

A NEW DANCE TO AN OLD SONG;
SPOILIATION OF EVIDENCE AND SUBSEQUENT
REMEDIAL MEASURES IN THE MOLD LITIGATION

By Michael J. Pietrykowski

Gordon & Rees
275 Battery Street, Suite 2000
San Francisco, CA 94111

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I. INTRODUCTION

The well defined legal concepts of spoliation of evidence and subsequent remedial measures usually offer little challenge to the practitioner. However, when applied against the backdrop of the mold litigation, these evidentiary concepts offer new twists and turns to this old song. This article reviews the legal concepts of spoliation of evidence and subsequent remedial repairs and discusses their application in the context of mold litigation.

II. SPOILIATION OF EVIDENCE

A. Definition

The loss, destruction, fabrication, alteration or suppression of evidence is known as “spoliation.” In the context of litigation, spoliation of evidence is commonly understood as the failure to preserve property that could be used as evidence by another party in pending or future litigation. The elements of a viable spoliation claim are: (1) the accused spoliator has notice of pending or future litigation; (2) the evidence is within the accused spoliator’s possession, custody or control; and (3) the spoliated evidence is relevant.ⁱ

The first element of a spoliation claim requires that the accused spoliator has notice of the pending litigation or the potential for future litigation. Generally, a party need only be concerned with the preservation of evidence if it knows or has reason to know that the threat of future litigation is a reality.ⁱⁱ

The second element requires that the spoliated evidence was held in the care, custody or control of the spoliator. This element not only applies to the actual spoliation but also to the agent and includes experts, attorneys, and accountants.ⁱⁱⁱ

The third essential element of a spoliation claim is that the spoliated evidence must be “relevant.” Relevant evidence is defined as any document, item, or thing “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence.”^{iv} Only evidence that is deemed “relevant” will be subject to a charge of spoliation.^v

B. Remedies

If spoliation occurs, the prejudiced party will have several remedies against the spoliator. Arguably, the most severe remedy allows the prejudiced party to prosecute a legal claim seeking damages for the spoliation. At least ten (10) jurisdictions have recognized spoliation of relevant evidence to be an independent tort cause of action.^{vi} In these jurisdictions, the independent tort cause of action may be asserted against the spoliator and the party presenting the claim is entitled to monetary damages. These damages are usually difficult to prove and require the moving party to show that it suffered a loss (*e.g.*, judgment) because evidence was not available to them. The remaining majority of jurisdictions have either considered and rejected spoliation of evidence as a separate cause of action or they have routinely ignored the possibility of spoliation as a separate cause of action.^{vii}

Although the majority of jurisdictions refuse to recognize spoliation of evidence as an independent cause of action, these states still provide considerable remedies for the victims of spoliation. These remedies include sanctions, adverse jury instructions, exclusion of evidence and even dismissal of the underlying lawsuit. For a more detailed listing of the remedies permitted by each state, refer to the attached state survey chart.^{viii}

The range of court-imposed sanctions upon a finding of intentional spoliation varies widely, and includes striking defenses, precluding evidence and dismissing claims on the entire action.^{ix} Some states, including Texas, allow a jury instruction that if evidence has been destroyed by a party, there is a presumption that the evidence would have been unfavorable to that party's case.^x

Negligent spoliation of evidence is the more common allegation underlying court-imposed sanctions because bad faith or willfulness of the spoliator need not be proven. Generally, courts consider the following factors in determining whether a charge of negligent spoliation exists and the imposition of sanctions is just: (1) Was relevant evidence lost, destroyed, altered or suppressed?; (2) Is the mishandling of evidence prejudicial to the opponent?; (3) Can the prejudice be cured?; and (4) What is the appropriate method by which the prejudice may be remedied?^{xi} Sanctions for negligent spoliation are often limited to the exclusion of expert or lay testimony and the barring of any evidence derived from the spoliated evidence.^{xii}

C. Spoliation of Evidence in the Mold Litigation

In the context of mold litigation, both plaintiffs and defendants are faced with unique and difficult challenges as they determine what and how evidence should be preserved. These challenges involve evidentiary issues and litigation strategies, and can be further complicated by plaintiffs' ongoing health problems and defendants' economic concerns. The following addresses these unique issues.

1. Pre-Litigation Setting

As discussed above, spoliation claims are not limited to spoliation during pending litigation. Parties and their lawyers should be particularly wary of possible spoliation claims even if renovation and/or remediation efforts are made prior to litigation. Although visual testing, air sampling and limited bulk sampling are not likely to lead to allegations of spoliation, remediation is destructive and may expose the unwary tester to allegations of intentional or negligent destruction or alteration of relevant evidence. Several years ago, the statement, "I didn't know that this mold stuff could be the basis for a claim," would not likely be challenged. Today, however, once mold is so much as mentioned, the potential for litigation must be realized, and all parties are thereafter put on notice that future litigation is a likely possibility.

If an individual determines that abatement, remediation or destructive testing must be performed, the individual should consider whether it is necessary to provide written notice to potential claimants and adversaries. Although this may seem burdensome and may be rejected for strategic reasons, an individual who unilaterally abates, remedies, or otherwise destroys evidence, regardless of intent, faces the possibility of a court imposing sanctions such as striking pleadings, imposing adverse evidentiary presumptions in jury instructions, or, at the very minimum, excluding any future expert or lay testimony pertaining to the destroyed evidence.

Even in the event that none of the potential parties object or refuse to participate in the abatement, remediation, or destructive testing efforts, the acting party should retain a consultant who can participate in the remediation, abatement or destructive testing. The consultant can thereby collect, chronicle, identify, and even preserve any potential evidence. If evidence is to be destroyed, the consultant's inspection record and analysis of that evidence can, if necessary, be offered as the evidence and will likely prevent or minimize later sanctions for spoliation.

2. Plaintiff Tenants

Many mold plaintiffs are tenants -- commercial or residential -- and are usually limited in their ability to collect evidence. They are typically not entitled to perform any destructive testing or to engage in investigation that may result in some destruction. This is a significant limitation for plaintiffs who suspect that the mold is more extensive than what is visible and accessible. In the pre-litigation setting, the tenant is usually without recourse. However, once litigation commences, the tenant may seek a court order permitting such destructive investigation or testing.^{xiii} In this scenario, the court will likely require that the evidence be made available to defendant.^{xiv}

Short of these extreme measures, plaintiff tenants will have to limit the evidence gathering process to visual observations (photographs, videos, eyewitness accounts, etc.) and rely on air and bulk sampling for counts and species identification. It is unlikely that spoliation of evidence will become an issue under these circumstances because defendant will have access to the same evidence. Still, the safest approach to ensure that the evidence will be admissible at trial is to make sure that the physical evidence is either preserved or well documented.

Plaintiff tenants will most likely have damage claims for contaminated personal property. In many instances, these claims can be adjusted and resolved immediately. However, when that is not the case and when it is not economical to store the property, the tenant should provide the landlord with the opportunity to examine the items before they are destroyed. Even still, the tenant will want the property recorded, photographed and examined by an appropriate consultant who can later provide sufficient testimony and documents in lieu of presenting the actual items.

3. Defendant Landlords

While plaintiff tenants face the challenges of limited access, the defendant landlords arguably have the contrary problem of having too much available information. This unlimited access and information can create quite a dilemma for the landlord and requires an analysis that balances evidentiary issues, litigation strategies, economic concerns and tenant health issues.

A typical mold defendant is a property manager or building owner ("landlord") who has or can obtain complete access to the subject space or building. As such, this defendant faces difficult decisions at an early stage about whether any evidence should be obtained. The landlord runs the risk of creating "bad evidence" which, if not preserved, will invite a sanction remedy for spoliation of evidence.

The evidentiary issues and litigation strategy may also be colored by the likely scenario that there is an alleged ongoing risk to the occupants. As such, the failure to act may become the basis of further claims of negligence, fraud and even punitive damages. Thus, the landlord is faced with the situation that if it aggressively explores and investigates the mold contamination

claims, it may be memorializing evidence that will be detrimental in future or subsequent litigation. On the other hand, if the landlord fails to investigate the claim, it will be portrayed as the “heartless landlord” who failed to respond to tenant’s complaints. This latter claim is particularly problematic for defendants because there are no accepted guidelines for admissible exposure levels and the mere presence of any mold may be sufficient to maintain an action for mold contamination.

If while investigating the claim, the landlord discovers evidence of mold contamination, it must decide whether and how the evidence will be preserved. If the landlord decides to proceed with abatement, and litigation is imminent or ongoing, it will have to provide plaintiff with the opportunity to inspect before the abatement.

Although a landlord’s intent may be renovation, not remediation, the landlord must still consider whether it has an obligation to preserve the evidence. Similar to the scenario in the asbestos property litigation, defendant (or plaintiff, if the ownership roles are reversed) may avoid a claim of spoliation if it puts plaintiff on notice and provides an opportunity to examine and, as appropriate, test the discovered mold.

4. Plaintiff Property Owners

In some situations, the mold plaintiff will be the property owner (e.g. - bad faith cases and claims against the developer or contractor responsible for the water intrusion). Like the defendant property owner, plaintiff property owner faces similar decisions concerning the preservation of evidence. However, unlike defendant, plaintiff is usually not concerned with collecting “bad evidence.” Rather, the focus will typically be about whether and how evidence should be preserved. Failure to maintain the evidence, even if it is favorable, could result in dismissal, evidentiary sanction or a negative inference at trial.

An extreme example of this involved a recent mold case in Eugene, Oregon where plaintiff homeowners abandoned their home and then burned it down.^{xv} Plaintiffs alleged that the construction company defendant performed faulty work that allowed moisture to be drawn into the structure, facilitating the growth of “toxic mold.” Plaintiffs, who claimed that their home and belongings were so contaminated that they were unsalvageable, burned their home down prior to bringing the suit. Defendant claimed that plaintiffs intentionally committed spoliation of evidence and sought dismissal of the case for the “misconduct” alleging that this intentional act was done to “inflame and prejudice the entire jury community.”

In response to defendant’s allegations, the court ordered that all of plaintiffs’ consultant reports, which were made before the house was burned and before litigation began, had to be disclosed. Although the case settled before trial, the disclosure of otherwise non-discoverable reports was arguably detrimental to plaintiffs’ case.

III. SUBSEQUENT REMEDIAL MEASURE

A. General Rule

A subsequent remedial measure is an action taken after the occurrence of an event that, if taken previously, would have made the event less likely to occur. The overwhelming majority of states follow the subsequent remedial measures exclusion set forth in Federal Rule of Evidence §407, which provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The subsequent remedial measures exclusion that is the model exclusion in the majority of jurisdictions, rests on three main policy grounds. First, the conduct is not in fact an admission, because the conduct is equally consistent with injury by mere accident or through contributory negligence.^{xvi} Second, social policy encourages people to take, or at least not discourage them from taking, steps in the furtherance of added safety.^{xvii} The third, and perhaps most important policy ground underlying the subsequent remedial measures exclusion, is that people who err on the side of caution and take measures to protect fellow citizens from even the possibility of future injury should not be expected to bear the risk that a jury will read more into a repair than is warranted.^{xviii}

Therefore, in every state except for Rhode Island, mold abatement and remediation measures will not be admissible to prove that the abating or remediating defendant was negligent. While the subsequent remedial measures exclusion provides considerable protection for the well-meaning defendant, the mold litigator must beware of the four significant exceptions to the exclusionary rule.^{xix}

B. The Exceptions and the Mold Litigation

In the majority of states, all evidence of subsequent remedial measures is excluded and is inadmissible unless evidence of such conduct is presented under one of the four exceptions to the exclusion. The first exception provides that evidence of subsequent remedial measures may be admitted if the party performing the remedial conduct denies ownership of the instrumentality causing the injury or harm. In the mold context, if a defendant denies that it had any ownership interest in the mold-infested building, plaintiff will be allowed to present evidence of abatement and/or remediation efforts that were made by defendant, funded by defendant, authorized by defendant, or even so much as acknowledged by defendant.

The second exception to the exclusionary rule provides that evidence of remediating conduct may be admitted if the remediating party denies having control over the instrumentality, circumstances or event causing the injury or harm. Thus, a court may admit any evidence of mold abatement or remediation measures taken by mold defendant if it is to rebut defendant's denial of control.

Under some circumstances, parties may wish to stipulate on the control issue, rather than cause the issue to be “controverted” and open the way for admission. By stipulating that defendant indeed was in control of a given area, defendant will later be protected from a plaintiff trying to produce evidence of defendant’s subsequent remedial measures under the guise of trying to prove that the area or instrumentality was within defendant’s control. However, such an admission may be particularly problematic if there is a dispute amongst co-defendants (e.g., property owner, property manager and homeowners association) regarding who was in a position of control.

The third exception allows that evidence of subsequent remedial measures may be admitted in the event that the remediating party challenges or controverts the feasibility of precautionary measures. If a party relying on the exclusion denies that the injury could have been prevented if it had taken appropriate action, evidence of defendant’s subsequent remedial measures will be admissible to illustrate how precautionary measures were possible and yet, not performed until after the injury or harm occurred. In a mold case, defendant’s reconstruction, remodeling, rebuilding or rehabilitating of the mold-infested property could be evidence of subsequent remedial measures and admissible if that same defendant denies that any precautionary measures could have been taken to prevent the growth of mold in the subject building.

The fourth and most important exception to the exclusionary rule provides that evidence of subsequent remedial measures may be admitted if it tends to impeach the testimony of a witness. For example, evidence of such measures may be used to impeach a witness, if, after having testified that the instrumentality allegedly causing the accident was in a proper condition, he is shown to have ordered the remedial measure. In this instance, the witness can then properly be asked whether such action was not at variance with his prior statement of proper condition.^{xx}

Even if one of the exceptions is applicable, the court must still find that the evidence is probative of a permissible purpose that is actually in controversy. In the event that ownership, control or the feasibility of precautionary measures are controverted, and a party seeks to present evidence of the subsequent remedial measures, evidence of the subsequent remedial measures may still be subject to exclusion when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.^{xxi} This balancing test, however, establishes a strong presumption in favor of admitting probative evidence.

C. Investigation? Renovation? Remediation?

The reasoning of the rule excluding evidence of subsequent remedial measures encourages individuals and entities to remedy hazardous conditions without fear that their actions will be used as evidence against them.^{xxii} However, in order to qualify for exclusion under the rule, the action taken by defendant must in fact be a “remedial measure,” and not simply investigations or reports made after the event.

For example, in *Prentiss & Carlisle v. Koehring-Waterous* (1st Cir. 1992) 972 F.2d 6, plaintiff was injured when a product manufactured by the defendant caught fire. Defendant sent employees to the site of the accident to investigate. These investigations resulted in reports concerning the cause of the fire. The court held that the reports were not subject to the exclusion because they did not constitute remedial measures. According to the court, it “would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports.” *Id.*

Plaintiff may also argue that defendant's purported remediation was actually a renovation that was not responsive to plaintiff's claims or complaints. If plaintiff can convince a judge of this claim, the discovery of more mold made during renovation may become admissible. One way for defendant landlord to combat plaintiff's characterization is to have an Operations and Maintenance Plan ("O & M plan") which clearly sets forth landlord's response plan to complaints. The landlord's strict and consistent compliance with the O & M plan can help bolster its assertion that it was reacting to a claim.^{xxiii}

Additionally, evidence of subsequent repairs might not be admissible to show negligence; however, the type, location and extent of the mold may become admissible as the parties dispute the level of contamination and causation. Therefore, documents created by landlords and their consultants in the remediation process may become discoverable. Cautionary landlords will consult legal counsel regarding the preparation of reports, memoranda and other documents created during a remediation.

D. Fraud Related Claims

The general rule excluding subsequent remedial repairs does not apply to fraud-related claims. In the mold context, the subsequent remedial repairs may become critical evidence to determine when defendant landlord became aware of contamination. Although the work may be subsequent repairs, plaintiff will argue that the information gathered during the process should be admissible to prove the landlord's knowledge and subsequent failure to disclose information. Moreover, other plaintiff tenants may argue that the work was not subsequent repairs as to them, rather just investigation and therefore discoverable.

III. CONCLUSION

Spoliation of evidence in the context of mold litigation imposes significant demands on both parties and presents a number of new challenges. Practitioners in mold litigation must be wary of pre-suit spoliation in each and every circumstance where litigation is reasonably foreseeable. Both plaintiffs and defendants must painstakingly chronicle, track, and preserve evidence. Moreover, the initial discussion as to whether to investigate and collect evidence should consider litigation strategies, economic concerns and ongoing health concerns. If the desire is to avoid a spoliation of evidence claim, whether before or during litigation, the parties need to provide notice of any destructive testing and conscientiously chronicle, track, record and preserve evidence with the assistance of experts.

Evidence of abatement measures and remediation will not be admissible to prove that the remediating party was negligent. However, defense counsel for a party who has performed subsequent remedial measures must be vigilant and avoid controverting matters of control, ownership, or feasibility of precautionary measures. Witnesses in mold litigation must be made aware of the risks of their own testimony and, particularly party witnesses, must be apprised of impeachment exception to the exclusionary rule.

ⁱ *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993).

ⁱⁱ *Shimanovsky v. General Motors Corp.*, 181 Ill.2d 112, 692 N.E.2d 286 (1998).

ⁱⁱⁱ *Vodusek v. Bayliner Marine Corps.*, 71 F.3d 148 (4th Cir. 1995).

^{iv} *Lewis v. J.C. Penney Inc.*, 12 F.Supp.2d 1083 (E.D. Cal. 1998).

^v *Squitieri v. City of New York*, 248 A.D.2d 201, 669 N.Y.S.2d 589 (1998).

^{vi} These states include Alabama, Alaska, Florida, Kansas, Illinois, Louisiana, Montana, New Jersey, New Mexico, and Ohio. The general elements of a spoliation of evidence cause of action in these jurisdictions are: (1) defendant spoliator had actual or constructive knowledge of pending or threatened litigation; (2) a duty, whether contractual, legal, or in tort, to preserve evidence existed between the parties; (3) the evidence was critical to the pending or threatened litigation; (4) but for the spoliation, this plaintiff would have prevailed in the underlying, pending, or threatened litigation; and (5) plaintiff suffered damages. *Smith v. Atkinson*, 771 So.2d 429 (Ala. 2000).

^{vii} These jurisdictions include but are not limited to Arizona, Arkansas, California, Delaware, Georgia, Kentucky, Maryland, Missouri, and Texas. *Tobel v. Travelers Insurance Company*, 195 Ariz. 363, 988 P.2d 148 (Ariz.App. 1999); *Goff v. Harold Ives Trucking Co.*, 342 Ark. 143, 27 S.W.3d 387 (2000); *Temple Community Hospital v. Superior Court*, 20 Cal. 4th 464, 84 Cal.Rptr.2d 852 (1999); *Lucas v. Christiana Skating Center Ltd.*, 722 A.2d 1247 (Del. 1998); *Gardener v. Blackston*, 185 Ga.App. 754, 365 S.E.2d 545 (1988); *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997); *Miller v. Montgomery County*, 64 Md.App. 202, 494 A.2d 761 (1985); *Baughner v. Gates Rubber Co.*, 863 S.W.2d 905 (Mo.App. 1993). California, for example, initially recognized an independent cause of action for intentional spoliation of evidence in a 1984 case, *Smith v. Superior Court*, 151 Cal.App.3d 491, 198 Cal.Rptr. 829. However, the ruling of *Smith* was set aside by subsequent rulings of the California Supreme Court in *Temple Community Hospital v. Superior Court*, 20 Cal.4th 464, 84 Cal.Rptr.2d 852 (1999), and *Cedars Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 74 Cal.Rptr. 2d 248 (1998). The California Supreme Court disallowed a separate cause of action for intentional spoliation of evidence and reassumed that the policy against creating derivative tort remedies for litigation-related misconduct, the strength of existing non-tort remedies for spoliation and the uncertainty of the fact of harm in spoliation cases outweighed the benefits of creating a tort remedy. Neither *Temple Community*, nor *Cedars Sinai*, specifically disallowed a separate cause of action against a party arising from the negligent spoliation of evidence; however, just this year, in *Lueter v. State of California*, 94 Cal.App.4th 1285, 115 Cal.Rptr.2d 68 (2002), the California Court of Appeals further precluded actions against a third party for negligent spoliation of evidence.

^{viii} “Spoliation of Evidence: Trend to a New Tort,” printed with permission of author and attached.

^{ix} *Stubli v. Big D International Trucks, Inc.*, 107 Nev. 309, 810 P.2d 785 (1991); *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23 (1st Cir. 1998). See also, *Shelbyville Mut. Ins. Co v. Sunbeam Leisure Product Co.*, 262 Ill.App.3d 636, 634 N.E.2d 1319, 199 Ill. Dec. 965 (insurance company plaintiff that initially preserved and then dismantled and destroyed allegedly defective grill was barred from presenting expert testimony concerning the defects in the grill resulting in dismissal of the action); *Marrocco v. General Motors Co.*, 966 F.2d 220 (7th Cir. 1992) (product liability plaintiff, in violation of protective order, arranged for private examination of evidence by its experts resulting in destruction of the evidence; the Court was within its discretion in ordering dismissal of the action); *Wong v. City and County of Honolulu*, 665 P.2d 157 (Hawaii 1983) (sanctions for spoliation of evidence include: 1) an order that the matters regarding which the order is made shall be taken to be established for the purposes of the action; 2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters into evidence; or 3) an order striking out pleadings or parts thereof, or staying further proceedings until order is obeyed or dismissing the action or proceeding or party or rendering judgment by default against the disobedient party).

^x *Malone v. Foster*, 956 S.W. 2d 573 (Tex. 1997).

^{xi} *Tracy v. Cottrell*, 206 W.Va. 399, 524 S.E.2d 879 (1990).

^{xii} *Travelers Insurance Co. v. Dayton Power & Light Co.*, 76 Ohio Misc.2d 17, 663 N.E.2d 1383 (1996).

^{xiii} Some jurisdictions will permit such an order if litigation is imminent and the evidence may not be later available.

^{xiv} Not only is the mold plaintiff limited to the type of evidence gathered, a mold plaintiff is also subject to criticism and eventual evidentiary challenges if evidence is gathered in a fashion deemed inappropriate. For example, in the well known *Ballard* case, defendant argued in a successful *Kelly-Frye* motion that plaintiffs' evidence was collected by unqualified individuals and was subsequently preserved improperly. Mealey's Litigation Report: Mold, August 2001, Vol. 1, Issue No. 8.

^{xv} Mealey's Litigation Report: Mold, June 2001, Vol. 1, Issue No. 6, citing Oregon case *O'Hara v. Stangland*, No. 16-00-12848 (2001).

^{xvi} Fed. R. Evid §407, Notes of Advisory Committee on Rules.

^{xvii} Fed. R. Evid §407, Notes of Advisory Committee on Rules.

^{xviii} Fed. R. Evid §407, Notes of Advisory Committee on Rules.

^{xix} Consistent with the general common law rule, the California Toxic Mold Protection Act of 2001 (SB 732), which establishes a task force to identify whether permissible exposure levels are feasible and to establish remediation standards, will not require sellers or landlords to disclose prior mold remediations.

^{xx} *Sanchez v. Bagues & Sons Mortuaries* (1969) 271 Cal.App.2d 188, 76 Cal.Rptr. 372.

^{xxi} Advisory Committee Note to the 1997 Amendment to Federal Rule of Evidence 407.

^{xxii} *Pau v. Yosemite Park & Curry Company* (9th Cir. 1991) 928 F.2d 880.

^{xxiii} See Mealey's Litigation Report: Mold, September 2001, Vol. 1, Issue No. 9, pp. 34-36.