IADC COMMITTEE NEWSLETTER
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TRANSPORTATION

JANUARY 2020

IN THIS ISSUE

To combat potential spoliation issues and claims, trucking companies and their attorneys are wise to communicate and plan. In some cases, the best defense to an overreaching plaintiff, seeking to improperly levy sanctions for alleged evidence spoliation is a well-planned offensive based strategy.

Defending the Evidence Spoliation Attack in Transportation Cases

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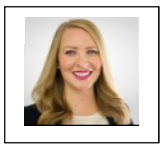

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ABOUT THE COMMITTEE

This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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More and more, it seems that the Plaintiff's bar is focusing on spoliation of evidence as a means to drive up the value of transportation cases. Whether it's a case that might otherwise be insignificant in value, or a case that already presents substantial exposure to motor carriers, spoliation claims have the potential to raise the stakes considerably. So how can you defend against evidence spoliation attacks?

First, it's important to understand what spoliation of evidence is and when the duty to preserve is triggered. "Spoliation of evidence 'is the destruction or the significant and meaningful alteration of evidence.'" *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir.2015). Spoliation can also refer to the "failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir.2001). It should be noted that the majority of jurisdictions do not recognize an independent tort for spoliation of evidence (Ohio, Connecticut, Florida, Illinois, New Jersey and California are among the exceptions to this rule). However, once litigation is "reasonably anticipated," and certainly once litigation is pending, the duty to preserve is triggered.

The first Line of Defense: Litigation Holds. You may never need to defend against a claim of spoliation if affirmative action is taken to preserve the appropriate evidence. "A party breaches its duty to preserve evidence if it fails to act reasonably by taking positive action to preserve material evidence ... The action must be reasonably calculated to ensure that relevant materials will be preserved, such as giving out specific criteria on what should or should not be saved for litigation." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 525 (D. Md. 2010) (internal citations omitted). "The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Once the duty to preserve attaches, any destruction of material evidence within the party's control is a breach of the duty. *Id.* at 220. In other words, the first line of defense is ensuring your client has comprehensive litigation hold protocols and, if they do not, helping them to develop and implement those protocols. Further, if you are engaged early enough in the process, counsel assisting its motor carrier client in determining the scope of what should be preserved under the specific facts and circumstances.

For example, perhaps your client's truck was caravanning at the time of the collision with other vehicles traveling ahead of and/or behind. Under those circumstances, the standard litigation hold may not apply to other vehicles that were in the caravan, but the data associated with those other vehicles may be relevant and material to the litigation. Another consideration is a third party's data of which you are aware but over which you do not have control. One example might be a telematics company that manages your client's fleet. Under those circumstances, your client likely has a duty to at least give the opposing party notice or access to the information: "If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation

to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence." *Silvestri v. General Motors Corp*., 271 F.3d 583, 591 (4th Cir. 2001).

The scope of a litigation hold is not one size fits all, so it is important that counsel be looking for ways that the scope may need to be adjusted under the circumstances in order to protect the motor carrier. For additional suggested reading, *The Duty to Preserve Electronic Evidence in the New Age of Transportation Under Amended FRCP 37(e)* published in IADC's Transportation Committee Newsletter in February, 2017, outlines other strategies and considerations with respect to preserving data early after a crash.

Reversing the Narrative: The Duty to Preserve is a Two-Way Street. It is well settled, yet often overlooked, that the duty to preserve evidence likewise attaches to a Plaintiff upon contemplation of litigation. (*See Best Payphones, Inc. v. City of New York,* 2016 WL 792396 (E.D. N.Y. 2016), order aff'd as modified, 2018 WL 3613020 (E.D. N.Y. 2018) (duty to preserve applied once party decided to bring an action); *Innis Arden Golf Club v. Pitney Bowes, Inc.,* 257 F.R.D. 334, 340, 70 Env't. Rep. Cas. (BNA) 1045 (D. Conn. 2009) (duty to preserve arose when plaintiff retained counsel in connection with potential legal action); *Cyntegra, Inc. v. IDEXX Laboratories, Inc.*, 322 Fed. Appx. 569, 2009-1 Trade Cas. (CCH) ¶ 76574 (9th Cir. 2009) (plaintiffs must necessarily anticipate litigation before the complaint is filed).

Just like the defense, Plaintiff and Plaintiff's counsel should assess and make sure all preservation obligations have been satisfied prior to filing suit whenever possible. For a personal injury matter, this might include all data and information regarding the Plaintiff's physical condition, such as the data collected by an Apple Watch or other fitness tracker illustrating that since the crash Plaintiff has been unable to exercise or at least continue their regular level of activity. If the Plaintiff is claiming that they were not using their mobile phone at the time of the collision, the phone and all of its applications should be preserved so that it can be confirmed that the phone was not being used at the relevant time. This can be accomplished for a relatively nominal expense with numerous forensic analysis companies. In an age where people often change phones as often as they change their toothbrush, this leaves serious potential for spoliation on the Plaintiff's part.

Under certain circumstances, a preservation letter should be sent out to Plaintiff's counsel as soon as litigation is filed, or perhaps even once a crash occurs. Not only does this put Plaintiff on notice of their duty to preserve evidence, but is helpful in the event discovery motion practice becomes necessary down the line. The Plaintiff may be less likely to push the issue of spoliation on Defendant's part if Plaintiff likewise did not preserve all relevant and material evidence, especially if a preservation letter was sent to Plaintiff at the outset of litigation.

From a practical standpoint, it is imperative that as soon as possible after a crash a spoliation related discussion occur between the motor carrier and counsel about whether to press for potential data available from the

claimant. Clearly an assessment of liability and other factors should be first considered, but the odds of gathering any meaningful data from a claimant significantly decrease by not proactively seeking information or records from the claimant immediately following a crash. It is a good practice to make an early conscious decision post-crash to either seek, or avoid seeking, evidence from a claimant since, more times than not, multiple years pass before any lawsuit is filed. This is particularly important because from the defense prospective it is extremely difficult to establish exactly when a claimant/Plaintiff contemplated litigation (even though these days it is wise to assume the moment a crash occurs a lawsuit is being considered).

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