Spoliation of Evidence

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Spoliation of evidence is a hot topic in insurance and legal circles these days. The purpose of this article is to give the reader enough practical knowledge of the subject to minimize the chances that it will occur on his or her files; a full discussion on the issue could easily cover a few chapters in a book.

For the purposes of this discussion, examples of evidence could include a broken wineglass, a ruptured car tire, a cracked toilet tank or even an entire house after a fire. Anything that occurs to alter that evidence from the condition it was in at the time of the loss could be construed as "spoliation." Obviously, the minute an individual (a firefighter, a fire investigator, the insured, etc.) walks through a fire scene, the risk of spoliation is present. However, there have been a number of cases in the Canadian courts that have established a number of circumstances and conditions that must be present for spoliation to be a viable defence argument. Some of these conditions can be determined by asking the following questions: Was the spoliation intentional? Was there any contemplation of litigation at the time the evidence was altered? Is there any other way of acquiring evidentiary value from the evidence (such as photographs) that is sufficient to provide the defendant with the information that direct access to the evidence would

have provided? In short, simply because the evidence has been altered does not mean that a valid spoliation defence can be raised. Regardless, there are a number of simple steps that the adjuster can follow to minimize a spoliation claim, should the adjuster take it upon himself or herself to retain the evidence (as opposed to a forensic expert, who should have much more training and knowledge on the subject).

First and foremost, establish a chain of custody. There are various literary and legal references that can be accessed for a proper definition; however, for our purposes, a chain of custody is a record (it could be as simple as a hand-scrawled note that is kept with the evidence) that can be used to establish that the evidence that you have in your possession is the incident item and that it is in the condition that it was in at the time of the loss. That is, the document should describe what the item is, where it was located and when it was removed, as well as how it was removed and by whom. The last point is probably the most overlooked detail, and it can turn out to be the most critical one. Consider a failed water pipe connection that the contractor removed and gave to you. Now consider that there are tool marks on the pipe that may be relevant to the claim. If you do not have the contact information of the person who removed it (not just the company name, but the actual person's name), how can you prove when exactly those tool marks were made in relation to the loss? Sure, if you took great, close-up, detailed and in-focus photographs of that pipe connection (which, by the way, was 40 feet up in the air at the warehouse ceiling), you may be able to prove that the tool marks were on the connection beforehand, but is that likely?

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Second, make sure that the evidence is properly preserved. It is surprising how easily some materials can be damaged. For example, some plastics can be damaged by sunlight, so keeping the evidence on your window ledge for a few months until you determine whether you will subrogate, and against whom, is probably not the best idea. Steel can corrode, so leaving a steel part in your damp basement is not a good idea either. Foodstuffs can spoil, chemicals can evaporate, etc. In order to properly preserve the evidence, you really need to understand it, and not just what it is (e.g., two pieces of a failed bolt), and know how the features of that evidence can have evidentiary value. For example, with a failed bolt, the most common blunder we see is that people stick the two pieces back together again. It is a natural temptation, but it can be a huge mistake, because the jagged, rough surfaces of the failed pieces (the "fracture surfaces") can tell an important story to a fractography expert looking at it under a

microscope. Jamming the pieces back together again can forever alter the condition of the fracture surfaces—ergo, spoliation!

Evidence preservation should be considered at the scene, before the evidence is removed. It may be impossible to remove the evidence without some damage occurring, so it may be advisable to leave the evidence in-situ and have other interested parties observe it in-situ before it is removed. That, in our opinion, is the best course of action, but it may not always be possible; therefore, in situations in which the evidence must be moved, you simply have to do the best you can to prevent spoliation. Retaining an expert at that time would be a good consideration, because they should know how to best document and preserve the evidence from the outset. Again, that may not always be possible, so take lots of detailed notes and photograph the scene and the evidence from multiple angles (and in focus!). Don't worry about using the proper terminology or jargon; just use plain English to describe what you see, smell and hear, even if it seems to be irrelevant at the time. Secure any other seemingly irrelevant debris found in and around the incident object too. A bag of debris can be easily sifted through in the future if it has been retained. If the debris goes out in the dumpster, important items could be lost.

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Third, once the evidence has been properly preserved and secured, do not take it apart, alter it or allow any testing be performed on it until you determine who all the relevant parties are and ensure that they have been notified of the proposed testing and have been given the opportunity to participate. A protocol or procedure should be established and agreed upon by all parties within a reasonable timeframe. Of course,

there will be situations in which you or your expert will need to perform some minor disassembly to determine the most basic information (e.g., who made the item you have in your possession). In those cases, proper note-keeping and photographic and/or videographic documentation of the disassembly process may be sufficient to defend against a potential spoliation claim. Remember, there can be no "contemplation of litigation" during the stage in which you have not determined whether the item actually failed and/or who made it. Thus a spoliation claim likely would not be successful in court. Legal counsel should be consulted, though, if you are in doubt.

In summary, while you are likely to hear lots of "saber rattling" from defence experts or counsel regarding spoliation of evidence, there are many practical steps you can take to reduce the success of spoliation claims. If you cannot retain an expert from the outset to handle the evidence, at the very least take lots of photographs and notes, establish a chain of custody for the evidence, and make sure that the evidence is properly preserved and stored. For additional information.

Check out related articles on our website, www.giffinkoerth.com, and refer to standards such as ASTM E860, E1188 and E1459 and NFPA 921.

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