INSURANCE LAW

Insurer's Failure to Retain Evidence Actionable

by Richard A. Huver, Column Editor

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Your client is in an accident and you believe a defect in their vehicle might have been the cause. The vehicle is a total loss and your client's auto insurance company has possession as part of its process to resolve the property damage claim. During its own investigation, the insurer concludes there was a defect in the vehicle and agrees to retain it for purposes of your client's litigation and its own subrogation claim. If the insurance company sells the car, can it be sued for "spoliation" of evidence? You may remember the law changed a decade ago when the California Supreme Court held there was no cause of action for spoliation of evidence -- either first party or third party -- based upon an affirmative duty to preserve evidence. *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 (first party) and *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 (third party).

Just such a question was presented in *Cooper v. State Farm Mutual Automobile Insurance Co.* (2009) 177 Cal.App.4th 876. Plaintiff, who was insured through State Farm, was involved in a single vehicle accident, allegedly as the result of tire tread separation on his rear tire. State Farm took possession of the vehicle including the subject rear tire incident to settling its insured's property damage claim. The vehicle was a total loss. State Farm's expert examined the tire and determined it had been defectively manufactured. Moreover, the expert concluded the defect had caused plaintiff's accident. Plaintiff was notified regarding State Farm's expert's opinion. Based at least in part on this opinion, plaintiff filed suit against the tire manufacturer. *Id*. at 879.

Plaintiff's attorney notified State Farm in writing that the tire must be maintained, indicating it was necessary evidence for the lawsuit. Plaintiff's letters stated that if the tire was lost or destroyed, he would pursue an action for spoliation against State Farm. Although State Farm confirmed it would retain the tire, it later disposed of the car, including the defective tire. Plaintiff amended his original complaint against the tire manufacturer to add State Farm as a defendant and to allege spoliation of evidence based on promissory estoppel and voluntary undertaking. The facts supporting plaintiff's complaint for spoliation included, *inter alia*, that (1) he had requested custody of the tires but State Farm had refused, contending it would retain the tires to pursue a subrogation claim, (2) State Farm entered into a "special relationship with its insured" to preserve evidence and violated its contractual and fiduciary obligations by disposing of the evidence; and (3) plaintiff reasonably relied on State Farm's representations to his detriment. *Id*. at 882.

Plaintiff later settled his case against the tire manufacturer during mediation, leaving State Farm as the only defendant at trial. *Id.* at 880. Following plaintiff's attorney's opening statement, the

trial court granted State Farm's motion for nonsuit, concluding plaintiff was legally precluded from recovering damages based on State Farm's alleged destruction of the tire because he could not prove he would have prevailed against the tire manufacturer had the tire been preserved. Plaintiff appealed. *Id.* at 880-881.

The trial court indicated its ruling was based in large part on the Supreme Court's holdings in *Cedars-Sinai, supra,* and *Temple Community Hospital, supra.* In *Cedars-Sinai*, plaintiff had sued the hospital (along with others) for injuries which occurred during birth. Plaintiff requested production of various documents during discovery, including fetal monitoring strips, which the hospital could not locate. Plaintiff amended the complaint to add a cause of action for intentional spoliation of evidence against the defendant hospital. In deciding whether to create a tort remedy against a party to litigation for intentional spoliation of evidence, the Supreme Court analyzed the public policy considerations that would result from such a holding and whether adequate remedies to address such conduct already existed. Based on its analysis, the Court concluded no such duty existed in the first instance, in part because there were already procedural and evidentiary sanctions that could be imposed against the party destroying the evidence which provided sufficient redress for the aggrieved party. *Cedars-Sinai, supra*, 18 Cal.4th at 12.

The very next year, the Supreme Court addressed the issue in *Temple Comm. Hosp., supra*, this time from the third-party perspective. In *Temple*, plaintiff was injured during surgery when an electrocautery tool allegedly caused an oxygen tank to ignite, causing plaintiff severe facial burns. Suit was filed against the surgeons as well as the equipment manufacturer, distributer and others in the chain of design and maintenance (but not the hospital). At some later point, the hospital disposed of the oxygen tank. Plaintiff's suit against one of the design defendants was thereafter dismissed on summary judgment because of the lack of evidence showing defect.

Plaintiff thereafter sued the hospital for spoliation of evidence. Again, the California Supreme Court refused to permit a third-party spoliation of evidence cause of action, relying upon the same public policy considerations as it had in *Cedars-Sinai*. The Court also concluded it would be anomalous to impose a duty to affirmatively preserve evidence on third parties, but not on first parties. *Temple, supra*, 20 Cal.4th at 466, 478.

However, the *Temple* Court did note an "independent duty" to preserve evidence could exist under certain circumstances: "To the extent third parties may have a contractual obligation to preserve evidence, contract remedies, including agreed-upon liquidated damages, may be available for breach of the contractual duty." Id. at 477.

In addressing plaintiff's appeal in *Cooper*, the Fourth Appellate District considered the evidence plaintiff had introduced which established an obligation on State Farm's part to retain the evidence. This included several letters plaintiff's attorney sent to State Farm placing them on notice of the importance of preserving the defective tire, which emphasized this duty as follows:

> **It is absolutely essential that the insured's vehicle be maintained/preserved, in its immediate post-accident condition, including all four tires, until our investigation is completed. The rights of our client/your insureds, are tied to the preservation of this evidence. Inasmuch as you physically**

> **control the vehicle and its component parts, this request creates a duty for you to preserve the evidence pursuant to this request.**

Id. at 885. The attorney also warned, "Please be advised that any destruction, alteration, salvage, ... may be/can be/will be considered actionable spoliation of evidence." He also warned: "Please be advised that if you dispose of the vehicle at this time and your insured's ability to recover for his damages is impaired in any way, State Farm Insurance will be held liable for intentional spoliation of evidence and bad faith." *Id.* at 900.

Plaintiff also introduced letters written by State Farm which set forth its contentions the tire was defective and said the defect was the cause of plaintiff's accident, as follows:

> **We are writing in regard to the damage to our insured's vehicle. Our investigation indicates the damage was caused by tire failure. As a result, our insured's vehicle was determined to be a total loss. The information in our file indicates that you, Continental Tire, are responsible for this damage.**
>
> **. . .**
>
> **The tire tread detached from the carcass due to a manufacturing defect. To manufacture a tire that separates is below the standard for the tire manufacturing industry.**

Id. at 886.

Based on this evidence, and other factors, the Fourth Appellate District concluded State Farm owed plaintiff a duty to preserve the allegedly defective tire, consistent with the "independent duty" delineated by the Supreme Court in *Temple*. *Cooper, supra*, 177 Cal.App.4th at 892. The *Cooper* court distinguished the holdings in both *Cedars-Sinai and Temple* because there the Supreme Court was determining whether to impose a duty to preserve evidence in the first instance. In contrast, the evidence presented by plaintiff in *Cooper* established State Farm had independently assumed the duty to preserve the tire. *Cooper, supra*, 177 Cal.App.4th at 892. The court reasoned:

> **Here, rather than seeking to impose a general tort duty of care on State Farm to preserve evidence, plaintiff ... presented prima facie facts to support an independent duty to preserve the evidence based on State Farm's promise and plaintiff's reliance thereon.**
>
> **...**
>
> **Additionally, '[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to a duty of acting carefully, if he acts at all.' ... Thus, it is settled law that one 'who, having no initial duty to do so, undertakes to come to the aid of another ...' has 'a duty to exercise due care in performance and is liable if ... the harm is suffered because of the other's reliance upon the undertaking.' [Citations omitted.]**

Id. at 894.

Another hurdle to overcome was State Farm's contention that plaintiff could not establish damages and any harm from State Farm's conduct was too speculative. The Court of Appeal generally agreed that it may be impossible for a jury to "meaningfully assess what role the missing evidence

would have played in the determination" of plaintiff's suit against the defendants. *Id.* at 896.

However, the plaintiff in *Cooper* had State Farm's own expert's report confirming the inspection of the vehicle and tire, noting the damage on the wheel well was consistent with tire tread separation, and concluding the tire tread had in fact separated causing the insured to lose control of the vehicle. Moreover, State Farm's expert believed the insurer had a good claim for subrogation against the tire manufacturer. *Id*. at 897. The court concluded: "Such evidence, together with the already existing evidence, may well be sufficient to prove that plaintiff probably would have prevailed in this case against Continental Tire if the tire had not been destroyed." *Id.* at 898.

What does the *Cooper* decision mean for you in your practice? Clearly, if you find yourself in a similar situation or a potentially similar situation with your client's insurance company, you **must** put the insurer on notice of (1) the necessity of preserving the evidence; (2) the importance the evidence will play in pursuing the lawsuit; (3) that your client is reasonably relying on his insurance company to preserve the evidence; and (4) advise the insurer that any destruction or loss of the evidence will be considered actionable. More importantly, you should convince your client's insurer to take an active role in examining and/or inspecting the vehicle to identify any alleged defects, which will provide the insurer with a subrogation claim, and also eliminate any speculative damages contention in the event the evidence is lost or destroyed.