

CARGO UPDATE NEWSLETTER

SPOILIATION OF EVIDENCE - NOT NECESSARILY – June 2012

Your cargo is damaged. Perhaps it was as a result of a faulty container refrigeration unit. Or maybe there was a hole in the container. Or the truck chassis might have been defective or improperly maintained. You make a claim against the responsible carrier or third party and request the digital print out for the refrigeration unit or the maintenance and repair records for the container or chassis. Instead of receiving the requested items, you are told that they don't exist- the digital print out was lost or recorded over, the container or chassis have been scrapped or repaired, and the records cannot be found. Ah hah, spoliation of evidence? – Well . . . not necessarily.

Spoliation has been defined as “the intentional destruction, mutilation, alteration, or concealment of evidence.” *Black's Law Dictionary*, 1531 (9th ed. 2009). The majority of States that have considered the issue do not recognize an independent cause of action for spoliation of evidence. Those States that do recognize an independent cause of action generally limit such actions to third-party spoliation, *i.e.*, spoliation claims against non-parties to a pending litigation. Florida recognizes an independent spoliation cause of action in third-party cases but not in first-party cases against parties to a pending litigation. The majority of jurisdictions remedy first-party spoliation through sanctions or adverse jury instructions. In the Eleventh Circuit, spoliation sanctions may include dismissal of the case, exclusion of expert testimony, or a jury instruction that raises a presumption against the spoliator.

In a very recent decision, the U.S. District Court for the Middle District of Florida in *Vanliner Insurance Company v. ABF Freight System, Inc.*, 2012 WL 750743 (M.D. Fla. 03/08/2012), denied a motion for spoliation sanctions due to the alleged failure of a defendant to download and/or preserve Electronic Control Module (“ECM”) data prior to destruction. The case arose from an automobile accident involving a disabled ABF tractor. The crux of the argument was that although ABF downloaded certain ECM data soon after the accident, it allegedly failed to download and preserve data pertaining to maintenance of the tractor. The court found that there was no evidence ABF had been put on notice of the negligent maintenance claim or that it could have reasonably foreseen the allegation at the time of download. Additionally, certain maintenance records were produced in discovery, and the court found that the movant had not met its burden of proving that the particular ECM data was crucial to being able to prove its prima facie case or defense. The court noted that in order to establish spoliation, the moving party must prove that the missing or destroyed evidence actually existed at one point in time, that the alleged spoliator had a duty to preserve the evidence, and that the evidence was crucial to proof of its prima facie case or defense. The court went on to note that even if all three elements are met, sanctions are only available where the spoliation was a result of bad faith. The court made clear that in the Eleventh Circuit, bad faith is an indispensable element of the court's analysis.

To summarize, the destruction or alteration of evidence does not always give rise to actionable spoliation. Each State's rules, decisions, and laws are different, so professional advice should be sought with regard to which rules, decisions and laws are applicable to your particular State and to your particular circumstances

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