

## **OAJ Product Liability Section Article January 2014**

### Evidence Preservation in Product Liability Claims

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For personal injury attorneys, the issue of evidence preservation has undoubtedly come up in your practice. It is an issue that both plaintiff and defense attorneys face.<sup>i</sup> For product liability attorneys, especially, this is a crucial and constant concern. Sanctions can be triggered even where there has been negligent or inadvertent destruction of evidence, not just deliberate destruction.<sup>ii</sup>

The importance of prompt and proper preservation of relevant, physical evidence<sup>iii</sup> in a potential product liability claim cannot be understated. Liability may be established or possibly destroyed entirely based on the information that can be gathered from the physical evidence or from the product itself. The availability and quality of expert testimony will likely hinge upon the immediacy and quality of the evidence preservation, as well as the quality of product examination and testing performed.

While many of the considerations discussed below are likely common sense, it is worth reviewing these general pointers and keeping them in mind in your daily injury practice. This is especially true since each case and each type of product requires careful consideration as to the unique steps required in order to properly preserve and ultimately test that product. This article is intended more to give you the “view of the woods” by prompting you to think about certain general preservation notions than it is to give you the “view of each tree” by attempting to identify every single step to explore for each type of product.

This article is intended to provide practical, general considerations applicable to many types of evidence preservation steps. The overarching principle is to preserve the relevant evidence in the condition it was in at the time of the event (or as near as reasonably possible), and to protect it from being altered, damaged or lost.

#### **Locate and Consult Your Expert Witness**

One early consideration should be to locate and consult with your forensic or other expert witness(es) to determine not only what physical evidence may exist, but to inquire about and learn what steps they recommend be undertaken to properly preserve that evidence. For instance, if you are investigating a case where a product or piece of a product broke, then taking great care to preserve the mating fracture surfaces may likely be very important. That may seem obvious to most, but a metallurgist or a materials scientist or engineer will tell you that doing something as simple and seemingly innocent as taking those two broken pieces and touching them back together by hand may add new markings on that fracture surface that can compromise, if not destroy, the validity of subsequent microscopic examinations by experts.

Be sure to confirm that your expert is familiar with the applicable industry evidence preservation or testing standards.

#### **Preserve at the earliest possible opportunity**

As the injured party's attorney, you often know of a potential claim long before the manufacturer does. As such, you are in the best possible position (and some may say have the obligation) to take immediate steps to preserve and prevent spoliation of the relevant items and broken pieces before any loss, destruction, waste or deterioration occurs.<sup>iv</sup> In an automobile product liability claim or crashworthiness case, this likely requires that the subject vehicle is purchased and stored before it is repaired, sold or scrapped. It is nearly impossible to successfully bring any claim concerning a failed or defective product if that product no longer exists and is not available for inspection or testing.

Similarly, it is important to ensure the product is not exposed to any additional outside forces or elements – moisture, sun, heat, cold – that would cause further damage or would compromise the ability to perform subsequent testing.

### **Use Evidence Chain of Custody Documentation**

It is helpful to maintain documentation that tracks the custody of the subject product to confirm the evidence is authentic, reliable and not materially altered. Such documentation may later prove useful in establishing that proper measures were taken to safeguard the item. Documentation should at least note the client or case name, a brief description of each item, including each detached piece, the date it was first received or inventoried, and who first received it and from whom. You should also note the item, date and time, name of person releasing and name of person receiving each item whenever the possession or custody of an item is changed. Certain highly-specific types of products may require additional information to be logged and maintained, such as moisture readings or temperature readings.

It may also be useful to document each item, its condition and any damage by photograph or videotape means, which could then be linked to your documentation so that you know and can prove the condition of each item at each stage of its custody.

### **Recognize the Difference between Non-Destructive and Destructive Examination and Testing**

Once you have taken steps to preserve and document the product, the natural tendency is to start more closely examining it, taking it apart, testing it or exploring it. This should be avoided. Examination and testing methods fall into two broad categories: Non-Destructive and Destructive. What constitutes a non-destructive versus destructive examination is not as obvious as you may think, and is often very product specific.

Generally, non-destructive testing is any technique used to evaluate or examine a product that causes no damage or change to the product. Examples include visual observation and photographing, but it may also include x-ray, ultrasound, and certain types of microscopic examination.

Destructive testing, on the other hand, is not just those obvious techniques that completely destroy or obliterate the item, such as crushing it or burning it. Rather, destructive testing is any technique whereby *any* amount of damage is caused to the product. This could include cutting, bending, heating or disassembling the item, but it may even include simply cleaning the product. As described above, it may also include something as simple as putting two broken pieces back together.

Great care and forethought should go into every interaction with the product to consider whether what you or someone else is about to do would constitute a non-destructive or a potentially destructive examination. You should be vigilant that others, including your experts, do not engage in any destructive testing without your prior approval.<sup>v</sup>

### **Develop and Reach an Agreed Testing and Examination Protocol**

You will need to work with your expert(s) to determine what testing and examination they will recommend and require in order to yield information that they can base their opinions on. More often than not, some of that testing will constitute some degree of destructive testing. Before that is undertaken, thought should be given to the risks of including or not including other potentially interested parties in that destructive testing. Engaging in unilateral destructive testing may often result in irreparable harm to the product (and your case) and may likely result in allegations of spoliation.

If you are able to identify all potentially interested parties, perhaps the safer course of conduct is to reach an agreement on a detailed, written inspection and testing protocol in advance. When determining who is a potentially interested party, it is better to cast a wide net and err on the side of inclusion. While you may be able to defeat a spoliation claim if it later turns out a potentially interested party was not included, it may provide grounds for that party or their experts to raise concerns about the validity of results.

A detailed, written protocol might include what will be tested, where it will be tested, who will test, who will be present, what techniques and testing equipment will be used, and how the results will be shared. It is also useful to address how to handle the situation if the need for changes or additions to the protocol becomes apparent during the inspection. This is slightly less of a problem if all interested parties are represented at the testing and agree in writing during the testing, but it poses a dilemma of whether to proceed or postpone further testing if an interested party who explicitly or implicitly agreed to a written set of protocols in advance of the inspection is not present.

### **Consider Obtaining Exemplar(s) Quickly**

Depending on the type of product and the nature of the alleged defect, obtaining one or more identical products for comparison or testing may prove very helpful.

Once you have obtained exemplars, you should treat them with similar care that you do the subject product. This means that in order to minimize the challenges to your expert's examination or testing of the exemplar, it may require that only your expert unseals, opens and unpacks the box containing the exemplar and does so under a controlled setting with videotaping by one or more camera angles. Depending on the rarity of the product (and limited availability of exemplars), you may also need to consider saving one (or more) exemplars, untouched, for further testing by you or the defense or reaching an agreement with the defense on the examination and testing of the exemplars.

Remember that the ultimate goal is to take appropriate measures to safeguard relevant evidence from loss, destruction, waste, deterioration or damage so that proper testing can ultimately be obtained and the results of that testing can be used to prove your client's claims.

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<sup>i</sup> The duty to preserve evidence applies to both potential plaintiffs and to defendants. See, e.g., *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006 Ohio 3172; *Penix v. Avon Laundry & Dry Cleaners*, 2009 Ohio 1362, ¶ 52.

<sup>ii</sup> *Simeone v. Girard City Bd. Of Edn.*, 171 Ohio App.3d 633, 2007 Ohio 1775, discretionary appeal not allowed by 114 Ohio St.3d 1476, 2007 Ohio 3699; *American States Ins. Co. v. Tokai-Seiki* (Miami County C.P., 1997), 94 Ohio Misc.2d 172 at 176; *Farley Metals, Inc. v. Barber Colman Co.* (1994), 269 Ill. App.3d 104.

<sup>iii</sup> This article is focused on physical evidence items and is not intended to address electronically stored information (ESI) and the rapidly expanding area of law concerning proper steps to preserve such evidence – by both plaintiffs and defendants.

<sup>iv</sup> For the elements of the tort of spoliation of evidence, see *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 1993 Ohio 229.

<sup>v</sup> Expert testimony may be excluded if evidence is altered or destroyed before other side's expert has opportunity to examine. See *Holliday v. Ford Motor Co.*, 2006 Ohio 284, ¶22; *Cincinnati Ins. Co. v. General Motors Corp.*, (1994), 6<sup>th</sup> Dist. No. 94OT017.