



**HAS EVIDENCE BEEN SPOLIATED?
IF SO, A MOTION TO DISMISS MAY BE IN ORDER**

By Steven R. Goldstein, Esq.¹

Quite often we are asked to defend an action in which a claim is made against a design professional that damages occurred as a result of improper design and/or construction phase services performed by the design professional. More specifically, it is often the case that damages occur as a result of the failure of a product or element of the construction which may have been designed or specified by the architect or engineer, or the subject of inspections or observations by the design professional during the project.

In many instances, the very element that failed has been destroyed, altered or discarded (spoliated) and subsequently replaced, thereby rendering it impossible for the design professional to determine the cause of the failure and whether the services performed by the architect or engineer in any way caused or contributed to the alleged failure. Under such circumstances, a claim against the design professional may be ripe for a motion to dismiss on the grounds of spoliation of evidence.

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The Courts have routinely held that it is appropriate to dismiss a Complaint when it is found that a party destroyed, lost, or in some way altered evidence before it could be examined by the opposing party's expert. In determining the appropriateness of striking a Complaint on the grounds of spoliation of evidence, the Court takes into consideration the following factors:

1. Was the party that destroyed the evidence on notice that the evidence might be needed for future litigation? The Courts have held that if there was such notice, it is appropriate to strike the pleading even if the destruction of evidence occurred through negligence rather than willfulness on behalf of the spoliating party;
2. What is the extent that the spoliation of evidence may prejudice a party? The Courts often look to see whether the result of spoliating the evidence severely and irreparably prejudiced the design professional's defense of the action; and
3. Is a dismissal necessary as a matter of elementary fairness? Courts look to determine whether the conduct of destroying the critical evidence resulted in the failure to provide the design professional with an opportunity to inspect the evidence in order to determine the cause of the failure, necessary to evaluate liability exposure for the incident.

When failure at a project occurs (including piping, roofing, etc.) it may be that the element was improperly designed and/or specified and/or constructed. Therefore, in order to properly evaluate and assess liability exposure, if any, on the part of the design professional, it is imperative that the architect or engineer, and/or the appropriate expert retained on behalf of the architect or engineer, be provided with an opportunity to inspect the elements at issue in order to determine the cause of the failure.

Without an opportunity to inspect such elements, an argument can be made that it is impossible to determine the cause and origin of the alleged failure and resulting damages. This inspection and testing is necessary and essential to the preparation of the design professional's defense. When such inspection and testing cannot be performed we often argue that the design professional has been severely and irreparably prejudiced in the defense of the matter. Under such circumstances, the appropriate course of action may be to serve a motion to dismiss the action against the design professional on the grounds of spoliation of evidence.

This article is intended only as a general discussion of the subject topic and as such does not create an attorney-client relationship with the reader and is not meant to provide legal advice in any manner.