Scribbles Squibs[1] # 60 (January 25, 2018):

WHAT IS SPOLIATION OF EVIDENCE AND HOW THIS CAN COST MASSACHUSETTS CONTRACTORS WHO DON'T UNDERSTAND IT BIG MONEY

By Massachusetts Construction Attorney Jonathan Sauer

I. INTRODUCTION.

"Spoliation" doesn't describe a situation where the cream is curdling in your coffee or when the hamburger in the fridge is of a particularly questionable color of dark gray and/or smell. Rather, this is a doctrine to describe a situation where a claim or a defense to a claim with regard to a products liability claim or a personal injury claim caused by a widget/material/part/piece of machinery goes bad because the proper steps have not been taken to preserve the physical evidence. This isn't particularly complicated to understand but it's something that you, the contractor, need to understand, as this will describe events/happenings almost certainly occurring before you turn the matter over to your lawyer, at which time it may be too late to protect yourself if the right things haven't already been done. Meaning, that the defective part went into the dumpster and is long gone.

This might have special significance where your company is a defendant in a products liability case or in a personal injury case where you would expect to be defended by your insurance company. Written into all insurance policies are provisions in which the insured promises to act in good faith towards its own insurance company and to cooperate with its own insurance company in claims situations. If a spoliation claim or defense is successfully made against your company, your insurance company might decline coverage, claiming that your company failed to comply with these two clauses and prejudiced your insurance company by your acts and omissions.

For this Squib, we'll be discussing a products liability claim by my client, a plumber, against a manufacturer involving a defective plumbing fitting and a personal injury case involving a claimed defective switch in a circular saw involving my client, the manufacturer of the circular saw.

Unlike some of the subject matters discussed in these digital papers, defining this problem is relatively easy, as are making some suggestions as to the protection of physical evidence in your possession. This should be one of the shorter Squibs.[2]

What is 'spoliation'? This is how this is defined in Black's Law Dictionary:

"The intentional destruction, mutilation, alteration or concealment of evidence, usu.*(sic)* a document".

"Spoliation of Evidence" refers to physical materials that are negligently or intentionally destroyed or changed before the opposing parties in a subsequent litigation have an opportunity to see, evaluate and test them, which results in unfair prejudice to the opposing party. And, as stated above, spoliation of evidence can apply to documents in addition to applying to physical things.

'Spoliation' in a construction context will usually apply to something physical (e.g. valves, couplings, switches, fire sprinkler heads). This could become an issue in a products liability case where a defective part cost a contractor some serious change and he wanted to chase the manufacturer to try and get his money back. And, it could also become a factor in a personal injury case, where someone claimed to be injured by a defective product. I'll give examples of each.

A. A DEFECTIVE PRODUCT FAILED AT A CONSTRUCTION PROJECT COSTING THE PLUMBER SOME BIG MONEY IN THE PROCESS.

The following is an example of how one of my clients properly retained and maintained a defective part that they would want some compensation for and did, actually, receive some substantial compensation for.

A public owner advertised for general contractor and trade contractor bids for the construction of its high school (PROJECT). A general contract was entered into between the owner and the general contractor.

My guy, the plumber, (MY GUY), entered into two subcontracts, one an HVAC contract and, the other, a plumbing contract.

A pipe supplier (PIPE GUY) submitted a two page price quotation (Proposal) to MY GUY with regard to various copper tubing. MY GUY issued in response to the Proposal, a one page purchase order (Purchase Order) to buy one unit of "Copper Pipe & Fittings". Purchase Order specifically includes a reference that "All equipment shall be per plans & specifications", which PIPE GUY never took exception to.

MY GUY installed various 1 ½" elbow joints (Fittings) at Project, as manufactured by a certain company we'll call FITTINGS GUY. These failed during the construction phase, which caused water leaks. MY GUY began replacing some of these and, eventually, ended up replacing all of such Fittings as he had installed, incurring costs of approximately $90,483.03 in doing so.

This was a prevailing wage job. And the FITTINGS GUY in its catalog had all kinds of reservations and exceptions as to being held responsible and as to the terms of the several warranties involved.[3] That catalog said that in the event of a part failure, the contractor would be entitled to a new part and ten dollars to install it!

MY GUY guy provided to FITTING GUY'S representative some of the fittings that had failed.

MY GUY had some of the fittings tested by a couple of PHD's from MIT, who prepared a report saying that the part was defective. No destructive testing was performed on the parts.

The long and the short of it was that the FITTINGS GUY sent a representative to a walk-through where the defective parts were stored, who had some authority to make decisions. MY GUY's claim for $90,483.03 fairly quickly was settled for around seventy thousand dollars with no suit, no mediation and no arbitration. There was no discussion about limiting the labor element of the warranty to ten dollars, which FITTINGS GUY attempted to accomplish in its catalogue. (This is an object lesson that the fact that something is in writing doesn't mean that this complies with the law, is enforceable or even reflects the nature of the negotiations that would subsequently occur.)

B. A CLAIMED DEFECTIVE SWITCH CONTAINED WITHIN A TWENTY-ONE YEAR OLD CIRCULAR SAW WAS ALLEGED TO HAVE CAUSED A SERIOUS PERSONAL INJURY.

> I was involved in a personal injury case some years back where a homeowner alleged that he cut his leg with a circular saw manufactured by my client. The Plaintiff's contention was that while he was holding the saw, which was 21 years old and had been kept rather carelessly in a pile of tools under a workbench, with the saw turned 'off' and with his finger off of the on-off switch, the saw started up on its own and thereafter seriously cut his leg. Obviously, of key importance in this case was whether or not the switch was defective, including whether the switch failed in the 'on' position or in the 'off' position. It was necessary to perform destructive testing to determine if or how the switch failed. When such becomes necessary, it is imperative that the expert witnesses between themselves determine what kind of test(s) will be performed on the defective part and by whom. This should only done with all parties having an opportunity to see the item of material and in such a manner that the opposing expert witness will not claim that your guy performed the test negligently or performed, possibly, the wrong test. With the circular saw case, the opposing experts determined that it was necessary to perform destructive testing. They agreed on a methodology for performing this testing. Here spoliation was not an issue. The case did not settle for big money.[4]

II. THE LEGAL STUFF.

In the case of FLETCHER v, DORCHESTER MUTUAL INSURANCE COMPANY 437 Mass. 544, page 549, 550 (2002), the Massachusetts Supreme Judicial Court stated:

"We have implicitly recognized that persons who are actually involved in litigation (or know that they will likely be involved) have a duty to preserve evidence for use by others who will also be involved in that litigation. Where evidence has been destroyed or altered by persons who are parties to the litigation, or by persons affiliated with a party (in particular, their expert

witnesses), and another party's ability to prosecute or defend the claim has been prejudiced as a result, we have held that **a judge may exclude evidence to remedy that unfairness**. . . .

Again, however, in recognizing such a duty, we simultaneously crafted the remedy for spoliation within the context of the underlying civil action. Sanctions in that action are addressed to the precise unfairness that would otherwise result. Thus, for example, **an expert's testimony (or portions thereof) may be excluded so that the expert would not have the unfair advantage of posing as "the only expert with first-hand knowledge" of the item.** (Case cited) of such a remedy must also take into account the party responsible for the spoliation. See *Kippenhan v. Chaulk Servs., Inc., supra* at 128, 697 N.E.2d 527 (defendant's spoliation of evidence did not preclude plaintiff's expert from testifying against codefendant). **Not only do we impose the sanction of excluding testimony, but we do so recognizing that such exclusion of testimony may be dispositive of the ultimate merits of the case, thereby imposing the ultimate sanction on the party responsible for the spoliation.** See *Nally v. Volkswagen of Am., Inc., supra* at 195, 199, 539 N.E.2d 1017 (summary judgment for defendant may be appropriate if exclusion of expert testimony prevents plaintiff from making out prima facie case). Of course, if spoliation occurs in violation of a discovery order, various sanctions, including dismissal or judgment by default, may be imposed for that violation. See Mass. R. Civ. P. 37(b)(2), 365 Mass. 797 (1974)." (Emphasis added)

Massachusetts does not recognize a cause of action for spoliation. In other words, the fact that a party participates in spoliation of evidence doesn't mean that it can be sued for doing so. Massachusetts courts do, however, allow "for a broad range of remedies for spoliation of evidence, including default, dismissal, exclusion of evidence, permitting adverse inferences against the spoliator, allowing the aggrieved party to present evidence about the pre-accident condition of the lost evidence and circumstances surrounding the spoliation, and instructions to the jury on adverse inferences that may be drawn from the spoliation." The rule excluding evidence as a remedy for spoliation is based on both the unfair prejudice that would otherwise result and the fact that there was a negligent or intentional destruction of physical evidence.

What does all of that mean?

1. Your case could result in a default or a dismissal, meaning that your case could be over before you had your day in court and you lost it.
2. Your evidence could be excluded, particularly as to your expert witness, if this individual was the only expert witness to actually examine the defective part. And, since most products liability cases will require expert witnesses to identify the defect, without this evidence, your case might be dismissed because you are not able to provide testimony on all of the elements necessary to prove your case.
3. Instructions to the jury concerning an adverse inference the jury could be made. A possible example relative to the judge's charge to the jury, which are his instructions at the end of the case before the jury is sent out to deliberate: "You may infer from the destruction of physical evidence by the plaintiff that plaintiff's expert witness's examination of that physical evidence did not find any defect with the product and that may explain why it was destroyed."

4. If the spoliation of the evidence occurs during the pendency of the case, then other bad things can happen, such as the imposition by the judge of financial sanctions against the party and/or its lawyer.

III. SUGGESTIONS WITH REGARD TO THE HANDLING AND PROTECTION OF PHYSICAL EVIDENCE.

1. Initially, do not throw it away. And, if you have several defective pieces, save them all. If it is likely to be the subject of subsequent claims and litigation, typically involving personal injury claims or product liability claims, the physical item of material must be available down the road for observation, evaluation and testing by all parties. If the problem involves enough money, there will be experts on each side who will want to test the product or at least observe the testing of the product.

2. At the very least, maintain the item of material in its *exact* physical state when it became an issue, most likely through some form of failure.

3. What is usually *better* is maintaining the item of material in a better state than it was in when it failed. So, for example, if the item of material failed while it was outside in the rain, preferably after getting the 'go ahead' from your counsel, bring the physical item indoors for storage. An advantage of this is the item will not get *further* damaged. You don't want to put yourself in the position of having opposing counsel argue that the condition of the part claimed to have failed is impossible to determine based on the subsequent damage the item of material suffered under your care by being improperly stored.

4. When storing an item of material, consider what might be the special requirements of that specific material. For example, it may be necessary to store the material at a certain level of humidity. The item may have to be stored at a certain temperature. The item of material may be such that it might degrade if exposed to direct sunlight. Therefore, determining as quickly as possible the best possible situation there might be for the storage of the item is of paramount importance.

5. Store the item *separately* from other exact materials of the same kind that are new and/or have not yet been incorporated into the work. Again, you don't want to put yourself in the position that opposing counsel can argue that due to the way the material was stored, it can't be determined which item of material was claimed to have failed.

6. If you retain an expert witness to evaluate the material, **DO NOT LET HIM/HER DO ANY DESTRUCTIVE TESTING OF THE MATERIAL** until the other side is able to have its expert also examine the material. Many experts will get fixated just on trying to determine why the item failed and not on what the effect of destructive testing might be with regard to the material and, further, what the effect of destructive testing might be on any case you are or might later be involved in. Any destructive

testing should only be performed with approval of opposing counsel and/or his/her expert witness, who should be offered the opportunity of being able to be present during the testing and, in fact, make some suggestions as to how the test should be performed.

7. Make sure that you make a video of whatever form of destructive testing that is done. If it is the other side that is making the video of material in your possession, allow the other side to do so only if it will provide you with a copy of its video. They may ask the same of you and it is a reasonable request which doesn't prejudice anyone. Keep in mind that while your video will capture both audio and visual, most likely, the audio portion of your video will not be played in court due to the fact that this is hearsay evidence and especially self-serving evidence.

8. Make sure the experts come to some agreement as to how the defective part will be stored, by whom and under what conditions after whatever testing occurs.

IV. CONCLUSION.

Look, you have installed some part and it fails. Your contracting party tells you to 'fix it', which you do, incurring, possibly, some significant costs. You want to put yourself in the position of being able to try to get reimbursed for these costs in any case you might file against the manufacturer, a distributor, a retail outlet and possibly others in the 'stream of commerce' of that particular part. Maintaining and protecting the physical evidence without performing destructive testing on the part(s) until the other side has had a chance to examine it helps you in your attempts to recover damages. But, damaging that part or throwing it away prematurely and under the wrong circumstances could invoke a claim by the other side of 'spoliation of evidence' and this could cause you to lose your case because of it.[5]

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"Knowledge is Money In Your Pocket! (It Really Is!")[6]

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[1] A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] Shorter as compared with what? About the same length as 'War and Peace' (1296 pages at Amazon on January 1, 2018) when it first came out? The unabridged version? The one without the pictures? Russian novels seldom have pictures. This may help explain some Russians' dour expressions, along with their having to deal with all of the cold and snow and recalcitrant Communists. I remember trying to read 'The Idiot' by Fyodor Dostoevsky. I recall it was a very dark novel. And, I quit reading it at about one thousand pages (no joke!), as it had *plenty* more pages to go and it was depressing the heck out of me! That kind of length makes Stephen King look like an underachiever, his novels looking more like short stories. And, who would willingly read that many pages without even finishing the book? I guess that person would have to be an idiot. Maybe only an idiot would read a book about *another* idiot. What? Could he be looking for pointers as to how to become a *better* idiot? But, going back to length, just as with some other things, size may matter. But, happily, when discussing the length of Squibs, some would say the shorter the better! Something that can just make an average-type person smile.

[3] The fact that there is language in a catalog reciting what the injured party's rights are is not necessarily correct. And, there are some rights that simply can't be erased even where the catalog says that they can. For example, although, technically, it can be done, it is difficult to cause someone to waive various implied warranties under the Uniform Commercial Code, such as an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. When we met with the manufacturer's representative on the defective pipe fitting, he didn't even

mention the ten dollar limitation on installing the replacement part, paying my guy a substantial portion of his damages without MY GUY's even having brought suit yet. Had we sued, we would probably have gotten more.

[4] The settlement of this case was a bit weird. The Plaintiff's lawyer, who practiced with his daughter, had wine and cheese available for those attending a 'settlement meeting'. That is the only time I have ever seen *that* happen! This didn't help get him any more money, however, the settlement being for a very nominal amount, what is called a 'cost of defense' offer. As I recall, the case settled for about 15k, which was not a lot of money considering that the individual actually did receive a serious injury, however it was caused.

[5] A Squib with only five and one-half pages of text? I *told* you that this Squib was going to be short! I'll just take the extra twenty or thirty pages that s*hould* have been in this Squib, triple it, and then fold all of that into the next Squib, which is already running really long all on its own, not even being half done. That'll make *that* Squib look as if it were written by old Fyodor himself. Except, that couldn't happen, his being, unfortunately for him, a Russian on the unhappy side of the dirt.

[6] I say this because it is true! Our spring seminars are coming up shortly in April and May. If you go to any one of them, I *guarantee* that you will learn *something* of value. Otherwise, every dime you pay for these free seminars will be cheerfully and immediately refunded! And, if you do very well on the final examination and ask nicely and promise not to move around a whole lot or look too much like a capitalist, maybe I'll give you a ride in the sidecar of my new Ural Patrol (Russian) motorcycle, these motorcycles manufactured in Irbit, Russia, which is in Siberia at the base of the Ural Mountains. Siberia, a place that by comparison makes St. Paul, Minnesota look like Miami Beach in August. Ural motorcycles were widely used by the Russians in World War II, the design of which was provided to the Russians by the Germans based on a 1930s' BMW. (They still look very much like a BMW 'boxer', which bikes are still being made today.) This was when Russia and Germany were making nice in the early days of World War II, before the Germans decided that fighting a war on two fronts was really in their best interests. At one point in time, 10,000 people worked at their factory, which was virtually all of the adults in the town of Irbit. The factory currently employs about 140 people, exporting about 900 bikes to the US per year. One of the biggest distributors for these bikes just happens to be located in Boxborough, MA, up 495 a bit. Having a military heritage – you can still buy a Gear-Up in a camouflage color – this is the *only* motorcycle in the world where a civilian can actually order (no joke!) a machine gun mount as an accessory. I plan on getting one. You never know when you might unexpectedly come upon a gaggle of architects. A fellow has to be prepared for contingencies and to be in a position to take advantage of his opportunities. Lock and load.