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Thank all of you who joined us at the 2007 DRI Annual Meeting in Washington, DC in October. In addition to having outstanding presentations by the Annual Meeting speakers each day, we were most fortunate to have two very well received presentations at our Aerospace Committee meeting—the first by Gary Halbert, General Counsel of the National Transportation Safety Board, and the second by Aileen Camacho, Aviation Legal Consultant—Latin America and Caribbean for Gates and Partners. For the first time that I can recall we had more people attending the Committee presentations than we had seats available in the room, and no one left disappointed. Our Aerospace Committee Chair for the Annual Meeting, Gordon Woodward from the DC office of Schnader, did an outstanding job coordinating with our speakers, sending notices to our Committee members about the meeting, and handling on-site logistical issues—thank you, Gordon! I am pleased to announce that Greg Carboy of Cowles & Thompson has agreed to serve as our Aerospace Committee Chair for the 2008 Annual Meeting. The 2008 Annual Meeting will take place on October 22-26 in New Orleans. Note this on your planning calendars now, and do not hesitate to reach out to me, Vice Chair Andy Harakas or to Greg if you have any suggestions for our 2008 committee program.

I strongly encourage all of you also to consider attending the 2008 DRI Product Liability Conference on February 6-8 at the Arizona Biltmore. The Aviation SLG (with which our Aerospace Committee closely coordinates) again has an outstanding program scheduled, including a presentation by Phil Rush of Martin Bischoff about conversion and modification of military surplus aircraft; a panel presentation by Bill Behan of AirSure, Tim McSwain of Allianz and Steve Prieser of Cutter Aviation about product liability concerns and strategies; and by Dr. Lee Dickson of Exponent about NTSB investigations.

I am pleased to report that our Aerospace Committee membership roster continues to grow steadily. We need your assistance as we outreach to a more diverse potential membership from law firms, including not only the current leaders of the aviation bar, but also the rising practitioners who are the future leaders of the aviation bar, and also greater representation from aviation insurers, manufacturers, airlines, and aviation industry groups. I challenge each of you to recruit just one additional member to our Committee in 2008 as we expand the services and leadership opportunities within the Committee.

On the subject of services, we need to hear your suggestions for how we can improve the substantive content and usefulness of our Aerospace Committee web page. We have begun posting meeting presentations on the web page, and seek to add articles prepared by Committee members, significant appellate briefs on pertinent topics, and similar materials. We also solicit your suggestions for teleconference or other CLE programs that our Committee can host. We have targeted early 2008 for our first Aerospace Committee teleconference CLE program—stay tuned for more information. We also seek your ideas for article topics for an upcoming issue of *For The Defense* and our next *Skywritings* newsletter.

Finally, we are taking a fresh look at our entire Aerospace Committee leadership roster, and anticipate making new steering committee appointments in 2008. These positions provide outstanding opportunities to network with and learn from other aviation practitioners and from the broader leadership group of DRI. If you are interested in serving in one of these leadership positions, please contact either me or Andy Harakas.

I hope to see you in Arizona in February and in New Orleans in October. Enjoy the newsletter, and fly safely!

February 07, 2008

Forum Non Conveniens After Sinochem: Where Litigants Stand After The Supreme Court's Recent Ruling

Forum non conveniens has long been an important tool utilized by aviation defense lawyers to keep plaintiffs from litigating cases in the United States that have a tenuous or non-existent connection to the United States. Typically, a motion to dismiss on *forum non conveniens* grounds is warranted when a foreign plaintiff commences litigation in the United States for an accident that occurred outside of the United States and where the majority of witnesses, evidence and parties are also located outside the United States. Frequently, United States residents will be named as defendants for the sole purpose of establishing a connection with the United States that otherwise would not exist. While plaintiffs will always concoct a hodgepodge of reasons why the case belongs in the United States, the simple reality is that plaintiffs want access to the notoriously generous U.S. jury system, liberal discovery rules and risk-free litigation that does not require the loser to pay fees and costs.xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

Traditionally, substantial deference is paid to a plaintiffs' choice of venue and the defendant has the very heavy burden of proof with respect to changing venue via a motion to dismiss on *forum non conveniens* grounds. In order to prevail on a *forum non conveniens* motion, as set forth in the seminal case of *Piper Aircraft Co. v. Reyno*, [1] a defendant must establish that there is an "available and adequate alternative forum" and that a weighing of both public and private factors favors the available and alternative foreign forum. In short, a forum is "available" if it has jurisdiction over all the parties and claims, and "adequate" if the plaintiff can make a meaningful recovery. While the weighing of private and public interests is a fact sensitive process unique to every case, ultimately the focus is on selecting a forum where the "trial will best serve the convenience of the parties and the interests of justice."[2]

As aviation cases ripe for a *forum non conveniens* motion to dismiss almost always involve complicated jurisdictional issues due to the international element of the claims, courts have traditionally been split with respect to whether jurisdiction must first be established before the court can decide a motion to dismiss on the grounds of *forum non conveniens*. A recent decision by the Supreme Court of the United States in *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp*[3] has cleared the path for federal courts to rule on motions to dismiss on *forum non conveniens* grounds without having to first tackle jurisdictional issues.

Before *Sinochem*

Prior to the Court's holding in *Sinochem*, there was a split amongst the Circuit Courts with respect to whether jurisdiction must first be established before a decision on a *forum non conveniens* motion can be issued. Some Circuit Courts held that courts may grant *forum non conveniens* dismissals without conclusively establishing jurisdiction,[4] while others required that jurisdiction be established prior to deciding a *forum non conveniens* motion.[5]

This above-described inconsistency stems from a prior Supreme Court decision holding that courts cannot make decisions on the merits of a case without first being assured they have jurisdiction.[6] This was interpreted by some Courts to mean that jurisdictional questions must be answered first, in every case, regardless of the existence of other non-merits issues. Problems arose, however, when courts were faced with complex jurisdictional questions and a relatively simple *forum non conveniens* question.

***Sinochem*—Paving the Way to Sidestepping Jurisdiction**

In *Sinochem,* decided March 5, 2007, the Supreme Court unanimously held that a district court may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant. Essentially, the rationale behind the decision was that the issue of jurisdiction only needs to be addressed when the Court is going to issue a judgment on the "merits"—the actual contentions regarding the subject matter of the litigation. Courts may address certain non-merits issues, such as *forum non conveniens*, without first considering their own jurisdiction. As a *forum non conveniens* dismissal is a determination that the merits of the case should be adjudicated elsewhere, the issue of jurisdiction does not need to be resolved for a court to render a decision with respect to a *forum non conveniens* motion.

The case involved a Chinese state owned importer (Sinochem), which purchased steel coils from an American corporation (Triorient). These coils were to be paid under a letter of credit by producing a valid bill of lading certifying that the coils had been loaded for shipment to China on or before April 30, 2003. Triorient subchartered a vessel owned by Malaysia International to transport the coils. The dispute between Sinochem and Malaysia International arose over the bill of lading, which Sinochem alleged was falsely backdated. Sinochem petitioned a Chinese court, which subsequently ordered the ship arrested. After unsuccessfully arguing before the Chinese court, Malaysia International filed suit in a United States District Court in Pennsylvania, seeking compensation for losses sustained due to the ship's arrest.

Consequently, Sinochem moved to dismiss on several grounds, including lack of jurisdiction and *forum non conveniens*. The arguments raised during these motions resulted in this matter being appealed to the 3rd Circuit Court of Appeals and, finally, to the Supreme Court of the United States.

Ultimately, the Court held that "a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold question. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case."[7]

The unanimous ruling in *Sinochem* indicates the Supreme Court's intention to promote judicial economy by providing district courts with the means to avoid congesting their dockets with cases that will clearly be litigated elsewhere. *Sinochem* will benefit the aviation defense lawyer who frequently files motions to dismiss on *forum non conveniens* grounds, as no longer will jurisdictional hurdles need to be cleared in order to get resolution on such a motion. Additionally, as the federal courts are now alleviated from having to devote resources to addressing jurisdictional issues, decisions on *forum non conveniens* motions likely will be issued at a quicker pace. Although future decisions will determine whether the *Sinochem* ruling will achieve this goal, its present application is limited, for purposes of *forum non conveniens,* to matters involving foreign plaintiffs.

The Court in *Sinochem* explicitly noted that its decision would not address conditional *forum non conveniens* dismissals. A conditional dismissal is granted when the court agrees with the defendant's contention that the merits of the case should be litigated elsewhere but, in order to provide the plaintiff with some degree of protection, the court imposes certain conditions along with the dismissal. Generally, these conditions require the defendant to voluntarily submit to the jurisdiction of the foreign court, to accept service of process or to waive statute of limitations defenses. By requiring a conditional dismissal, the plaintiff is safeguarded from 1) the foreign tribunal opting to not hear the case or 2) potentially unsavory tactics by the defendant that would deny the plaintiff an opportunity to have the case adjudicated. Thus, should the defendant fail to abide by the dismissing court's conditions (*e.g.*, by refusing to appear in the foreign jurisdiction), the plaintiff can petition the court to rehear the case.

In contrast, one compelling reason for a court to grant an unconditional *forum non conveniens* dismissal, as was the case in *Sinochem*, is the defendant's involvement in ongoing proceedings in a foreign tribunal that are directly related to the subject matter at issue in the case before the United States court. In such cases, which are often referenced as "textbook" *forum non conveniens* situations by the courts, the plaintiff is protected because the defendant already submitted to the foreign tribunal's jurisdiction and there is no doubt as to whether the foreign tribunal will hear the case.

Thus, *Sinochem's* most immediate impact will be the savings in judicial resources and time and litigation costs for the parties in "textbook" *forum non conveniens* cases. These savings will be realized as federal courts now have the means of bypassing non-merits issues (e.g., jurisdiction), which often involve extensive litigation, where the resolution of those issues is futile and unnecessary given the fact that the case ultimately is destined to be litigated elsewhere. Moreover, the *Sinochem* decision further illustrates that, as between non-merits issues such as jurisdiction and *forum non conveniens*, there is no order of preference, and judicial economy would dictate tackling whichever issue ensures the most efficiency.

Nonetheless, one important factor to consider with regard to the *Sinochem* ruling is its potentially limited scope and application. *Sinochem* provides a clear rule only in situations where multiple non-merits issues need be addressed and one such issue can be resolved with minimal effort while the other issue is more complex and will require greater scrutiny and judicial resources. As such, when the former is resolved in a manner favoring dismissal, then the case can be dismissed without having to address the latter, thereby saving time and costs. However, potential issues can arise in defining what constitutes a "complex issue", thereby leaving open an avenue for potential inconsistencies in *Sinochem's* application. More importantly, the Court's decision to not address jurisdictional requirements in cases involving conditional dismissals leaves the door open for jurisdictional challenges of a dismissing court's order. The common argument raised with regard to a conditional order issued without first resolving jurisdiction is that a court cannot exercise power (*e.g.*, by requiring the defendant to submit to a foreign jurisdiction) over a party when the issue of whether that party is subject to the court's jurisdiction has yet to be resolved. In other words, the court should not issue orders when its authority to do so has not yet been established. Therefore, until it is addressed by the United States Supreme Court, lower courts are likely to continue to disagree on this issue.

Conclusion

Forum non conveniens will continue to be a valuable tactic for defendants to use against plaintiffs engaging in "forum shopping." While *Sinochem* might be limited in application, it ultimately will prove to be an important tool in promoting judicial economy and saving parties the costs of unnecessary discovery and litigation on jurisdictional issues. The judiciary can now resolve simple *forum non conveniens* motions without having to address complex jurisdictional issues in a case that will ultimately be decided in a foreign venue. Hopefully, this will lead to quick decisions on *forum non conveniens* motions that will not only maximize judicial resources but spare the parties the unnecessary costs of litigating complex jurisdictional issues in cases that are in any event destined for adjudication in a foreign venue.

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[i] The authors gratefully acknowledge the assistance of Kevin Moore and Paul Bowles in the preparation of this article.

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[1] 454 U.S. 235 (1981).

[2] *Koster v. Am. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 527 (1947).

[3] 127 S. Ct. 1184 (2007).

[4] *In re Papandreou,* 139 F.3d at 255 256.

[5] *Dominguez Cota v. Cooper Tire & Rubber Co.,* 396 F.3d 650 (5th Cir. 2005).

[6] *Steel Co. v Citizens for a Better Env't,* 523 U.S. 83 (1998).

[7] *Sinochem*, 127 S. Ct. at 1188.

February 07, 2008

Precluding Plaintiff's Use Of The NTSB Probable Cause Report At Deposition Or Trial

Pursuant to federal statute, the probable cause portion of a National Transportation Safety Board ("NTSB") report is not admissible in evidence. Specifically, 49 U.S.C. §1154(b)(2007) (hereinafter "the Statute") provides: "No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." A "report of the Board" is defined as "the report containing the Board's determinations, including the probable cause of an accident, issued either as a narrative report or in a computer format." (49 CFR §835.2).

Relying upon the Statute, courts have consistently held that the NTSB's Probable Cause Report is not admissible into evidence, including during the summary judgment stage of litigation. (*See Curry v. Chevron, USA*, 779 F.2d 272 (5th Cir. 1985); *Chiron Corp. v. NTSB*, 198 F.3d 935 (D.C. Cir. 1999); *Travelers Ins. Co. v. Riggs*, 671 F.2d 810 (4th Cir. 1982); *Petroleum Helicopters, Inc. v. Rolls-Royce Corp.*, 2007 U.S. Dist. LEXIS 56549 (S.D. Ind. 2007); *Esparza v. Eagle Express Lines, Inc.*, 2007 U.S. Dist. LEXIS 22382 (E.D. Tex. 2007)). Courts have consistently precluded parties and their experts from referring to or relying upon the NTSB's conclusions. (*See Dowe v. National Railroad Passenger Corp.*, 2004 U.S. Dist. LEXIS 9450 (N.D. Ill. 2004); *Barna v. United States of America*, 183 F.R.D. 235 (N.D. Ill. 1998); *In re Air Crash Near Roselawn*, 1997 U.S. Dist. LEXIS 13788 (N.D. Ill. 1997); *Major v. CSX Transp.*, 278 F. Supp. 2d 597, 603-04 (D. Md. 2003)).

Notwithstanding the statutory prohibition, a skilled lawyer may attempt to capitalize on a conclusion favorable to his or her client by asking questions about the NTSB's Probable Cause Report at depositions of parties and experts. If you anticipate questions about the Probable Cause Report, you will be better able to (1) object and make a clear record at the deposition, and/or (2) preclude such questions and testimony at trial.

During a deposition, counsel seeking to capitalize on a favorable Probable Cause Report will (1) ask if the witness if he or she is familiar with the NTSB's investigation and/or conclusions; and (2) whether he or she agrees with the conclusions.[1]

If you are counsel defending that deposition, you should immediately object to all references to and questions concerning the NTSB's Probable Cause Report. The basis of the objection is that 49 U.S.C. § 1154(b) prohibits all such references and questions. It is well settled that the scope of discovery is broader than the scope of admissibility. The language of the Statute, however, explicitly extends beyond admissibility by inclusion of the prohibition against *use* of the NTSB report in civil litigation. While there is no case law on point, a strong argument can be made in favor of instructing a witness not to answer questions referring to or relating to the NTSB's Probable Cause Report. Before instructing a witness not to answer, however, you should be familiar with the relevant local rules concerning when you can and cannot instruct a witness not to answer. xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

Even if a witness is required to answer over your objection, the questions and answers likely will not be admissible at trial. Assuming that opposing counsel attempts to use the deposition transcript or ask the offending questions at the time of trial, the arguments favoring preclusion are significantly stronger. When faced with the admission of such offending testimony, you should assert two objections. First, object on the basis that the Statute precludes such testimony. Second, argue that counsel is attempting to elicit testimony that will usurp the function of the jury, as one express purpose of the Statute is to prevent such a result. (*See Petroleum Helicopters*, 2007. U.S. Dist. LEXIS 56549 ("The purpose of this statute [49 U.S.C. § 1154(b)] is to prevent embroiling the NTSB in controversial issues, preserve the impartiality of the NTSB, to prohibit the presentation of opinion testimony, and to prevent the NTSB's reports from usurping the function of the jury.") (*citing* 49 C.F.R. § 835.1 and *Universal Airline v. E. Air Lines*, 188 F.2d 993 (D.C. Cir. 1951)).

With one exception, all courts addressing the issue have ruled that the NTSB's Probable Cause Report, including any reference thereto, is inadmissible. The sole exception is the Sixth Circuit Court of Appeals' decision in *Hickson Corp. v. Norfolk Southern Railway Co*, 124 Fed. Appx. 336 (6th Cir. 2005), in which the court allowed such testimony based on the "invited error rule". The invited error rule refers to "an error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling." (BLACK'S LAW DICTIONARY 582 (8th ed. 2004)).

In *Hickson*, the party opposing admission of the NTSB's Probable Cause Report presented evidence indicating that the NTSB approved of the Defendant's conduct, thereby inviting the opponent to enter the probable cause report into evidence. Other courts, however, have held that the fact that an expert reviewed the NTSB's Probable Cause Report does not necessitate admission of the report. (*See, e.g., Dowe*, 2004 U.S. Dist. LEXIS 7233).

Assuming you object appropriately and have not invited the admission of the NTSB Probable Cause Report into evidence, you should be able to successfully preclude admission of the NTSB Probable Cause Report or any reference to it.

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[1] *See Dowe v. National Railroad Passenger Corp.,* 2004 U.S. Dist. LEXIS 9450 (N.D. Ill. 2004). The following questioning of an expert at trial was determined to be in violation of 49 U.S.C. § 1154(b):

Q: And you reviewed and relied upon that final NTSB report, isn't that right?

A: Yes.

Q: You rely on the facts in it?

A: Yes.

Q: And you would agree with me that neither the state or federal reports had any criticism of Mr. Flores?

February 07, 2008

Spoliation Of Evidence: The Standard And Relevant Law

On August 1, 1998, an aircraft crashed into Lake Okeechobee injuring plaintiff. Plaintiff alleged that the aircraft experienced a “sudden and unexpected loss of left engine power” during takeoff from Okeechobee County Airport, causing it to crash into the lake beyond the runway. During the investigation by the National Transportation Safety Board (NTSB), the aircraft was recovered from the lake bottom and its two engines were sent to the aircraft manufacturer for testing under NTSB supervision. Shortly after the accident, plaintiff’s attorney requested that the aircraft manufacturer preserve all portions of the engine that were salvaged from the crash. xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

Plaintiff sued the aircraft manufacturer for strict product liability and negligence, alleging that the left-engine power failure resulted from a design defect in a portion of the exhaust system for the left engine. Plaintiff alleged that both of the aircraft's engines were replaced in May 1987 and that the left engine's exhaust system had been replaced in September 1995.

Plaintiff also claimed that the aircraft manufacturer spoliated evidence, alleging that the left engine's exhaust system was present when the aircraft was recovered from the lake on August 2, 1998, but missing when plaintiff’s experts examined the aircraft wreckage in December 1998. The aircraft manufacturer had tested the wreckage in August and September 1998 and then shipped the wreckage to plaintiff in late September 1998.

One of the tools available to defense counsel and an effective method of putting a plaintiff on the defensive is to challenge plaintiff’s failure to preserve critical evidence shortly after an accident. Spoliation is defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

The evidentiary spoliation doctrine is a rule of evidence, administered at the discretion of the trial court to respond to circumstances in which a party fails to present, loses, or destroys evidence. *Id*; *see also Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995). The spoliation doctrine authorizes a court to order dismissal, to grant summary judgment, or permit an adverse inference to be drawn against a party, as a means to "level the evidentiary playing field and for the purpose of sanctioning improper conduct." *Vodusek*, 71 F.3d at 156.

Hartford Ins. Co. of the Midwest v. American Automatic Sprinkler Systems, Inc., 23 F. Supp. 2d 623 (D. Md. 1998). The law regarding spoliation may differ depending on whether state or federal law is applied. *Compare Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997) (requiring a finding of “bad faith” failure to preserve evidence before sanctions imposed) with *Rockwell Int’l Corp. v. Menzies*, 561 So. 2d 677 (Fla. Dist. Ct. App. 1990) (sanctions may be imposed without a showing of “bad faith”).

Indeed, the law is not even uniform among the federal circuits. For instance, in the Fifth and Eleventh circuits, there must be a showing that the alleged spoliator acted in bad faith before sanctions may be imposed. *See Russell v. University of Texas of Permain Basin,* 234 Fed.Appx 195 (5th Cir. 2007) (Plaintiff is entitled to a spoliation instruction only if she can show that defendant acted in bad faith); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (same). In the First, Second, Third, Fourth and Ninth Circuits, a finding that the alleged spoliator acted in bad faith is not a prerequisite to imposing sanctions. A finding of simple negligence is enough. *See Trull v. Volkswagen of America, Inc.,* 187 F.3d 88 (1st Cir 1999); *Klezmer v. Buynak,* 227 F.R.D. 43 (E.D.N.Y. 2005); *Vodusek v. Bayliner Marine Corporation,* 71 F.3d 148 (4th Cir. 1995); *Glover v. BIC Corporation,* 6 F.3d 1318 (9th Cir. 1993).

In the Sixth Circuit, the rules that apply to the spoliation of evidence and the range of appropriate sanctions are defined by state law. *Beck v. Haik,* 377 F.3d 624, 641 (6th Cir. 2004). In the Seventh Circuit, spoliation of evidence is a form of negligence under state law. *Borsellino v. Goldman Sachs Group,* 477 F.3d 502 (7th Cir. 2007). In the Eighth Circuit, a finding of bad faith is necessary to impose certain sanctions, such as an outright dismissal or an adverse inference instruction. *Menz v. New Holland North America, Inc.,* 440 F.3d 1002, 1006 (8th Cir. 2006). As such, when analyzing whether to seek sanctions against a party for spoliating evidence under a particular set of facts, it is of paramount importance to determine what legal standard will apply.

For purposes of this article, Eleventh Circuit law will be applied to the factual scenario set forth at the outset. As *Bashir* makes clear, in the Eleventh Circuit, federal courts should follow federal law on issues of spoliation, citing to *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975).[1] *See also Flury v. Daimler Chrysler Corp*, 427 F.3d 939, 943 (11th Cir. 2005). Both *Bashir and Vick* involved the “adverse inference” rule, which infers missing or destroyed evidence will be unfavorable to the person losing or destroying the evidence, **only** if the circumstances surrounding the evidence's absence indicates **“bad faith”** on the part of the nonmoving party. *Bashir*, 119 F.3d at 932; *Vick*, 514 F.2d at 737; *see also Penalty Kick Management Ltd. v. Coca Cola Co*, 318 F.3d 1284, 1294 (11th Cir. 2003).

As the *Vick* court explained:

The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. 'Moreover, the circumstances of

the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.'

Id, *quoting* McCormick, *Evidence* § 273 at 660-61 (1972).

To address spoliation, a court may impose sanctions ranging from dismissal of the spoliator's case to an inference that the missing evidence would have been unfavorable to the spoliator. *See Flury*, 427 F.3d 939, 945 ("As sanctions for spoliation, courts may impose the following: (1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator."). To justify even the mild sanction of an adverse inference, though, the Court must find bad faith *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir.1997) ("In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith."); *accord Penalty Kick Mgmt., Ltd. v. Coca Cola Co*, 318 F.3d 1284, 1293-94 (11th Cir. 2003).

In the Eleventh Circuit, the typical sanction courts impose for destroying evidence is an adverse inference. The Bashir court, following Vick, held that:

In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated in bad faith. (Vick citation omitted) Thus, under the "adverse inference rule," we will not infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith, e.g., that appellees tampered with the evidence.

Id. at 931. The Eleventh Circuit in Bashir then found that the district court did not err in refusing to draw an adverse inference from a railroad's loss of a speed recorder tape of a train that struck a pedestrian because there was no evidence that the railroad purposely lost or destroyed the tape. *Id.*

To establish bad faith, courts construing Vick have stated that "[a] plaintiff must establish that the defendant intentionally destroyed the evidence sought for the purpose of depriving the plaintiff of its use." *Catoire v. Caprock Telecommunications Corp.*, 2002 WL 31729484 (E.D. La. 2002); *citing Burge v. St. Tammany Parish Sheriff's Office*, 2000 WL 815879, at *3 (E.D. La. 2000). Moreover, the destroying party must have been on notice of the evidence's relevance to potential liability, "and thus subject to the duty to preserve such evidence." *Anderson v. Prod. Mgmt. Corp.*, 2000 WL 492095, at *4 (E.D. La. 2000).

To determine whether a party spoliated evidence either in bad faith or negligently, it is always necessary to analyze whether the transgressing party was under a duty to preserve the evidence in the first place. This analysis also may differ depending on the law of the jurisdiction in which the case is pending. In the Eleventh Circuit, a litigant is only under the duty to preserve evidence which it knows, or reasonably should know, is relevant in the action. *Bank Latino, S.A.C.A. v. Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D. Fla. 1987). As the court held in *Bank Latino,* sanctions may be imposed only upon litigants who destroy documents while on notice that they are or may be relevant *Id.* at 1277. [2]

To prove that a party spoliated evidence, the prejudiced party has the burden of producing some evidence suggesting that a document relevant to substantiating his or her claim was destroyed. *See Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108 (2d Cir. 2001). Moreover, the prejudiced party must also establish that the spoliation is attributable primarily to the other party and to no one else. *Anderson v. National Railroad Passenger Corp.*, 866 F. Supp. 937, 945 (E.D. Va. 1994). Some threshold level of blameworthiness and bad faith is required before spoliation, if in fact it is shown to have occurred, becomes relevant *Id.; see also Parkinson v. Guidant Corporation*, 315 F. Supp. 2d 760 (W.D. Pa. 2004) (spoliation motion for sanctions denied, as court could not definitively assign blame for missing piece of evidence because evidence was in possession of third-party hospital for six months).

The court in *Nation-wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F. 2d 214, 218 (1st Cir. 1982) explained the rationale for imposing an adverse inference:

The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be. See Fed. R. Evid. 401. Precisely how the document might have aided the party's adversary, and what evidentiary shortfalls its destruction may be taken to redeem, will depend on the particular facts of each case, but the general evidentiary rationale for the inference is clear.

The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk. In McCormick's words, "the real underpinning of the rule

of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof." McCormick on Evidence § 273, at 661 (1972).

Id.

With respect to the factual scenario set forth above, even under the Eleventh Circuit's heightened "bad faith" legal standard, a credible argument could be made that plaintiff is entitled to an adverse inference from the aircraft manufacturer's failure to preserve the left engine's exhaust system. By failing to preserve the left engine's exhaust system, the aircraft manufacturer purposely ignored a specific request by plaintiff to preserve the engines salvaged from the wreckage, evidence which the aircraft manufacturer surely must have known would be relevant to any subsequent litigation arising out of the accident. As such, plaintiff in the factual scenario above should file a spoliation motion and request an adverse inference in the form of an instruction to the jury that the left engine's exhaust system was in fact defective.

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[1] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[2] Federal and state jurisdictions are in almost unanimous agreement that a party has no duty to preserve evidence that is not in its control. *See Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983); *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir.1995); *EEOC v. H.S. Camp & Sons, Inc.* , 542 F. Supp. 411, 444 (M.D. Fla. 1982); *Watson v. Brazos Electric Power Cooperative, Inc.*, 918 S.W. 2d 639, 643 (App. Texas 1996); *Phillips v. Covenant Clinic*, 625 N.W. 2d 714, 719 (Iowa 2001).

February 07, 2008

The Repose Period Under GARA: When Does The Clock Begin To Run For Component Part Manufacturers?

Congress' treatment of the "general aviation industry" [1] is in marked contrast to its usually*laissez faire* attitude regarding tort reform. This is evidenced by Congress' enactment of the General Aviation Revitalization Act of 1994 ("GARA").[2] Under this Act, plaintiffs are barred from bringing suit eighteen (18) years after the first sale of an aircraft or replacement of a new component part. Congress was prompted to enact this bill after general aviation manufacturers' unions painted a bleak picture of the general aviation industry. Congress estimated that, in the 1980's, 100,000 jobs were lost in aviation manufacturing, services, and sales.[3] From 1978 to 1994, general aviation aircraft annual sales fell from around 18,000 to 928.[4] While sales plunged, product liability costs increased from $24 million in 1978 to more than $200 million in 1992.[5] Perhaps the most devastating impact on the industry was that the surge of product liability claims made it nearly impossible for general aviation manufacturers to secure liability insurance for design or product defects.[6] In an attempt to revitalize the general aviation industry, Congress enacted GARA on August 17, 1994. GARA is a statute of repose that generally precludes claims against aircraft manufacturers when they are brought more than eighteen (18) years after the aircraft/component part was first placed into service.[7]

GARA applies to "civil actions for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft."[8] GARA defines "general aviation aircraft" as "any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration ("FAA"),which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger carrying operations as defined under regulations in effect under the Federal Aviation Act of 1958.'[9]xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

Since GARA is a federal statute, it has supremacy over state law.[10] Thus, GARA precludes a plaintiff from recovering under state law for the following claims: (1) strict liability for defectivedesign, manufacture, and marketing; (2) negligent design, testing, manufacture, and marketing; and (3) negligent failure to warn.[11] However, GARA's statutory protection is not available when (1) a manufacturer knowingly misrepresented, concealed or withheld from the FAA required information that is material and relevant to the performance of the maintenance or operation of an aircraft, component, system, subassembly, or other part that is causally related to the harm which the claimant allegedly suffered, (2) a person is a passenger only for purposes of receiving treatment for a medical procedure or other emergency (3) a person is not a passenger on an aircraft at the time of his/her injury or death, and (4) the action, brought under written warranty, is enforceable but for the operation of the Act.[12]

Commencement Of GARA's Period Of Repose

The beginning of GARA's repose period depends on who receives delivery of the aircraft. For example, when a manufacturer delivers the aircraft to "its first purchaser or lessee," the eighteen-year repose period is triggered on the date of delivery. Whereas, when the aircraft is delivered to "a person in the business of selling aircraft," the repose period begins when that person receives delivery of the aircraft from the manufacturer. Additionally, the repose period begins on the "date of completion of the replacement or addition" when any new component, system, subassembly, or other part replaces another component, system, subassembly, or other part that was originally in, or was added to, the aircraft, and which is alleged to have caused such death, injury, or damage.

Interpretation Of Terms Under GARA

Many cases that have been decided under GARA involve questions of interpretation of the following GARA terms, which are not defined by the Act: *"manufacturer", "system"* and *"replacement"*. Also, GARA does not address the situation in which an aircraft originally designed for military use is later transferred to civilian use.

A) Aircraft Originally Designed For Military Use

While the definition of "General Aviation Aircraft" set forth by GARA appears certain, there has been some contention among litigants as to when the definition applies. For example, some aircraft originally were built for military purposes, but later were transferred to civilian use. In those cases, plaintiffs have argued that GARA's statute of repose did not begin to run until the aircraft was officially recognized by the FAA as a "general aviation aircraft." Defendants have responded that the moment the aircraft is first purchased and delivered is when GARA's clock began to run. Fortunately, courts have sided with the defendants, consistently holding that, "the limitations period is triggered by the initial delivery of the aircraft, even if the aircraft cannot be considered a 'general aviation aircraft' at that time."[13]

B) Parties With Standing As *Manufacturers* Under GARA

A *"manufacturer"* within the meaning of GARA may include (1) the original component part manufacturer, (2) replacement component part manufacturers and (3) manufacturers holding a Parts Manufacturer Approval ("PMA").[14] GARA's rolling provision applies only to the manufacturer of the new replacement part or newly added part and not to the original manufacturer.[15] However, there are situations when it is unclear exactly who is considered the manufacturer of the part in question.

As previously stated, where GARA applies, it precludes lawsuits brought against a new component part manufacturer *"in its capacity as manufacturer"*. Plaintiffs' attorneys often argue that the manufacturer is not entitled to GARA's protection on the grounds that (1) it was not acting "within its *capacity as a manufacturer*," and/or (2) the nature and work of the manufacturer triggered GARA's rolling provisions and restarted GARA's clock.

In *Mason v. Schweizer Aircraft Corp.*,[16] the court rejected the plaintiff's argument that the manufacturer was acting in the capacity of a maintenance provider and not a manufacturer when it issued a maintenance manual that was allegedly defective. Instead, the court held that (1) the defendant was acting in its capacity as a manufacturer when it issued the manual and (2) the rolling provision of the statute of repose is not triggered upon the issuance or sale of a manual unless the manual contains a revision that is causally related to the event. Here, the manual was not the proximate cause of the accident given that the plaintiff's claim rested on "a failure to warn [theory]" and not the premise that "the revision or change to the manual" was the cause of the accident.[17]

In *Caldwell v. Enstrom Aviation Corp.*,[18] the court dealt with the latter instance in which a revision to the flight manual was the proximate cause of the accident. The court concluded that the accident was caused solely by the defective manual, which was changed within the eighteen (18) year period, making it "new." Thus, the defendant did not fall within GARA's protection.

Another scenario that often arises is when an entity holding a Parts Manufacturing Approval ("PMA") manufactures a product, along with the original manufacturer. Courts have held that when these entities manufacture the product in lieu of the original manufacturer, instead of alongside it, they "stand in the shoes of the manufacturer." For example, in *Burroughs*,[19] the court held that when a holder of a PMA becomes "the entity responsible for issuing manuals and bulletins and fulfilling the manufacturer's obligations for continued airworthiness," it becomes the manufacturer for all intents and purposes. Thus, when the original manufacturer would be protected under GARA, the PMA manufacturer should also be.

Although *Burroughs* involved a situation where the PMA manufacturer took over the original manufacturer's product line, since the PMA manufactured product should conform to the original manufacturer's design, when the PMA manufacturer produces the product alongside the original manufacturer, it should be afforded the same protection under GARA as the original manufacturer.

(C) *Systems* As Defined By GARA

In *Hiser v. Bell Helicopter Textron, Inc*.,[20] a helicopter assisting in a fire-fighting missioncrashed, allegedly due to the failure of portions of its fuel transfer system. There was also an allegation that a contributing cause of the crash was the failure of a warning system to activate at the proper time to warn the pilot of a low fuel condition.

In *Hiser*, the fuel transfer system that allegedly failed had not been replaced within eighteen years of the accident. The fuel flow switches within the aircraft's low-fuel warning system—which allegedly were defectively designed and did not detect the failure—had been replaced within that period. The court found that the installation of new parts—even in accordance with a partial redesign of the system—does not constitute a replacement of the entire system.[21] Rather, for GARA purposes it is a replacement only of that particular component.[22]

Nevertheless, the court found GARA did not bar the claim because, "[w]hile the fuel transfer system may have been largely GARA protected, the component that was supposed to warn of failure was not itself GARA protected."[23]

And finally, in the unpublished decision of *Hinkle v. Cessna Aircraft Company*,[24] the Michigan Court of Appeals upheld the summary judgment dismissal of the fuel pump and engine manufacturers. *Hinkle* involved a 1995 accident in which the aircraft's right engine driven fuel pump failed. The fuel pump was manufactured in 1973, more than eighteen years prior to the accident. The plaintiff argued that since the fuel pump is an integral part of the engine, which was not 18 years old, a failure of the fuel pump is tantamount to failure of the engine itself and the engine manufacturer should be held liable. The court rejected this argument since it would effectively permit the plaintiff to circumvent GARA's statute of repose by allowing suit against any manufacturer of a larger part that was replaced or added within GARA's statute of repose, in which a sub-part that is the actual cause of the accident is incorporated and where that part was over eighteen years of age. The court emphasized that the proper focus is on the component that actually causes the crash, not the larger part that encompasses many smaller components.

(D) *Replacement* Within The Meaning Of GARA

Also in *Hinkle*, the court rejected plaintiff's argument that GARA's statute of repose should not apply to the engine or the fuel pump manufacturers because the fuel pump was overhauled less than two years prior to the crash, thus "rolling" the GARA statute. The court referred to the express language of GARA, which states that its eighteen-year repose period will begin anew when a new component "replaces" an old one, and that "[r]eplacement" requires two acts, (1) removal of the old and (2) substitution of the new.[25]

The court in *Caldwell* [26] recognized that the legislative intent behind the statute was to "provide for a "rolling' statute of repose [so] victims and their families will have recourse *against new component part manufacturers*." The component part rule is therefore utilized by courts to reflect the intent of the legislature: a balance between "providing some certainty to manufacturers... while preserving victims' rights to bring suit for compensation in certain particularly compelling circumstances."[27]

One unresolved issue under GARA is whether GARA's repose period runs from the time the component part manufacturer sells its product to an airframe manufacturer, supplier or other manufacturer. GARA specifically states that the rolling provision starts, with regard to replacement of a new component part, on the date of "completion or addition." It is open for debate whether "completion" occurs when the manufacturer finishes making the part or when it is installed on an aircraft. Plaintiff's attorneys will argue that Congress intended for completion to occur, not at the date of sale and delivery of the component part, but rather on the date that the part takes its place in an airframe. This argument is bolstered by GARA's dictate that the date of sale is when the statute begins for airframe manufacturers. Thus, the argument goes, if Congress intended for the latter provision to have the same meaning, it would have expressly stated so as it did with respect to airframe manufacturers.

The obvious response for defendants is that in the interest of justice the repose period should begin at the time of sale because the part is out of the manufacturer's control. Lack of control has two major effects on the manufacturer. First, the manufacturer has no way of knowing what happens to its part after the date of sale and second, it has no control over how long the purchaser keeps the part on the shelf.

Finally, very often component parts are removed from the original aircraft and later installed in another aircraft, and still later may be installed in yet another aircraft. Does GARA's repose period restart when the component is then installed in another (other than the original) aircraft? "Once a part is originally installed on an aircraft, GARA's eighteen year statute of repose period begins to run, even when the part is removed and installed as new in another aircraft."[28] In this case, the component is not "new" as contemplated by GARA, but rather is simply a replac ement part. The *Glover* Court even went as far as to hold that "for GARA to apply, a defendant manufacturer who performs maintenance on a part subsequent to manufacture must prove it did not replace any part with a new part."[29] This scenario often arises given that many manufacturers provide overhaul, rebuilding, and maintenance services. Their work in those capacities may be susceptible to suit after the expiration of the period of repose if they do not keep good records pertaining to when and to what extent they overhauled/repaired one of their parts. Good recordkeeping will enable manufacturers to assert a GARA defense early on in litigation, thereby reducing litigation costs.

"Having" a GARA defense and being able to assert it successfully in court are two very different matters. Some manufacturers have been prevented from successfully asserting a defense under GARA because they lacked a sufficient evidentiary record of proof. To ensure protection under GARA, manufacturers should keep accurate and updated records of when a product was sold, installed, removed,

overhauled, repaired and reinstalled. Records should also indicate the entity that performed the overhaul, repair and maintenance and what work was performed. These relatively simple measures will enable manufacturers not only to "have" a GARA defense, but also to be able to assert it successfully in court.

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[1] General Aviation aircraft are civilian aircraft carrying fewer than twenty (20) passengers and not used in scheduled passenger carrying service. Approximately seventy percent of general aviation aircraft are small, single engine, piston powered aircraft. *See* General Aviation Revitalization Act of 1994 (GARA), Pub. L. No. 103 298, 3(3), 108 Stat. 1552, 1553; Schwartz, Victor E., *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry* , 67 J. Air L. & Com. 1269, 1272 n. 6 (2002).
[2]Pub.L. No. 103 298, 108 Stat. 1552.

[3] H.R. Rep. No. 103 525, pt., at 2 (1994), reprinted in 1994 U.S.C.C.A.N. 1644.
[4] U.S. Gen. Accounting Office, GAO 01 916, Status of Industry, Related Infrastructure, and Safety Issues 18 (2001).

[5] James F. Rodriguez, *Tort Reform & GARA: Is Repose Incompatible with Safety?* , 579 (Summer 2005) (discussing the rapid decline of the general aviation industry due to product liability suits).

6] Lloyds of London was quoted as saying "We are quite prepared to insure the risks of aviation, but not the risks of the A merican legal system." *Id.* at 580.

[7] GARA, *supra* note 2, § 2(d).
[8] GARA, *supra* note 2.

[9] *Id.*

[10] Supremacy Clause U.S. Constitution

[11] *Burroughs v. Precision Airmotive Corp.* , 78 Cal. App. 4th 681 (Cal. Ct. App. 2000).
[12] GARA, *supra* note 2

[13] *Kennedy v. Bell Helicopter Textron, Inc.* , 283 F.3d 1107, 1112 (9th Cir. 2002); *Croman v. General Electric, 2005 U.S. Dist. LEXIS 39408* , (E.D. Cal. 2005).

[14] Manufacturers that hold a PMA are entitled independently to produce an original manufacturer's product line with approval from the Federal Aviation Administration.

[15] GARA's eighteen year period of repose is reinitiated on the date of completion of the replacement or addition of new component, system, etc. to the aircraft. *See* GARA, *supra* note 2.

[16] 653 N.W. 2d 543 (Iowa 2002).

[17] *Id.*

[18] 230 F. 3d 1155 (9th Cir. 2000).

[19] 78 Cal. App. 4th at 693.

[20] 111 Cal. App. 4th 640 (2003).

[21] *Id. at 649 51*

[22] *Id.* at 651

[23] *Id.* at 654

[24] No. 247099, 2004 WL 2413768 (Mich. Ct. App. Oct. 28, 2004).

[25] *Hiser*, 111 Cal. App. 4th 640 (2003)

[26] 30 F.3d at 1157

[27] *Burroughs*, 78 Cal. App. 4th 681 (2000) (quoting GARA, H.R. No. 103 525(II), 103d Cong., 2d Sess.).

[28] *Estate of Glover v. American Resource Corp.* , No. 160673, slip op. at 1 (Cal. Super. Ct. Sept. 13, 1996).

[29] *Id.*

March 17, 2008

On August 1, 1998 an aircraft crashed into Lake Okeechobee injuring plaintiff. Plaintiff alleged that the aircraft experienced a “sudden and unexpected loss of left engine power” during takeoff from Okeechobee County Airport, causing it to crash into the lake beyond the runway. During the investigation by the National Transportation Safety Board (NTSB), the aircraft was recovered from the lake bottom and its two engines were sent to the aircraft manufacturer for testing under NTSB supervision. Shortly after the accident, plaintiff’s attorney requested that the aircraft manufacturer preserve all portions of the engine that were salvaged from the crash. xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

Plaintiff sued the aircraft manufacturer for strict product liability and negligence, alleging that the left-engine power failure resulted from a design defect in a portion of the exhaust system for the left engine. Plaintiff alleged that both of the aircraft's engines were replaced in May 1987 and that the left engine's exhaust system had been replaced in September 1995.

Plaintiff also claimed that the aircraft manufacturer spoliated evidence, alleging that the left engine's exhaust system was present when the aircraft was recovered from the lake on August 2, 1998, but missing when plaintiff’s experts examined the aircraft wreckage in December 1998. The aircraft manufacturer had tested the wreckage in August and September 1998 and then shipped the wreckage to plaintiff in late September 1998.

One of the tools available to defense counsel and an effective method of putting a plaintiff on the defensive is to challenge plaintiff’s failure to preserve critical evidence shortly after an accident. Spoliation is defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

The evidentiary spoliation doctrine is a rule of evidence, administered at the discretion of the trial court to respond to circumstances in which a party fails to present, loses, or destroys evidence. *Id*; *see also Vodusek v. Bayliner Marine Corp*., 71 F.3d 148, 156 (4th Cir.1995). The spoliation doctrine authorizes a court to order dismissal, to grant summary judgment, or permit an adverse inference to be drawn against a party, as a means to "level the evidentiary playing field and for the purpose of sanctioning improper conduct." *Vodusek*, 71 F.3d at 156.

Hartford Ins. Co. of the Midwest v. American Automatic Sprinkler Systems, Inc., 23 F.Supp.2d 623 (D.Md. 1998). The law regarding spoliation may differ depending on whether state or federal law is applied. *Compare Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997) (requiring a finding of “bad faith” failure to preserve evidence before sanctions imposed) with *Rockwell Int’l Corp. v. Menzies*, 561 So. 2d 677 (Fla. Dist. Ct. App. 1990) (sanctions may be imposed without a showing of “bad faith”).

Indeed, the law is not even uniform among the federal circuits. For instance, in the Fifth and Eleventh circuits, there must be a showing that the alleged spoliator acted in bad faith before sanctions may be imposed. *See Russell v. University of Texas of Permain Basin,* 234 Fed.Appx 195 (5th Cir. 2007) (Plaintiff is entitled to a spoliation instruction only if she can show that defendant acted in bad faith); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (same). In the First, Second, Third, Fourth and Ninth Circuits, a finding that the alleged spoliator acted in bad faith is not a prerequisite to imposing sanctions. A finding of simple negligence is enough. *See Trull v. Volkswagen of America, Inc.,* 187 F.3d

88 (1st Cir 1999); *Klezmer v. Buynak,* 227 F.R.D. 43 (E.D.N.Y. 2005); *Vodusek v. Bayliner Marine Corporation,* 71 F.3d 148 (4th Cir. 1995); *Glover v. BIC Corporation,* 6 F.3d 1318 (9th Cir. 1993).

In the Sixth Circuit, the rules that apply to the spoliation of evidence and the range of appropriate sanctions are defined by state law *Beck v. Haik,* 377 F.3d 624, 641 (6th Cir. 2004). In the Seventh Circuit, spoliation of evidence is a form of negligence under state law. *Borsellino v. Goldman Sachs Group,* 477 F.3d 502 (7th Cir. 2007). In the Eighth Circuit, a finding of bad faith is necessary to impose certain sanctions, such as an outright dismissal or an adverse inference instruction. *Menz v. New Holland North America, Inc.,* 440 F.3d 1002, 1006 (8th Cir. 2006). As such, when analyzing whether to seek sanctions against a party for spoliating evidence under a particular set of facts, it is of paramount importance to determine what legal standard will apply.

For purposes of this article, Eleventh Circuit law will be applied to the factual scenario set forth at the outset. As *Bashir* makes clear, in the Eleventh Circuit, federal courts should follow federal law on issues of spoliation, citing to *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975).[1] *See also Flury v. Daimler Chrysler Corp*, 427 F.3d 939, 943 (11th Cir. 2005). Both *Bashir* and *Vick* involved the "adverse inference" rule, which infers missing or destroyed evidence will be unfavorable to the person losing or destroying the evidence, **only** if the circumstances surrounding the evidence's absence indicates **"bad faith"** on the part of the nonmoving party. *Bashir*, 119 F.3d at 932; *Vick*, 514 F.2d at 737; *see also Penalty Kick Management Ltd. v. Coca Cola Co,* 318 F.3d 1284, 1294 (11th Cir. 2003).

As the *Vick* court explained:

The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. 'Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case'

Id, *quoting* McCormick, *Evidence* § 273 at 660-61 (1972).

To address spoliation, a court may impose sanctions ranging from dismissal of the spoliator's case to an inference that the missing evidence would have been unfavorable to the spoliator. *See Flury*, 427 F.3d 939, 945 ("As sanctions for spoliation, courts may impose the following: (1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator."). To justify even the mild sanction of an adverse inference, though, the Court must find bad faith. *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir.1997) ("In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith."); *accord Penalty Kick Mgmt., Ltd. v. Coca Cola Co*, 318 F.3d 1284, 1293-94 (11th Cir. 2003).

In the Eleventh Circuit, the typical sanction courts impose for destroying evidence is an adverse inference. The Bashir court, following Vick, held that:

In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated in bad faith. (Vick citation omitted) Thus, under the "adverse inference rule," we will not infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith, e.g., that appellees tampered with the evidence.

Id. at 931. The Eleventh Circuit in *Bashir* then found that the district court did not err in refusing to draw an adverse inference from a railroad's loss of a speed recorder tape of a train that struck a pedestrian because there was no evidence that the railroad purposely lost or destroyed the tape. *Id.*

To establish bad faith, courts construing *Vick* have stated that "[a] plaintiff must establish that the defendant intentionally destroyed the evidence sought for the purpose of depriving the plaintiff of its use." *Catoire v. Caprock Telecommunications Corp.,* 2002 WL 31729484 (E.D. La. 2002); *citing Burge v. St. Tammany Parish Sheriff's Office,* 2000 WL 815879, at *3 (E.D. La. 2000). Moreover, the destroying party must have been on notice of the evidence's relevance to potential liability, "and thus subject to the duty to preserve such evidence." *Anderson v. Prod. Mgmt. Corp.,* 2000 WL 492095, at *4 (E.D.La. 2000).

To determine whether a party spoliated evidence either in bad faith or negligently, it is always necessary to analyze whether the transgressing party was under a duty to preserve the evidence in the first place. This analysis also may differ depending on the law of the jurisdiction in which the case is pending. In the Eleventh Circuit, a litigant is only under the duty to preserve evidence which it knows, or reasonably should know, is relevant in the action. *Bank Latino, S.A.C.A. v. Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D. Fla. 1987). As the court held in *Bank Latino,* sanctions may be imposed only upon litigants who destroy documents while on notice that they are or may be relevant. *Id* at 1277.[2]

To prove that a party spoliated evidence, the prejudiced party has the burden of producing some evidence suggesting that a document relevant to substantiating his or her claim was destroyed. *See Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108 (2d Cir. 2001). Moreover, the prejudiced party must also establish that the spoliation is attributable primarily to the other party and to no one else.*Anderson v. National Railroad Passenger Corp.*, 866 F.Supp. 937, 945 (E.D.Va. 1994). Some threshold level of blameworthiness and bad faith is required before spoliation, if in fact it is shown to have occurred, becomes relevant*Id.; see also Parkinson v. Guidant Corporation*, 315 F.Supp.2d 760 (W.D.Pa. 2004) (Spoliation motion for sanctions denied, as court could not definitively assign blame for missing piece of evidence because evidence was in possession of third-party hospital for six months).

The court in *Nation-wide Check Corp. v. Forest Hills Distributors, Inc.,*692 F. 2d 214, 218 (1st Cir. 1982) explained the rationale for imposing an adverse inference:

The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be. See Fed. R. Evid. 401. Precisely how the document might have aided the party's adversary, and what evidentiary shortfalls its destruction may be taken to redeem, will depend on the particular facts of each case, but the general evidentiary rationale for the inference is clear.

The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk. In McCormick's words, “the real underpinning of the rule of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof.” McCormick on Evidence § 273, at 661 (1972).

Id.

With respect to the factual scenario set forth above, even under the Eleventh Circuit’s heightened “bad faith” legal standard, a credible argument could be made that plaintiff is entitled to an adverse inference from the aircraft manufacturer’s failure to preserve the left engine's exhaust system. By failing to preserve the left engine's exhaust system, the aircraft manufacturer purposely ignored a specific request by plaintiff to preserve the engines salvaged from the wreckage, evidence which the aircraft manufacturer surely must have known would be relevant to any subsequent litigation arising out of the accident. As such, plaintiff in the factual scenario above should file a spoliation motion and request an adverse inference in the form of an instruction to the jury that the left engine's exhaust system was in fact defective.

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[2] Federal and state jurisdictions is in almost unanimous agreement that a party has no duty to preserve evidence that is not in its control. *See Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983);*Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir.1995); *EEOC v. H.S. Camp & Sons, Inc.*, 542 F. Supp. 411, 444 (M.D. Fla. 1982); *Watson v. Brazos Electric Power Cooperative, Inc.*, 918 S.W. 2d 639, 643 (App. Texas 1996);*Phillips v. Covenant Clinic*, 625 N.W. 2d 714, 719 (Iowa 2001).

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Barry S. Alexander

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