

DRI Spoliation Project – FOURTH CIRCUIT CASE LAW

1. What Law Applies in Federal Diversity Claims?

Are legal issues involving spoliation considered substantive in nature (such that state law applies) or procedural in nature (such that federal law applies)?

“[A] federal law of spoliation applies ... because the power to sanction for spoliation derives from the inherent power of the court, not substantive law.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). Spoliation is considered a “rule of evidence” and thus is “administered at the discretion of the trial court.” *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (quoting *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995)). However, at least one federal court has held that “when spoliation of evidence does not occur in the course of pending federal litigation, a federal court exercising diversity jurisdiction in which the rule of decision is supplied by state law is required to apply those spoliation principles the forum state would apply.” *Ward v. Texas Steak LTD*, 2004 WL 1280776 *2 (W.D. Va. May 27, 2004).

2. When Does the Duty to Preserve Evidence Arise?

Is there a duty to preserve potential evidence based on knowledge of pending litigation or a potential claim?

Yes. “The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998)).

Have the courts in the jurisdiction imposed sanctions for failure to preserve property or information which a party was required by statute or regulation to retain?

No such cases were found, but the failure to comply with such a duty would possibly be a factor in determining the level of culpability of the party responsible for the loss of the evidence, which could result in more severe sanctions.

Has the failure to follow a party’s document retention policy been the basis for a claim of spoliation?

If litigation is pending or reasonably foreseeable, and the duty to preserve documents and records is triggered, the destruction of documents earlier than called for in a document retention/destruction policy could be viewed as evidence of blameworthiness of the offending party and used to justify a more severe sanction. See *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“[A] court must find some degree of fault to impose [spoliation] sanctions.”); *Broccoli*, 229 F.R.D. at 510 (court should take into account the blameworthiness of the offending party). If litigation is not pending or even reasonably foreseeable when documents are destroyed earlier than called for in a document retention/destruction policy, the level of blameworthiness is presumably lower – assuming there is a good explanation for not following the document retention/destruction policy – and would seem to militate against the more severe types of sanctions. However, “even when conduct is less culpable, dismissal [the ultimate sanction] may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.” *Silvestri*, 271 F.3d at 593.

More often, it appears that relevant documents are destroyed as a part of a routine document retention/destruction policy. In this regard, “[o]nce 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.” *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (quoting *Thompson v. HUD*, 219 F.R.D 93, 100 (D. Md. 2003)).

3. What Type of Evidence Must Be Preserved?

The duty to preserve applies to evidence that “may be relevant to anticipated litigation.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). “The duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses.” *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003)). “Any information relevant to the claims or defenses of any party, or which is relevant to the subject matter involved in the litigation, is covered by the duty to preserve.” *Id.*

According to the court rules, what type of evidence must be preserved?

See Rule 26(a) of the Federal Rules of Civil Procedure regarding required disclosures in civil actions, which requires the production to other parties of

certain information that the disclosing party may use to support its claims or defenses.

Does the case law expand the requirements of the court rules?

Yes, because the duty to preserve evidence arises “not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *See Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *White v. Office of the Public Defender for the State of Maryland*, 170 F.R.D. 138, 148 (D. Md. 1997) (“reliance upon the court’s inherent authority as the source of the sanction permits the court to reach situations the federal rules of procedure do not cover.”). Also, the disclosure requirements of Rule 26(a) require the production of a copy of (or a description by category and location) of all documents and tangible things “that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses,” Fed. R. Civ. P. 26(a)(1), whereas the duty to preserve evidence can require that steps be taken to prevent the spoliation of evidence that is not within the possession, custody, or control of the party. *See Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (party that does not own or control the evidence still has duty to prevent spoliation of evidence – see response to next question); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155-56 (4th Cir. 1995) (noting that failure to produce a witness “that naturally would have elucidated a fact at issue” may justify an adverse inference).

Does the duty to preserve potential evidence extend to evidence held by third parties?

Yes, but to a lesser extent. “If a party cannot fulfill th[e] 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) (where plaintiff, plaintiff’s attorney, and plaintiff’s experts knew damaged vehicle would be material evidence in anticipated litigation against GM, plaintiff failed to take any steps to discharge his duty to prevent spoliation of evidence, such as attempting to buy the damaged vehicle or request that it be maintained in its post accident condition until GM could inspect it); *Evans v. Medtronic, Inc.*, 2005 WL 2043949 *23 (W.D. Va. Aug. 22, 2005) (employees of defendant had duty to warn plaintiff of impending destruction of the Lead, even though they did not possess or exert control over the product at the time); *cf. Bolling v.*

Montgomery Ward & Co., Inc., 930 F. Supp. 234, 237-38 (W.D. Va. 1996) (spoliation inference not appropriate where no evidence of plaintiff's blameworthiness and, although owner of vehicle was plaintiff's father-in-law, there was no reason to suppose plaintiff conspired with or induced him to dispose of the vehicle) (citing *Brewer v. Quaker State*, 72 F.3d 326, 334 (3rd Cir. 1995) (unavailable evidence must have been within the control of party to be charged for spoliation inference to apply)).

4. What are the Sanctions for Failure to Preserve Evidence?

“A district court has broad discretion in choosing an appropriate sanction for spoliation[.]” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). However, “the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.” *Id.* (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999)). Spoliation sanctions are intended to level the evidentiary playing field and sanction improper conduct. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

What factors are considered in determining sanctions?

The district court must consider both the spoliator's conduct and the prejudice caused. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001). The inherent power of federal courts to impose sanctions for spoliation of evidence “is limited to that [action] necessary to redress conduct ‘which abuses the judicial process.’” *Silvestri*, 271 F.3d at 590 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 115 L. Ed.2d 27, 11 S. Ct. 2123 (1991) (recognizing the inherent power of courts to fashion appropriate sanctions for conduct that disrupts the judicial process)).

What discovery sanctions are available under rules of civil procedure?

See Rule 37(c)(1) of the Federal Rules of Civil procedure, which provides the federal courts with broad discretion to impose “appropriate sanctions” for a party's failure to disclose information required by Rule 26(a), which sanctions may include payment of reasonable expenses and attorney's fees caused by the failure to disclose, an order establishing certain facts, precluding certain matters from being introduced into evidence, striking some or all of the pleadings, dismissing the action, or instructing the jury as to the failure to disclose.

Does the case law recognize a court's discretionary power to impose evidentiary sanctions beyond the court rules?

Yes, the federal courts have broad discretion to fashion appropriate sanctions under both the case law and the Federal Rules of Civil Procedure. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (“[T]he trial court has broad discretion to permit a jury to draw adverse inferences from a party’s failure to present evidence, the loss of evidence, or the destruction of evidence.”); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) ([T]he power to sanction for spoliation derives from the inherent power of the court, not substantive law.”).

Is an adverse inference jury instruction available?

Yes. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (authorizing a court to permit a jury to draw adverse inferences from a party’s failure to present evidence, the loss of evidence, or the destruction of evidence); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (spoliation of evidence rule allows the drawing of an adverse inference against a party whose intentional conduct causes not just the destruction of evidence, but also against one who fails to preserve or produce evidence – including the testimony of witnesses); *Trigon Insurance Co. v. United States*, 204 F.R.D. 277, 291 (E.D. Va. 2001) (appropriate sanction to draw adverse inferences respecting substantive testimony and credibility of experts); *but see Ward v. Texas Steak LTD*, 2004 WL 1280776 *2 (W.D. Va. May 27, 2004) (applying adverse inference based on Virginia law in federal diversity case in which Virginia law supplied the rule of decision and where the spoliation occurred before litigation commenced).

Conduct required: Intentional or negligent?

An adverse inference “cannot be drawn merely from the negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.” *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (quoting *Vodusek*, 71 F.3d at 156); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“[A] court must find some degree of fault to impose [spoliation] sanctions.”); *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (court should consider blameworthiness of the

offending party and the prejudice suffered by the opposing party).

Is a rebuttable presumption jury instruction available?

See Rules 301 and 302 of the Federal Rules of Evidence. Rule 302 provides that in civil actions “the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.” Fed. R. Evid. 302. See *Hartford Insurance Co. of the Midwest v. American Automatic Sprinkler Systems, Inc.*, 23 F. Supp.2d 623, 627 (D. Md. 1998) (“an inference does not ‘amount to substantive proof that the evidence was unfavorable’ and citing a Maryland case for the proposition that “[t]he presumption that arises from a party’s spoliation of evidence cannot be used by [a party] as a surrogate for presenting evidence of ... negligence in his prima facie case.” (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 561, 694 A.2d 150, 156 (Md. App. 1997)); *Roberts v. Sears, Roebuck & Co.*, 2000 WL 33422750 *8 (W.D.N.C. April 30, 2000) (“Like Virginia, North Carolina case law provides that spoliation, if proved, creates a presumption”).

Conduct required: Intentional or negligent?

This will typically depend on the applicable State law. See Fed. R. Evid. 302.

Has the exclusion of other evidence been imposed?

Yes. See *Trigon Insurance Co. v. United States*, 204 F.R.D. 277, 291 (E.D. Va. 2001) (court discussed that precluding expert witnesses might be an appropriate sanction, but determined it was unnecessary; court found it would be appropriate to foreclose consulting company’s further participation in any aspect of the expert testimony to be offered by the government).

Conduct required: Intentional or negligent?

“[A] court must find some degree of fault to impose [spoliation] sanctions.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); see *Trigon Insurance Co. v. United States*, 204 F.R.D. 277, 289 (E.D. Va. 2001) (documents were intentionally destroyed despite duty not to

destroy them); *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (court should consider blameworthiness of the offending party).

Has a default judgment or dismissal of a claim been upheld?

Yes. See *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001); *White v. Office of the Public Defender for the State of Maryland*, 170 F.R.D. 138, 152-53, 148 (D. Md. 1997); cf. *Nichols v. Steelcase, Inc.*, 2005 WL 1862422 *9-10 (S.D. W. Va. Aug. 4, 2005) (following *Silvestri*, but denying motion to dismiss based on alleged spoliation of evidence where evidence did not establish that plaintiff acted in bad faith or otherwise so egregiously as to warrant the ultimate sanction of dismissal and the absence of the chair did not so substantially prejudice the defense as to merit dismissal).

Conduct required: Intentional or negligent?

Dismissal constitutes the ultimate sanction for spoliation and “is usually justified only in circumstances of bad faith or other ‘like action.’” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) (quoting *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998)). “But even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.” *Id.* “[T]o justify the harsh sanction of dismissal, the district court must consider both the spoliator’s conduct and the prejudice caused and be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.” *Id.*; see *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993) (“when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action”); see also Fed. R. Civ. P. 37(c) (authorizing dismissal of action as sanction available to a court for party’s failure to disclosure information required by Rule 26(a) without substantial justification).

Have other sanctions, such as attorney fees or costs, been recognized?

Yes. See *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 512 (D. Md. 2005) (court granted plaintiff’s motion for reasonable costs and attorney’s fees based on merits of the motion for sanctions and in accordance with Fed. R. Civ. P. 37); *Trigon Insurance Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001) (court awarded attorney’s fees and costs incurred as a consequence of the government’s spoliation of evidence).

5. Does the Jurisdiction Recognize a Separate Action for Spoliation?

No. “[T]he acts of spoliation do not themselves give rise in civil cases to substantive claims or defenses.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). “Even though application of the rule could prove to be critical to a party’s recovery on a claim, it is not an affirmative defense, but a rule of evidence, to be administered at the discretion of the trial court.” *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (quoting above language from *Vodusek*, 71 F.3d at 155).

Is a claim for intentional spoliation recognized? No.
What are the elements of the claim? N/A

Is a claim for negligent spoliation recognized? No.
What are the elements of the claim? N/A

Are there any special rules regarding proof of causation or damages? N/A

Must the claim be brought in same action? N/A

What is the statute of limitation for an action for spoliation? N/A

6. What Duties Are Imposed on a Party Wanting to Dispose of Property Which May Be Potential Evidence?

“It is the duty of a party, a party’s counsel and any expert witness, not to take action that will cause the destruction or loss of relevant evidence where that will hinder the other side from making its own examination and investigation of all potentially relevant evidence.” *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995). Also, even “[i]f 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).

Must notice of intent to dispose of the property be given?

Yes, if litigation is anticipated and the relevance of the evidence is or should be known. *See Silvestri v. General Motors Corp.*, 271 F.3d 583, 592 (4th Cir. 2001). In *Silvestri*, the Fourth Circuit indicated that under such circumstances, as was the situation in the case before it, plaintiff should have given GM notice of the claim and advised of any opportunity to inspect the vehicle, even though plaintiff did not own the vehicle. *Id.* Furthermore, the Court suggested that plaintiff should have attempted to buy the damaged vehicle from the owner, or at least requested that the vehicle be maintained in its post-accident condition until GM could inspect it. *Id.*

Must the notice be in writing, and, if so, what must be included (e.g., intended date of disposal, interim location, procedure for obtaining access for inspection, and intended method of disposal).

Written notice containing the foregoing would be the better practice to avoid being accused of spoliation, but this is not necessarily required.

Must all parties agree to the disposal of the property?

After reasonable notice and a reasonable opportunity to inspect the evidence have been provided, it is unlikely that all parties must agree to the disposal of the property. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (“A party’s failure to produce evidence, may, of course, be explained satisfactorily. When a proponent cannot produce original evidence of a fact because of loss or destruction of evidence, the court may permit proof by secondary evidence.”). However, extra care should be taken before the evidence is repaired or destroyed, even if the destruction is deemed necessary by your expert to properly examine and analyze the property. In *Vodusek*, the Fourth Circuit affirmed the trial court’s instruction to the jury regarding the contention of defendants that plaintiff’s expert destroyed evidence as a part of his investigation (he cut up the boat with a chainsaw to reach inaccessible parts), which the defendants’ contended resulted in the loss of relevant evidence. This was the case even though plaintiff’s expert took photographs before, during, and after his investigation and videotaped his alteration of the boat in an effort to preserve the evidence. The instruction did not decide the spoliation issue

for the jury, but provided the jury with appropriate guidelines for evaluating the evidence.

If a party objects to the disposal of the property, can the costs of retaining the "evidence" or "property" be shifted to the objecting party?

For the reasons set forth above, if a party does not agree to the disposal of the property even after having had an opportunity to inspect the property, it would be advisable to give that party the opportunity to purchase the property or make arrangements to pay for its safekeeping. In the event such arrangements are not feasible or agreed to, the disposing party should, at a minimum, document the physical evidence and all other related evidence with good, clear photographs and provide written notice to the other party of its opportunity to inspect the property before the property is destroyed.

Are any other duties imposed by statute or case law on a party who wants to dispose of potential evidence?

This is possible under particular statutes or circumstances not addressed herein, but for purposes of spoliation of evidence, a party who wants to dispose of potential evidence, and who has knowledge of pending or anticipated litigation, should proceed with caution and be aware of the potentially serious consequences of disposing of evidence that may be relevant to such litigation.

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