by an expert. *Id.* The insurer notified the plaintiff’s attorney, after a year’s delay “that the car would be salvaged unless the attorney indicated that the wanted the vehicle preserved for an additional period of time.” *Id.* After receiving no response, the insurer ordered the car destroyed. *Id.* The Idaho Supreme Court found that the insurer’s notification to the insured, prior to destruction of the car shielded it from exposure to tort liability. *Id.* *See also* County of Solano v. Delancy, 264 Cal. Rptr. 721 (Cal. Ct. App. 1989); and Reid, 218 Cal. Rptr. 913 (Cal. Ct. App. 1985).

<sup>139</sup> *See, e.g.*, Johnson v. United Servs. Auto. Ass’n, 79 Cal. Rptr. 2d 234, 240 (Cal. Ct. App. 1998) (addressing spoliation by a third party); *See also* Nolte, *supra* note 17, at 380-81; Joe Wetzel, *Spoiling an Illinois Personal Injury Plaintiff’s Spoliation Claim for Routinely Maintained Items*, 28 S. ILL. U. L.J. 455, 464 (2004).

lawsuit relating to the evidence or in the event of a plaintiff filing a complaint.<sup>140</sup> One proponent of the constructive knowledge requirement argues, “the constructive knowledge standard of conduct presents the most efficient allocation of transaction costs.”<sup>141</sup> However, this approach has often been criticized as too broad in scope because it requires “property owners to make often-arbitrary determinations about what is relevant to a hypothetical lawsuit that has not, and may never be, filed.”<sup>142</sup> Some courts have agreed with this contention.<sup>143</sup>

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<sup>140</sup> Wetzel, *supra* note 138, at 465.

<sup>141</sup> Nolte, *supra* note 17, at 384 (“The insurer and the policyholder share the transaction costs involved in insurance-related spoliation cases. Resolution of the knowledge requirement problem should depend on the most efficient allocation of these costs”) (quoting Robert Cooter & Thomas Ulen, *Law and Economics* 477 (1988)):

"Prior to the conclusion of the insurance case, the insurance carrier bears no transaction costs except those created by its duty to investigate and appropriately consider the insurance case to the degree necessary to foresee its insured's prospective third-party litigation. The policyholder, on the other hand, bears additional transaction costs for acquiring information from the insurer. If courts applied the constructive knowledge standard, the insurer would incur no additional transaction cost since the duty to foresee possible third-party action already exists. On the other hand, the policyholder would expend additional transaction costs if required to inform the insurer of prospective litigation."

*Id.*

<sup>142</sup> See Judge, *supra* note 17, at 452; County of Solano, 264 Cal. Rptr. at 731 (Anderson, P. J. dissenting) (stating “on a clear day you can foresee forever!”).

<sup>143</sup> *Johnson*, 79 Cal. Rptr. 2d at 240; See also *Hannah v. Heeter*, 584 S.E.2d 560, 570 (W. Va. 2003) (providing a third party must have actual notice of a pending or potential litigation and asserting “[A] third party's constructive notice of a pending or potential action is not sufficient to force upon the third party the duty to preserve evidence.”) (quoting *Smith v. Atkinson*, 771 So.2d 429, 433 (Ala. 2000)); *Mace v. Ford Motor Co.*, 653 S.E.2d 660, 666 (W.Va. 2007) (appellants arguing the insurance carrier was “on notice” because they had paid “500 claims” and filed their own product

### 3. Method of Notice

A subset of the notice requirement is the method of delivering that notice. In *American Family Mutual Insurance Company v. Golke*,<sup>144</sup> the Court provided that “notice can be effectuated by first-class mail, and evidence of mailing creates a presumption of receipt that may create an issue for the fact finder only by denial of receipt.”<sup>145</sup> However, Chief Justice Abrahamson, in her concurrence stated, “[i]n some circumstances first-class mail might be fine [and] in others, not.”<sup>146</sup> She further noted that in a “technologically-advanced 21st century”<sup>147</sup> it is more efficient to use a method of notice “that provides written evidence that he or she actually did give the notice and that the recipient actually did receive the notice.”<sup>148</sup>

However, the majority in *Golke* determined that the method or frequency of notice is less important because ultimately it is left to the court’s judgment and discretion, under the totality of the circumstances to determine whether the content of the notice was sufficient.<sup>149</sup> The Court noted that certain factors will be taken into consideration in determining the sufficiency of notice:

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liability suit against Ford however the court stated, that with constructive notice, where there *may* or *might* be a cause of action, is insufficient to give rise to a third-party's duty to preserve evidence; there has to be a direct and explicit notice).

<sup>144</sup> *Am. Family Mut. Ins. Co. v. Golke*, 768 N.W.2d 729, 731 (Wis. 2009).

<sup>145</sup> *Id.* at 738 (The majority noting that “[t]he legislature has long recognized that first-class mail service is an efficient mechanism that is reasonably calculated to provide actual notice of possible or pending litigation and effective alteration of substantive legal rights and interests.”). *See also* *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 20 (Mont. 1999) (providing that a telefax of a request to preserve the evidence was a “usual and customary procedure” in delivering important letters and concluding that through a telefax and telephone conference “a jury may very well determine that Stimson had actual notice of the Olivers’ request to preserve the evidence.”).

<sup>146</sup> *American Family*, 768 N.W.2d at 748 (Abrahamson, C.J., concurring).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 737-38.

- (1) The length of time the evidence can be preserved;
- (2) The ownership of the evidence;
- (3) The prejudice posed to possible adversaries by the destruction of the evidence;
- (4) The form of the notice;
- (5) The sophistication of the parties; and
- (6) The ability of the party in possession of the evidence to bear the burden and expense of preserving it.<sup>150</sup>

In considering the sixth factor, the issue of cost arises when one party has the responsibility to bear the burden of expense in preserving the evidence. The Supreme Court of Alabama pronounced a specific request to preserve the evidence “must be accompanied by an offer to pay the cost or otherwise bear the burden of preserving [because the court did not consider] a tort duty to preserve should be created simply by someone specifically requesting a third party to preserve something.”<sup>151</sup> Numerous cases have noted the high costs to insurance companies to locate and obtain the storage space needed to preserve evidence.<sup>152</sup> One court has provided that it was “sensitive to the legitimate interests and rights of third parties who are in the possession of such evidence.”<sup>153</sup> Because preservation may involve significant burdens, the request to preserve evidence must be accompanied by an offer to pay the cost of that preservation and also, the third party “can decline the responsibility, shifting the risk of loss back to the plaintiff.”<sup>154</sup>

Alternatively, the Supreme Court of Montana found there is “no need to require the requesting party to include an offer to pay reasonable costs of preservation in the request [because] particularly where the evidence is small in size and manageable, there will be no costs associated with the preservation.”<sup>155</sup> The Court further stated that the burden of preservation

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<sup>150</sup> *Id.*

<sup>151</sup> *Smith v. Atkinson*, 771 So. 2d 429, 433 (Ala. 2000).

<sup>152</sup> *See, e.g., Dowdle Butane Gas Co. v. Moore*, 831 So.2d 1124, 1131 (Miss. 2002); *Gicking v. Joyce Int’l Inc.*, No. 93-00434 WL 942114 (Mar. 22, 1996) at \*4; *State ex. rel Vedder v. Zakib*, 618 S.E.2d 537 (W. Va. 2005); *Schusse v. Pace Suburban Bus Div. of Reg’l Trans. Auth.*, 779 N.E.2d 259 (Ill. App. Ct. 2002).

<sup>153</sup> *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 18 (Mont. 1999).

<sup>154</sup> *Smith*, 771 So.2d at 433.

<sup>155</sup> *Oliver*, 993 P.2d at 20.

should be on the person or entity requesting the preservation, and a third party can demand “reasonable costs” from the requesting party.<sup>156</sup>

## C. POLICY CONSIDERATIONS

### 1. Justifications

Although the courts have shown inconsistency in recognizing a cause of action for third party spoliation cases, some courts have announced compelling policy considerations for imposing a duty to preserve in third-party spoliation situations. For example, the Montana Supreme Court provided:

Relevant evidence is critical to the search for the truth. The intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial system. There can be no truth, fairness, or justice in a civil action where relevant evidence has been destroyed before trial. Historically, our judicial system has fostered methods and safeguards to insure that relevant evidence is preserved. Ultimately, the responsibility rests with both the trial and appellate courts to insure that the parties to the litigation have a fair opportunity to present their claims or defenses.<sup>157</sup>

The District of Columbia Court of Appeals determined despite the speculative nature of damages in spoliation of evidence cases, recovery should not be barred altogether and concluded “[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to

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<sup>156</sup> *Id.* (stating “the person requesting preservation would have the option of deciding whether or not to incur such costs.”). *But see* Thompson v. Owensby, 704 N.E.2d 134, 139 (Ind. Ct. App. 1998) (providing, with respect for insurance companies, “the evidence must be maintained by someone, and a liability carrier can typically maintain evidence at a lower cost than an individual claimant because the carrier can distribute the cost among all policyholders.”). *But cf.* Killings v. Enter. Leasing Co., 9 So. 3d 1216, 1222-23 n.6 (Ala. 2008) (noting that a duty to preserve evidence can be established without the plaintiff offering to pay the cost or bear the burden of preservation if the defendant voluntarily agrees to preserve the evidence).

<sup>157</sup> *Oliver*, 993 P.2d at 17.

deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his act.”<sup>158</sup>

## 2. Pitfalls

Most recently, the case of *Reynolds v. Bordelon*<sup>159</sup> specifically addressed the issues in imposing a duty on an insurance company. In *Reynolds*, the issue was whether Louisiana recognized a claim for negligent spoliation.<sup>160</sup> In this case, a motorist was involved in a vehicle accident and subsequently brought an action against the manufacture of the vehicle’s air bags for failure to properly deploy during the accident.<sup>161</sup> However, plaintiff’s insurer Automobile Club Inter-Insurance Exchange (“ACIIE”) and the custodian of his vehicle after the accident, Insurance Auto Auctions Corporations (“IAA”), failed to preserve the vehicle for inspection purposes. Because of this, the parties could not determine whether any defects existed despite being put on notice of the need for preservation. Plaintiff brought a claim against the custodian of his vehicle and the insurer for negligent spoliation of evidence. The Court emphasized that the duty inquiry was central to its discussion on whether Louisiana recognized the tort of negligent spoliation of evidence. The Court then analyzed the duty requirement in terms of policy considerations.<sup>162</sup>

The Court in *Reynolds* focused on several policy considerations in rejecting the tort of negligent spoliation of evidence.<sup>163</sup> The Court specifically discussed: (1) that the recognition of the tort would not act to deter future conduct;<sup>164</sup> (2) the compensation to victims was highly

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<sup>158</sup> *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 853 (D.C. 1998) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

<sup>159</sup> *Reynolds v. Bordelon*, 172 So. 3d 589 (La. 2015).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (quoting Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law* § 5.02 (2004)).

<sup>163</sup> *Id.* at 596.

<sup>164</sup> According to the *Reynolds* Court, “. . . the act of negligently spoliating evidence is so unintentional an act that any recognition of the tort by the courts would not act to deter future conduct, but would, rather, act to penalize a party who was not aware of its potential wrongdoing in the first place.” *Reynolds*, 172 So. 3d 589, 597 (2015). Emphasizing that

speculative;<sup>165</sup> (3) flaws existed within the satisfaction of the community's sense of justice and predictability;<sup>166</sup> and, (4) the recognition of the tort would result in improper allocation of resources.<sup>167</sup> The Court in *Reynolds* found that societal justice and predictability weighed heavily against the recognition of the tort of negligent spoliation of evidence.<sup>168</sup> Adoption of the tort would place the imposition of a new duty on third parties to protect them from liability, "resulting in higher costs for the public" outweighing societal interest as a whole.<sup>169</sup> Observing that if it were to recognize the tort of negligent spoliation, third parties would be left with the burden of adopting retention policies in fear of possible liability in the unknown future, which inadvertently leads to possible implications of property rights.<sup>170</sup> Many other jurisdictions have also demonstrated reluctance in imposing unreasonable burdens on insurance companies to preserve and maintain evidence<sup>171</sup> finding that "the burdens and costs of recognizing a tort remedy for third party spoliation are considerable — perhaps even greater than in the

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this is particularly true when the spoliation of evidence is by a third-party who has no motivation to do so. *Id.* See also *Temple Cmty. Hosp. v. Super. Ct.*, 84 Cal. Rptr. 2d 852, 861 ("If existing remedies appear limited, that may well be because third party spoliation has not appeared to be a significant problem in our courts. After all, the nonparty who is not acting on behalf of a party but is independently motivated to destroy evidence with the intent to interfere in the outcome of litigation between other parties must be a rarity, perhaps because such destruction can subject the nonparty to criminal prosecution."). *But cf.* *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 853 (D.C. 1998).

<sup>165</sup> "[T]he parties and the trier of fact would be called upon to estimate the impact of the missing evidence and guess at its ability to prove or disprove the underlying claim, resulting in liability based far too much on speculation." *Reynolds*, 172 So.3d at 598. The Court also reasoned that as a comparative negligence jurisdiction, liability would be highly speculative in determining the measure of the proportional fault of the spoliator and the likelihood of success of the underlying case. *Id.* at 597-98.

<sup>166</sup> *Id.* at 598.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See, e.g., *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998) (weighing the benefits of recognizing the spoliation cause of action against the burdens and costs it would impose).

case of first party spoliation.”<sup>172</sup> Additionally, a vast expanse in the class of potential defendants and plaintiffs would result.<sup>173</sup>

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<sup>172</sup> *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 233 (Cal. 1999). (“In sum, we conclude that the benefits of recognizing a tort cause of action, in order to deter third party spoliation of evidence and compensate victims of such misconduct, are outweighed by the burden to litigants, witnesses, and the judicial system that would be imposed by potentially endless litigation over a speculative loss, and by the cost to society of promoting onerous record and evidence retention policies”). *See also Coprich v. Superior Court*, 95 Cal. Rptr. 2d 884, 890 (Cal. Ct. App. 2000) (the policy considerations compelled the court to assert that “the burdens and costs to litigants, the judicial system, and others if the courts were to allow a tort remedy for negligent spoliation of evidence would outweigh the limited benefits [and] conclude there is no tort remedy for first party or third party negligent spoliation of evidence.”). *But see Smith v. Atkinson*, 771 So. 2d 429, 433 (Ala. 2000) (where the court disagreed with the insurer’s argument that a third party “duty to preserve evidence could result in wasteful and unnecessary record- and evidence-retention practices [and contended] if the third party does not wish to take responsibility for evidence, it can decline the responsibility, shifting the risk of loss back to the plaintiff.”).

<sup>173</sup> As one court put it:

It is common knowledge that thousands of accidents occur on California roadways each year, leaving behind totally and partially damaged cars and trucks. Every accident involving personal injury or property damage has the potential to be a lawsuit. These lawsuits could encompass myriad parties, claims, and cross-claims—known and unknown, foreseeable and unforeseeable.

*Johnson v. United Servs. Auto. Ass’n.*, 79 Cal. Rptr. 2d 234, 241 (Cal. Dist. Ct. App. 1998); *See also Temple*, 976 P.2d at 229-30:

Third party spoliation of evidence is analogous to perjury by a witness, and the same endless spiral of lawsuits over litigation-related misconduct could ensue were we to recognize a tort cause of action for third party spoliation. As in the case of spoliation by a party, one party unfortunately may be deprived of critical evidence and of a defense, or remain uncompensated for an injury. This



## D. DAMAGES AND PENALTIES/SANCTIONS

## 1. Damages

Calculating and estimating damages has shown to be one of the most difficult tasks for courts in third party spoliation of evidence cases. One court determined damages should be established by a “trial court and the trier of fact after a full trial on the merits.”<sup>174</sup> However, damages are speculative

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potential injustice cannot be avoided, however, if we are to escape what we have identified as the greater harm of subjecting parties, witnesses, and the courts to unending litigation over the conduct and outcome of a lawsuit.

*But see Id.* at 237 (Kennard, J., dissenting):

[T]ort liability for third party spoliation does not pose a threat to the finality of adjudication . . . [a] third party spoliator by definition is not a party to the underlying cause of action to which the spoliated evidence is relevant, and the spoliator has not litigated with the spoliation victim any issue relating to that evidence or to the underlying cause of action [and] [a]ny judgment against the third party spoliator would not alter the previous determination of liability between the spoliation victim and the spoliation victim's opponent in the underlying action [thus] [a] tort remedy would therefore have no effect, either formally or practically, on the judgment rendered on the cause of action to which the spoliated evidence was relevant and would not clash with the public policy favoring finality of adjudication.

<sup>174</sup> *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267, 272 (Ill. 1995), *as modified on denial of reh'g* (June 22, 1995). *But see Lueter v. California*, 115 Cal. Rptr. 2d, 74-75 (Cal. Dist. Ct. App.):

[W]ithout knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action . . . [thus] the jury could only speculate as to what the nature of the spoliated evidence was and what effect it might have had on the outcome of the underlying litigation.

due to the uncertainty of what the destroyed evidence would have shown.<sup>175</sup> Addressing this uncertainty, courts have come up with possible solutions to calculate uncertain damages including: (1) awarding the plaintiff the entire amount of damages that the plaintiff would have received if the original lawsuit had been pursued successfully;<sup>176</sup> (2) awarding the plaintiff any costs and fees incurred in pursuit of the original suit<sup>177</sup>; and (3) discounting damages to account for uncertainties by balancing of interests by the damages that would have been obtained in the underlying lawsuit, multiplied by the probability that plaintiff would have won the suit had he possessed the spoliated evidence.<sup>178</sup>

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*Id.*

<sup>175</sup> See, e.g., *Smith*, 771 So. 2d at 436 (providing “the appropriate measure of damages is difficult to determine in spoliation cases because, without the missing evidence, the likelihood of the plaintiffs prevailing on the merits cannot be precisely determined. ‘It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiffs success on the merits of the underlying lawsuit.’”) (quoting *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1987); See also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (contending speculative damages cannot be recovered because the amount is too uncertain and providing the general rule “that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain.”). Cf. *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 21 (Mont. 1999) (providing “a plaintiff is required to prove damages with reasonable certainty . . . [but] when there is strong evidence of the fact of damage, a defendant should not escape liability because the amount of damage cannot be proven with precision.”).

<sup>176</sup> *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 853 (D.C. 1998) (citing 3 JEROME H. NATES, et al., *DAMAGES IN TORT ACTIONS* § 19.33.3 (1997)).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 852-53 (choosing to adopt the third solution and holding “that in an action for negligent or reckless spoliation of evidence, damages arrived at through just and reasonable estimation based on relevant data should be multiplied by the probability that the plaintiff would have won the underlying suit had the spoliated evidence been available.”). See also *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 27-28 (Fla. Dist. Ct. App. 1990) (providing the “harsh results of the application of the rule of certainty,

There are other courts that have applied the certainty requirement for damages more rigorously in contract cases compared to tort cases.<sup>179</sup> One court provided the reason for this difference in application is that in tort “once the plaintiff is in the area of risk created by the defendant’s wrong, the defendant is usually liable for all injuries caused by his misconduct [where] in contract, undoubtedly out of concern for the impact on commerce, damages are limited to the types of loss the breaching party had reason to anticipate at the time the contract was made.”<sup>180</sup> Alternatively, the District of Columbia Court of Appeals provided that damages should be tailored by estimating the likelihood of success in a potential civil action.<sup>181</sup>

## 2. Penalties/Sanctions

One court determined that the “availability of punitive damages would only magnify the cost of erroneous liability determinations [and] [t]he risk of erroneous spoliation liability could also impose indirect costs by causing persons or entities to take extraordinary measures to preserve for an indefinite period documents and things of no apparent value solely to avoid the possibility of spoliation liability if years later those items turn out to have some potential relevance to future litigation.”<sup>182</sup> Consequently, the result

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referred to as the ‘all-or-nothing’ approach, has led courts and scholars to criticize the rule and carve out exceptions and modifying doctrines.”).

<sup>179</sup> *Miller*, 573 So. 2d at 28-29.

<sup>180</sup> *Id.* at 29.

<sup>181</sup> *Holmes*, 710 A.2d 846; *See also* *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 21 (Mont. 1999) (providing that even though damages should be proven with reasonable certainty, “a defendant should not escape liability because the amount of damage cannot be proven with precision . . . [and held] that damages arrived at through reasonable estimation based on relevant data should be multiplied by the significant possibility that the plaintiff would have won the underlying suit had the spoliated evidence been available.”); *Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1181 (Conn. 2006) (stating that with the difficulty in calculating damages in a spoliation of evidence tort, the proper measure of determining damages is “guided by the purpose of compensatory damages, which is to restore an injured party to the position he or she would have been in if the wrong had not been committed.”).

<sup>182</sup> *See, e.g., Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 519 (Cal. 1998).

would be endless, meritless litigation subject to abuse not necessarily for evidence that was intentionally destroyed but for evidence that was misplaced or discarded accidentally in ordinary dealings or practice.<sup>183</sup>

Alternatively, once a party reasonably anticipates litigation, an affirmative duty to preserve evidence may be relevant and subsequently spoliation may be established.<sup>184</sup> If spoliation is established, the spoliating party may be vulnerable to sanctions including: “(1) dismissal of a claim or granting judgment in favor of a prejudiced party;<sup>185</sup> (2) suppression of evidence; (3) an adverse inference, referred to as the spoliation inference; (4) fines; [and/or] (5) attorneys’ fees and costs.”<sup>186</sup> The Pennsylvania and

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<sup>183</sup> See *id.* at 519; See also *Coprich v. Superior Court*, 95 Cal. Rptr. 2d 884, 888 (Cal. Ct. App. 2000) (“The *Temple Community* court acknowledged that fewer sanctions are available to deter spoliation by third parties or to mitigate its effects, but it concluded that the burdens and costs on litigants, the judicial system, and others would outweigh the benefits of a tort remedy and that the limited remedies available are sufficient.”).

<sup>184</sup> Memorandum Opinion & Order, *Travelers Prop. Cas. Co. of Am. v. Cooper Crouse-Hinds, LLC*, No. CIV. 05-CV-6399, CMR No. 8 (E.D. Pa. Aug. 31, 2007), 2007 WL 2571450, at \*4.

<sup>185</sup> Cf. *Garfoot v. Fireman's Fund Ins. Co.*, 599 N.W.2d 411, 422 (Wis. Ct. App. 1999) (declining to hold the requirement that “if the trial court determines a party destroyed evidence with a conscious attempt to affect the outcome of the litigation or a flagrant knowing disregard of the judicial process, the court does not have the discretion to impose a sanction of dismissal unless those acts resulted in prejudice to the opposing party.”).

<sup>186</sup> See *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102, 110-11 (E.D. Pa. 2005). See also *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 335 (D.N.J. 2004) (“Spoliation sanctions serve a remedial function by leveling the playing field or restoring the prejudiced party to the position it would have been without spoliation [and] [t]hey also serve a punitive function, by punishing the spoliator for its actions, and a deterrent function, by sending a clear message to other potential litigants that this type of behavior will not be tolerated and will be dealt with appropriately if need be.”). Cf. Memorandum Opinion & Order, *Travelers*, CMR No. 12-13 (No. CIV. 05-CV-6399), WL 2571450 at \*6 (providing that the “Court must consider the availability of sanctions less severe than the entry of judgment in Defendants’ favor that can adequately protect Defendants’ rights and deter future spoliation by Plaintiff or others . . . . [T]he sanction of default judgment should be employed only in the most egregious of spoliation

Mississippi courts have applied a balancing test to determine sanctions, established in a Third Circuit Court of Appeals decision, for both first and third party spoliation cases.<sup>187</sup> The test to determine whether a sanction is appropriate includes: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.”<sup>188</sup> These alternative approaches do not work in third-party situations.

In evaluating these three considerations, the court can determine if an adverse inference instruction [to the jury] is the least severe and most appropriate sanction based on the circumstances of the case, with the purpose of deterring similar conduct in future cases.<sup>189</sup> An adverse inference applies from the “common sense observation that when a party destroys evidence that is relevant to a claim or defense in a case, the party did so out of the well-founded fear that the contents would harm him.”<sup>190</sup> However, there is a four-factor test that must be satisfied for the adverse spoliation inference to apply including: (1) the evidence in question must be within the party’s control; (2) it must show that there has been actual suppression or withholding of the evidence; (3) the evidence destroyed or withheld was

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cases . . . [not in cases where] spoliation apparently resulted from a lack of care and a failure to take reasonable precautions to protect the integrity of the [evidence] as well as a failure to promptly notify Defendants that their product was the potential subject of a subrogation suit.”)

<sup>187</sup> *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994); *Gicking v. Joyce Intern, Inc.*, 719 A.2d 357, 358 (Pa. Super. Ct. 1998); *Ogin v. Ahmed*, 563 F. Supp. 2d 539, 545 (M.D. Pa. 2008).

<sup>188</sup> *See Ogin*, 563 F.Supp.2d at 545-46 (the court applied the three key considerations and found 1) Defendants bear a high degree of fault for the destruction of the actual driver's logs because the defendants received both notice of pending litigation and actual notice of litigation and they should have taken reasonable precautions to preserve the evidence; 2) the Defendants actions prejudiced the Plaintiffs because by destroying the driver’s logs it was difficult to discern whether there were any negligent conduct violations that may gave rise to punitive damages; and 3) an adverse inference instruction was the least severe and most appropriate sanction based on the circumstances because the Defendants unilaterally determined the relevance of the actual driver’s logs and destroyed the records.))

<sup>189</sup> *Ogin*, 563 F.Supp.2d at 546.

<sup>190</sup> *Mosaid Tech. Inc.*, 348 F. Supp. 2d at 336 (citation omitted).

relevant to claims or defenses; and (4) it was reasonably foreseeable that the evidence would later be discoverable.<sup>191</sup>

In *Travelers Property Casualty Company of America v. Cooper Crouse-Hinds*, a fire damaged a building owned by a construction company.<sup>192</sup> The building was insured through a policy purchased from Travelers Property Casualty Company of America [“Plaintiff”].<sup>193</sup> Subsequently, Plaintiff hired investigators to determine the fire’s cause and found suspicion with a fluorescent light fixture that was hanging above a set of wall shelving.<sup>194</sup> Photographs were taken and the fixture was removed and sent to the Plaintiff’s laboratory for further investigation.<sup>195</sup> After further investigation, photographs, and discovery of missing parts, it was determined the light fixture was the cause of the fire.<sup>196</sup> After further investigation of the light fixture without the components documented as missing, by another hired examiner, the Plaintiff filed a complaint asserting claims of strict products liability, negligence, and breach of warranty against numerous Crouse-Hinds entities.<sup>197</sup> Crouse-Hinds [“Defendants”] filed a Motion for Summary Judgment claiming the Plaintiff did not provide an opportunity for them to examine the allegedly defective light fixture because: (1) Defendants received the light fixture almost two years after the Plaintiff’s anticipated a subrogation suit; (2) when the fixture was sent to Defendants’ counsel, it was missing an additional component; and (3) the components were in a substantially different condition than they were when Plaintiff and its experts examined the fixture.<sup>198</sup> Defendants’ argued that summary judgment should be ruled in their favor as a sanction against Plaintiff for

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<sup>191</sup> Memorandum Opinion & Order, *Travelers*, CMR No. 13-14 (No. CIV. 05-CV-6399), WL 2571450 at \*7; *Mosaid Tech. Inc.*, 348 F. Supp. 2d at 336; *See also* Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.N.J. 2000), *as amended* (Nov. 29, 2000) (stating “While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation, it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.”).

<sup>192</sup> Memorandum Opinion & Order, *Travelers*, CMR No. 1 (No. CIV. 05-CV-6399), WL 2571450 at \*1.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at CMR No. 3-4 (No. CIV. 05-CV-6399), WL 2571450 at \*2.

<sup>198</sup> *Id.* at CMR No. 4 (No. CIV. 05-CV-6399), WL 2571450 at \*2.

spoliation of evidence.<sup>199</sup> Conversely, Plaintiff argued that the deterioration of the evidence was unintentional and should not be attributed to Travelers and the deteriorated evidence did not prejudice Defendants because they could test using an exemplar light fixture.<sup>200</sup> The Court determined that Plaintiffs were subject to sanctions because “a significant segment of Plaintiff’s daily operations includes conducting loss investigations for the purpose of subrogation actions [and] [they] knew that (1) fire-damaged materials are likely to deteriorate over time unless special precautions are taken to preserve them; and (2) it was imperative to contact the party potentially liable for the fire as soon as possible so that the fixture and its components could be examined.”<sup>201</sup>

In considering sanctions, the Court applied a balancing test to the circumstances and found: (1) the Plaintiff was at fault for failing to timely notify Defendants that their product was the subject of a subrogation investigation, and for failing to provide Defendants with an immediate opportunity to examine the fixture;<sup>202</sup> (2) Defendants suffered some prejudice from the spoliation of the light fixture but only a minimal amount;<sup>203</sup> and (3) the appropriate sanction was less severe than the entry of judgment.<sup>204</sup> The Court determined the most logical sanction was an adverse

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<sup>199</sup> *Id.* at CMR No. 4 (No. CIV. 05 -CV-6399), WL 2571450 at \*4.

<sup>200</sup> *Id.* at CMR No. 4-5 (No. CIV. 05-CV-6399), WL 2571450 at \*2; *but cf. id.* at CMR No. 11 (No. CIV. 05-CV-6399), WL 2571450 at \*5 n.28 (noting that “intentional or bad-faith destruction is not required for a finding of spoliation [and] [e]ven unintentional destruction, if the result of unreasonable conduct, subjects a party to sanctions.”).

<sup>201</sup> *Id.* at CMR No. 10 (No. CIV. 05-CV-6399), WL 2571450 at \*5.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at CMR No. 11 (No. CIV. 05-CV-6399), WL 2571450 at \*6 (providing that prejudice is less for design-defect cases because the Defendants could have inspected and tested multiple fixtures of the same design and also, examined all the photographs taken immediately after the fire).

<sup>204</sup> *Id.* at CMR No. 13 (No. CIV. 05-CV-6399), WL 2571450 at \*6 (recognizing the Plaintiffs did not intentionally destroy the evidence. Rather, the spoliation resulted from lack of care and failure to take reasonable precautions to protect the light fixture. Thus, the sanction “must remedy the injustice done to the injured party, punish the spoliator for its wrongful conduct, and deter the spoliator and other potential spoliators by alerting litigants before this Court that this type of behavior will not be tolerated in the future.”).

spoliation inference.<sup>205</sup> Moreover, in applying the four-factor test, the Court found each factor was satisfied because (1) Plaintiff was in possession of the light fixture, and thus the fixture was within its control; (2) by not notifying Defendants of the subrogation suit in a timely manner, key components of the light fixture were destroyed before Defendants could examine them; (3) the destroyed components were relevant to causation issues in this case; and (4) as soon as Plaintiff began contemplating a subrogation suit against Defendants, it was reasonably foreseeable that the components would later be discoverable by Defendants in order to prepare their defense against Plaintiff.<sup>206</sup> The Court declined to enter summary judgment against Plaintiff based on the spoliation of design-defect theory however, based on the Plaintiff's failure to preserve the evidence, the Court concluded a spoliation inference was appropriate to instruct the jury.<sup>207</sup>

#### V. RECOMMENDATIONS TO THE SPOILIATION OF EVIDENCE TORT

To ensure that a party's property interest is protected while prohibiting a party from discarding evidence it knows to be relevant in a specific lawsuit, an appropriate approach is to apply the actual knowledge standard of conduct to an insurance carrier. Without proper notice of a lawsuit to the spoiler, an insurance company should be able to dispose of the property as they wish. An insurance company should be put on notice prior to a duty being imposed and, if so, then they should be able to negotiate costs.<sup>208</sup> The mere fact that an insurance company takes possession of an automobile should not amount to the creation of a duty in itself to preserve evidence in possible civil litigation between a motorist and third party absent actual notice of the policyholder's intent to sue. Notice requirements are not only necessary but vital to the interests of society as a whole in ensuring that premiums remain reasonably low and encouraging policyholders to remain insured. Imposing a duty of care, in the absence of such a requirement,

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at CMR No. 13-14 (No. CIV. 05 – CV – 6399), WL 2571450 at \*7.

<sup>207</sup> *Id.*

<sup>208</sup> *Johnson*, 79 Cal. Rptr. 2d at 237 ("A similar uncertainty of the fact of harm, though, has been addressed in the prospective economic advantage arena ... and the costs of preservation can be placed on the person seeking preservation.").



results in the negative consequences of leading a third-party to be in constant fear that their property might at some point be needed in a lawsuit, trampling traditionally well-protected property interests within our society.<sup>209</sup> Stockpiling property places a heavy burden on any third party, such as insurance companies, inevitably causing them to preserve evidence in the fear of facing liability in some unforeseen potential litigation in the near future.<sup>210</sup>

Furthermore, another dilemma emerges because the insured ultimately decides whether or not to bring an action and when. As such, the transaction costs of storing particular items in an insurance company's possession should be placed on the party making such a request for the preservation of evidence.<sup>211</sup> Thus, onerous retention policies are not the most cost-effective way in handling the negligent spoliation of evidence dilemma for a variety of reasons, which can be seen as the majority of the jurisdictions addressing the issue decline to impose such a standard on insurance companies.

It is the opinion of the authors that courts should make a categorical "no duty" rule regarding third-party spoliation claims involving insurance companies' obligations to preserve auto related damage evidence. The

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<sup>209</sup> See Jonathan Judge, Comment, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 WIS. L. REV. 441, 451 (2001).

<sup>210</sup> *Cty. of Solano v. Delancy*, 264 Cal. Rptr. 721, 731 (Cal. Ct. App. 1989) (Anderson, P. J. dissenting).

<sup>211</sup> *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 20 (Mont. 1999) (recognizing tort action for negligent or intentional third-party spoliation, but not for first-party spoliation and stating):

We see no need to require the requesting party to include an offer to pay reasonable costs of preservation in the request. In many instances, particularly where the evidence is small in size and manageable, there will be no costs associated with the preservation. However, after receiving such a request, the third party may demand the reasonable costs of preservation from the requesting party. Of course, the person requesting preservation would have the option of deciding whether or not to incur such costs. This condition places the burden of preservation where it rightfully belongs, on the person or entity requesting preservation.

*Id.*

analysis of adopting a “no duty” rule is best illustrated by the Louisiana Supreme Court’s decision in *Reynolds v. Bordelon*. In determining whether society is best served in recognizing a duty, and thus, a tort, the court in *Reynolds* made the following observation:

The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the Court in making its determination. “All rules of conduct, irrespective of whether they are the product of a legislature or a part of the fabric of the Court-made law of negligence, exists for purposes. They are designed to protect *some* persons under *some* circumstances against *some* risks. Seldom does a rule protect every victim against every risk that may befall him, merely because it is shown that the violation of the rule played a part in producing the injury. The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the Court in each case as it arises. How appropriate is the rule to the facts of this controversy? This is a question that the Court cannot escape.<sup>212</sup>

Analyzing the duty requirement in terms of policy, the Court in *Reynolds* systematically walked through each of the policy goals that might exist regarding whether to adopt the tort of negligent spoliation in a third-party context.

Regarding the first factor—deterrence of undesirable contact—the Court found that “the act of negligently spoliating evidence [was] so unintentional an act that any recognition of the tort by the courts would not act to deter future conduct, but would, rather, act to penalize a party who was not aware of its potential wrongdoing in the first place.”<sup>213</sup> The Court stated that this was “particularly true in the case of negligent spoliation by a third party, who is not vested in the ultimate outcome of the underlying case, and thus, has no motive to destroy or make unavailable evidence that could tend to prove or disprove that unrelated claim.”<sup>214</sup> Therefore, the Court found that this factor weighed in favor of a no duty rule. Turning to the second factor—compensation of victims—was an issue that was strenuously debated

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<sup>212</sup> *Reynolds v. Bordelon*, 172 So. 3d 589, 597 (La. 2015) (citing *Hill v. Lundin & Assocs.*, 256 S.2d 620, 623 (La. 1972)); *See also* *Malone, Ruminations on Cause-in-Fact* 9 STAN. L. REV. 60, 73 (1956).

<sup>213</sup> *Reynolds*, 172 S.3d at 597.

<sup>214</sup> *Id.*

nationally among those states that did not recognize the tort because the damages were so highly speculative.<sup>215</sup> In determining the proper measure of damages, the parties and the trier of fact would be called upon to estimate the impact of the missing evidence and then guess at its ability to prove or disprove the underlying claim, which involved too much speculation.<sup>216</sup> Such hypothetical and abstract inquiries regarding damages weighed in favor of a no duty rule.<sup>217</sup> Next, the Court in *Reynolds* focused on the third consideration—satisfaction of the community’s sense of justice—noting that because the reasonable person standard was inherent in the negligence analysis, it was prudent for the Court to ask whether reasonable persons would expect certain behavior and certain situations and, conversely, whether reasonable persons could be expected to be exposed to liability in certain situations.<sup>218</sup> This part of the inquiry focused squarely on *predictability*.<sup>219</sup> Commenting upon the policy considerations of social justice and predictability, the Court in *Reynolds* made the following insightful observation:

Recognition of the tort of negligence spoliation would place a burden on society as a whole, causing third parties who are not even aware of litigation to adopt retention policies for potential evidence in cases, in order to reduce their exposure to liability. There is simply no *predictability* in requiring preservation and recordkeeping for unknown litigation. Moreover, broadening the delictual liability for negligent spoliation would place restrictions on the property rights of persons, both natural and juridical insofar as the tort would act to limit the right to dispose of one’s own property. These policy concerns are readily apparent in the facts before this Court where [the insurance company] paid to the [insured] what was owed under his policy and received the title to the total vehicle. Then [the vehicle storer/custodian] in the normal course of its business, received the vehicle and disposed of it by auctioning it to a salvage yard for spare parts. To impose a requirement that all potential evidence be preserved for possible future litigation would wreak havoc on an industry whose very existence is sustained by destruction of possible subjects of litigation: totaled vehicles. It is

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 598.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

easy to imagine the trickle-down effect that a preservation policy would have on insureds themselves; the longer an insurer or auction company is required to store a vehicle, the higher the costs, and the more likely insurance premiums would be increased to absorb those costs. Moreover, the delay in proceeds being remitted to the insurer at the time of the auction prevents those funds from being immediately available to offset the total loss payout the insurer pays to the insured. Again, this practice could result in higher costs for the public.<sup>220</sup>

The Court in *Reynolds* found that the two factors of *social justice* and *predictability*, weighed heavily against broadening the delictual obligation for negligent spoliation.<sup>221</sup>

The Court in *Reynolds* identified five public policy considerations that had to be considered in creating a new duty: (1) deterrence of undesirable conduct;<sup>222</sup> (2) compensation of victims;<sup>223</sup> (3) satisfaction of the community's sense of justice and predictability;<sup>224</sup> (4) proper allocation of resources, including judicial resources;<sup>225</sup> and (5) deference to the legislature.<sup>226</sup>

The proper allocation of resources factor favored a no duty rule.<sup>227</sup> Establishing a derivative tort would invite litigation and encourage parties to bring new lawsuits where the underlying lawsuit was unsuccessful.<sup>228</sup> Such derivative litigation, according to the *Reynolds* court, could open the floodgates for endless lawsuits where the losses were speculative at best.<sup>229</sup> These lawsuits would also create confusion for fact-finders, particularly juries, because it devolved into a trial within a trial.<sup>230</sup>

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<sup>220</sup> *Id.* (emphasis added)

<sup>221</sup> *Id.* (emphasis added)

<sup>222</sup> *Id.* at 597

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 598

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 599

<sup>227</sup> *Id.* at 598

<sup>228</sup> *Id.* at 598

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* The court in *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998), discussed the problems associated with determining proximate cause in spoliation of evidence of cases. The court concluded that the plaintiff was

Finally, the Court in *Reynolds* considered the position of the Louisiana Legislature. The Louisiana Legislature deferred to the courts on questions of fault and tort law in determining the viability of certain causes of action. Because of this, the *Reynolds* court concluded that the Louisiana Legislature did not require recognition of the tort of negligent spoliation.<sup>231</sup> Having considered all the policy factors and alternative remedies to plaintiffs,<sup>232</sup> the *Reynolds* court observed as alternative remedies the

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required to show “based on reasonable inferences derived from both existing and spoliated evidence, that the underlying lawsuit was significantly impaired, that the spoliated evidence was material to that impairment and that the plaintiff enjoyed a significant possibility of success in the underlying claim.” *Id.* at 850. The court noted that it was “too heavy a burden on a plaintiff to show that he or she would have won with the missing evidence. Such a showing would be nearly impossible because judges and juries [could not] evaluate the value of evidence that they [could not] see.” *Id.* (quoting *Petrik v. Monarch Printing Corp.* 501 N.E.2d 1312, 1322 (Ill. App. Ct. 1986)). For a plaintiff to recover for the destruction of evidence, the plaintiff must likely first pursue and lose the underlying claim. To plead causation, the plaintiff must allege that an injury proximately resulted from the breach of a duty. Therefore, in a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit. This is so because a threat of future harm, not yet realized, should not be actionable. The wrongful conduct must impinge upon a person. If the plaintiff is able to establish their claim in the underlying lawsuit without the missing evidence, then the plaintiff has not been injured by the loss of the evidence. It is easy to envision factual situations where a party has negligently lost or destroyed evidence, but that evidence was not critical or even material to the plaintiff’s underlying suit.

<sup>231</sup> *Reynolds*, 172 So. 3d at 599.

<sup>232</sup> Additionally, Louisiana recognizes the adverse presumption against litigants who had access to evidence and did not make it available or destroyed it. Regarding negligent spoliation by third-parties, the Plaintiff who anticipates litigation can enter into a contract to preserve the evidence and, in the event of a breach, avail themselves of those contractual remedies. Court orders for preservation are also obtainable. In this particular case, the Plaintiff also could have retained control of his vehicle and not released it to the insurer, thereby guaranteeing its availability for inspection. Furthermore, he could have bought the vehicle back from the insurer for a nominal fee. *Id.* at 600.

following: “discovery sanctions and criminal sanctions are available for first-party spoliators.

Decades ago, a wise court noted “[t]he risk reasonably to be perceived defines the duty to be obeyed....”<sup>233</sup> When dealing with negligent spoliation claims involving third party insurance companies, there are no broad concerns of deterring wrongful but potentially profitable litigation-related conduct or of preserving the integrity of the civil justice system.<sup>234</sup> The *Reynolds* court properly noted the potentially harsh consequences facing unsuspecting third parties with regard to spoliation:

[T]he act of negligently spoliating evidence is so unintentional an act that any recognition of the tort by the courts would not act to deter future conduct, but would, rather, act to penalize a party who was not aware of its potential wrongdoing in the first place. This is particularly true in the case of negligent spoliation by a third party, who is not vested in the ultimate outcome of the underlying case, and thus, has no motive to destroy or make unavailable evidence that could tend to prove or disprove that unrelated claim.<sup>235</sup>

This limited risk calls for a limited duty.<sup>236</sup> If a third party negligent spoliation duty is going to be imposed, such a duty should be limited to situations where there is an express agreement by the parties or a specific request that is made by the insured accompanied by an offer to bear the burden of preserving the evidence.<sup>237</sup>

In total vehicle loss situations, the insured can retain control of his vehicle and not release it to the insurer, thereby guaranteeing its availability for inspection. However, the policy’s implied covenant of good faith and fair dealing will require the insured to work out a financial arrangement with the insurer to pay the salvage value of the vehicle. Any request for preservation should be made in writing with proof of delivery to the insurance company. The so-called mailbox rule should not be utilized as a presumption of delivery. This approach secures the necessary predictability. If any duty is going to be imposed upon the insurance company, the cornerstone of the duty

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<sup>233</sup> *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

<sup>234</sup> *Johnson v. United Servs. Auto. Ass’n.*, 79 Cal. Rptr. 2d 234, 240 (1998).

<sup>235</sup> *Reynolds*, 172 S.3d at 597.

<sup>236</sup> *Johnson*, 67 Cal. Rptr. 2d at 240.

<sup>237</sup> *Id.*

should be actual, specific knowledge coupled with mutual agreement and a promise of payment for the relevant property. Otherwise, there is no predictability in requiring preservation and recordkeeping for unknown litigation.

## VI. CONCLUSION

The words of the Louisiana Supreme Court encapsulate why an independent cause of action for negligent spoliation of evidence by insurance companies should not be adopted. The Court observed: “To impose a requirement that all potential evidence be preserved for possible future litigation would wreak havoc on an industry whose very existence is sustained by destruction of possible objects of litigation: [partially damaged or] totaled vehicles.”<sup>238</sup> “[T]he act of negligently spoliating evidence is so unintentional an act [for insurance companies resolving automobile physical damage claims] that any recognition of the tort by the courts would not act to deter future conduct, but would, rather, act to penalize a party who is not aware of its potential wrongdoing in the first place and who had a contractual obligation to repair damaged vehicles and a contractual right to take the salvage of a totaled vehicle.”<sup>239</sup>

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<sup>238</sup> *Reynolds*, 172 So. 3d at 598.

<sup>239</sup> *Id* at 597.