



THAT DELETE KEY MAY BITE YOU: SPOILIATION CLAIMS AGAINST TRUCKING COMPANIES FOR DESTRUCTION OF ELECTRONIC DATA

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Recently developed satellite and computer technologies are greatly enhancing the trucking industry's control over its drivers. A truck driver is no longer the independent cowboy alone on the great open road, but is becoming more akin to an astronaut whose movements are being monitored by mission control. With the trucking industry's increased level of information and control also comes increased responsibility with respect to the retention of this information. In the courtroom, these newly undertaken responsibilities may translate into increased liabilities. Additionally, information obtained from satellite and computer technologies may provide crucial evidence exonerating or inculcating a truck driver involved in an accident. In the context of a civil lawsuit arising out of a trucking accident, the availability and content of information generated by the new technologies is likely to become a much litigated issue. Trucking companies that have deleted this information from their computer files are likely to face claims of spoliation of evidence and the threat of sanctions. This article provides an overview of the law on spoliation of evidence and examines how this law will be applied to trucking companies accused of deleting or altering electronic tracking and other computerized information.

I. OVERVIEW OF THE LAW OF SPOILIATION OF EVIDENCE

Omnia praesumuntur contra spoliatem: "All things are presumed against the spoliator."

Spoliation has been defined as the destruction, significant alteration, or non-preservation of evidence that is relevant to pending or future litigation.(1) Over the past decade, spoliation of evidence has come under increased scrutiny by the courts.(2) Commentators have recognized that we are in the midst of a nationwide anti-spoliation trend.(3) It has been observed that the law of spoliation "appears to be in the process of rapid change, although the patterns of the new order are not yet entirely clear."(4) As the law against spoliation develops, so has the potential for sanctions and punitive damages against parties destroying evidence.(5)

Most jurisdictions have recognized a common law duty to preserve evidence. These courts have held that a party must preserve documents, tangible items, and information that are "relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence." (6) While there is no question that a party's duty to preserve relevant evidence arises during pending litigation, courts have been less clear about whether a duty exists pre-litigation. A number of courts have recognized the need for a duty to preserve evidence prior to litigation being initiated.(7) The rationale is that a party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed.(8) Some courts have found that once a party is on "notice" of potential litigation a duty to preserve evidence arises.(9) Other courts have determined that a party is on notice of potential litigation when the litigation is reasonably

foreseeable.(10) The duty to preserve evidence only extends to evidence that is relevant to the pending or potential litigation.(11)

In deciding whether to impose sanctions, courts have typically looked at the following factors: (1) the culpability of the spoliating party, (2) the prejudice to the non-offending party, (3) the degree of interference with the judicial process, (4) whether any lesser sanctions will remedy any harm and deter future acts of spoliation, and (5) whether sanctions will unfairly punish a party for misconduct by the attorney.(12) The two most important factors to consider, however, are the culpability of the spoliator and the prejudice to the non-spoliator.(13) Courts should also consider whether the destroyed evidence is cumulative of other competent evidence that a party can use in the place of the destroyed evidence.(14)

Once it has been determined that evidence has been improperly spoliated and prejudice has resulted, the court must decide which sanctions to apply. Courts generally have relied upon three methods to remedy the spoliation: (1) an independent cause of action for intentional and/or negligent spoliation,(15) (2) discovery sanctions, and (3) the imposition of an evidentiary presumption against the spoliator. The most severe sanction is dismissal of the action or entry of a default judgment.(16) The sanction of dismissal may be warranted when the non-offending party has been denied the opportunity to put on its case or where there has been a repeated obstruction of discovery.(17) The sanction of dismissal might not be used unless there is evidence of willfulness or bad faith on the part of the spoliating party.(18) Another often used sanction is to exclude evidence or testimony. Courts generally use this sanction when the spoliating party is attempting to admit testimony or evidence adduced from the destroyed evidence.(19)

The most common sanction for spoliation of evidence is to instruct the jury to raise an adverse presumption against the spoliating party. The "spoliation inference" reflects the commonsense notion that a party who has notice that evidence is relevant to litigation and who proceeds to destroy it would probably have suffered if the evidence were not eliminated.(20)

The first type of jury instruction permits an inference that the destroyed evidence, if produced, would have been unfavorable to the position of the spoliating party. This inference may be allowed even when the spoliation resulted from an innocent mistake or negligence.(21) A second type of instruction allows the jury to presume the spoliating party's consciousness of the fact that its case was weak. This harsh sanction is normally only allowed in cases of intentional spoliation.(22) Some jurisdictions, however, do not allow any presumption to be raised when the failure to produce the evidence is adequately explained(23) or where there has been no showing of bad faith on the part of the spoliator.(24)

Courts have refrained from imposing sanctions when the act of destruction occurred in the ordinary course of business. Under the ordinary business exception, an act of destruction is subject to a two part test. The destruction must have occurred (a) as a matter of routine and (2) without any evidence of fraudulent intent.(25) When a party's duty to preserve evidence arises before the destruction or when a policy is at odds with a duty to maintain records, the policy will not excuse the obligation to preserve evidence.(26)

II. CASES INVOLVING SPOILIATION OF TRUCKER'S LOG BOOKS

A. J.B. HuntTransport, Inc. v. Bentley

The Georgia case of J.B. Hunt Transport, Inc. v. Bentley (27) presents an almost worst case scenerio for a trucking company. In that case, the J.B. Hunt's employee, Luther, was operating a tractor-trailer on I-85 when he rear-ended the plaintiff who was parked on the side of the highway. Eyewitness testimony at trial revealed that the defendant was driving erratically, swerving from side to side shortly before the collision. The night before the collision, the subject tractor-trailer had been taken off the road for service of a brake problem and a "wobble" in the front end of the tractor. There was no specific evidence as to Luther's whereabouts the night before the accident. The plaintiff alleged that Luther had insufficient rest before the accident. The plaintiff also sought both compensatory and punitive damages against Hunt for compelling Luther to drive without sufficient rest.

At trial, an executive of J.B. Hunt testified that Luther's logbook was destroyed six months after the occurrence in the normal course of business. Evidence revealed that a month before the log was destroyed, Hunt had retained the services of an investigator in anticipation of the Bentley litigation. Evidence at trial also showed that Hunt drivers had a history of repeated violations of federal driving time limitations. There was no direct evidence, however, that Luther was violating the time requirements when the accident occurred. The destroyed logs would have shown the activities of Luther while the truck was being repaired and whether he had in fact violated the federal limits on driving time. The trial court instructed the jury to presume that the logbook showed that Hunt compelled Luther to drive with insufficient rest. The jury awarded the plaintiff compensatory and punitive damages against Luther and against Hunt for its own actions. The appellate court affirmed, stating as follows:

The practices of Hunt showed that it did not abide by the required safety regulations. It was a "habitual violator" of the hours-in-service requirements of the Georgia Public Service Commission for its vehicles. Commission inspection of 236 of its vehicles over 3 years showed one-third (76) in logbook violations which were penalized because of driver excessive driving. It operated a "forced dispatch" system, under which driver's could be fired for refusing a load. . . . Considering its destruction by Hunt, it was a reasonable presumption that the logbook showed that the driver was compelled by Hunt to drive with insufficient rest.(28)

Regarding the jury's imposition of \$250,000 in punitive damages against Hunt, the court stated as follows:

"From these circumstances, the jury could find, by applying the clear and convincing standard, that Hunt exhibited a conscious indifference to the consequences of putting a tired driver, at the risk of losing his job if he did not comply, and/or a defective tractor-trailer out on the highway, with the schedule for delivery which prompted maintaining the maximum allowable speed even in construction areas. This constituted a sufficient basis for the aggravating circumstances which the jury found as the predicate for punitive damages against Hunt."(29)

B. Ordonez v. M.W. McCurdy & Co., Inc.

The First District Court of Appeals of Texas applied the ordinary course of business exception to a spoliation claim in Ordonez v. M.W. McCurdy & Co., Inc.(30) Ordonez involved an accident in which the defendant's employee, while operating a tractor-trailer, rear-ended the plaintiff. One of plaintiff's theories was that the accident was caused because the defendant driver was fatigued. The driver's logbook had been destroyed, and the plaintiff requested the court to instruct the jury to presume that

the missing logbook contained information adverse to the defendants. At trial, a corporate representative of M.W. McCurdy testified that it was the routine practice of his company to keep drivers' logbooks for only six months after which they are thrown away. The appellate court upheld the trial court's refusal to give the spoliation instruction on the basis that the evidence showed the defendant had destroyed the logbooks in the ordinary course of business and not for the purpose of concealing evidence from the plaintiff.

C. Temple v. CCC Highway, Inc.

The Court of Appeals of Ohio upheld the trial court's refusal to give a spoliation instruction in Temple v. CCC Highway, Inc.⁽³¹⁾ In Temple the defendant driver, while operating a tractor-trailer, rear-ended another tractor-trailer parked on the shoulder of the road. The defendant failed to produce the driver's logbook. The trial court refused to instruct the jury that if the logbook had been produced it would have operated against defendant's interests. The appellate court noted that any information that could have been obtained from the logbook was provided by the defendant/driver's testimony. The driver testified at trial as to the amount of sleep and rest he had and his whereabouts prior to the accident. The driver further testified that the investigating police officer at the scene did not request his logbook. The appellate court, therefore, concluded that the record did not show that the defendant/ driver attempted to conceal or suppress his logbook and that the trial court did not abuse its discretion in refusing to give the plaintiff's requested instruction.

D. Comments

J.B. Hunt illustrates the potentially devastating effect that the destruction of a driver's logbook could have on a personal injury lawsuit. Hunt aptly demonstrates how plaintiff's counsel can exploit the destruction of a defendant/driver's logbook to its full advantage. Due to the failure of the defendant in Hunt to produce its driver's logbook, the jury was not only allowed to draw an adverse inference against the driver but against the trucking company as well. Because the defendant could not prove that its driver had adequate rest, plaintiff's counsel was allowed to introduce evidence that the trucking company was a habitual violator of hours-in-service requirements. Such evidence can be extremely prejudicial as the award of punitive damages against J.B. Hunt illustrates. If the logbooks had not been destroyed and had shown that the driver had adequate rest, there would not have been a causal connection between the trucking company's habitual hours-in-service violations and the plaintiff's injury; any evidence attempted to have been introduced regarding J.B. Hunt's habitual violations, therefore, would have been excluded as irrelevant.

The lesson to be learned from Hunt is that the destruction of logbooks relevant to an accident is done at the potential peril of the trucking company. By destroying logbooks after an accident, the trucking company may be turning evidence that might have been exonerating into the cornerstone of the plaintiff's case against it. Figuratively speaking, the ashes of the destroyed logbooks may hang like a black cloud over the trucking company for the duration of the lawsuit. It should also be noted that in Hunt, unlike the Ordonez case, the court refused to recognize the ordinary course of business exception to spoliation. As stated above, some courts may not apply the ordinary course of business exception where the duty to preserve records arose before the destruction.

The Temple case demonstrates the use of the cumulative evidence rule. Even though the driver's logbook was destroyed, the court reasoned that any information that could have been obtained therein was provided by way of the driver's testimony. The trial court in Temple, however, could have barred the driver's testimony as a sanction for having destroyed the logbook. The trial

court chose not to, and allowed the testimony of the driver due to the lack of any evidence of bad faith on the part of the defendant.

III. INFORMATION GENERATED BY THE NEW TECHNOLOGY

Global positioning systems (GPS), automatic on-board recording devices, and logbook scanners are providing trucking companies with instantaneous information regarding their driver's whereabouts, hours of service, miles driven, and much more. For example, a trucking company that equips its tractors with a Qualcomm Omnitrac satellite tracking system can possess information regarding the exact location of a truck, the amount of miles to its destination, and its estimated time of arrival. Qualcomm can also provide trucking company's with information regarding vehicle performance, speed and fuel consumption automatically and without driver intervention. Werner Enterprise's Paperless Log System (PLS) is an automatic on-board recording device which is used in conjunction with a satellite tracking system. Werner's PLS allows drivers to input federally mandated log data into an on-board mini-computer unit. The information is contemporaneously available to the trucking company through satellite technology.⁽³²⁾ Trucking companies and drivers can also send and receive e-mail messages through the Qualcomm and PLS systems. Another system, LogSCAN, enables drivers to scan their handwritten log sheets in their tractors; the information is then automatically transferred into the trucking company's computer system. LogSCAN will then interpret the data and provide the company with information regarding over-hours violations and the driver's available hours for the next day's dispatch. LogSCAN also compares driver's logs to supporting documentation, such as fuel or toll receipt, to determine falsification of driver's logs.

Through the use of these new technologies, motor carriers can monitor, direct and discipline their drivers with increased speed and precision. The new technologies give motor carriers the ability to prevent driver over-hours violations before they occur and to immediately notify and discipline drivers in the midst of an over-hours violation. While the new satellite technologies give the motor carriers increased information and control over their drivers, the use of these technologies arguably create greater legal duties on the part of the carriers. For example, if a carrier was aware through the use of a satellite tracking system that a driver was in the midst of an over-hours violation but failed to send an e-mail message to the driver's on-board computer directing him to rest, the carrier could be subject to a very convincing claim of negligent supervision in the event of an accident. The potential for the new technologies to deter over-hours violations and thus prevent accidents, of course, far outweighs additional liabilities that may be assumed by the trucking industry through their use. In fact, as the use of the tracking technologies become more prevalent, a trucking company could be found negligent for not employing them at all. The use of GPS, on-board recording, and log scanners create an abundance of computerized information regarding vehicle and driver operations which was not before available. Currently, the Federal Highway Administration and the trucking industry are battling over the FHWA's right to these electronic records in its review of driver's logbooks. Although the FHWA has declared that it is not requiring carriers to maintain electronic tracking data, the trucking industry is still uncertain if it will be required by the FHWA to maintain these electronic records as "supporting documents"⁽³³⁾ of a driver's records of duty status. Lana Bates, the president of The Truckload Carriers Association, has stated that the FHWA's "supporting document" proposal issued last April, has made "the supporting documentation requirement a lot stricter." According to Bates, "In effect, they've mandated electronic logs, without actually mandating electronic logs."⁽³⁴⁾ Electronic or computer data from satellite tracking, on-board recording, and log scanners may be required to be held for six months from the date of creation just like the logbooks.

IV. THE POTENTIAL FOR CLAIMS OF SPOILIATION IN CIVIL SUITS

Discovery rules in civil lawsuits potentially allow the discovery of much more information from a trucking company than required by the FHWA in conducting its reviews. Most jurisdictions allow the discovery of any relevant materials or materials which may lead to the discovery of admissible evidence.(35) Computerized data obtained from satellite tracking, on-board recording, and log scanning technologies most likely would fall within the scope of discoverable information. Materials that provide evidence of vehicle and driver performance on or about the time of an accident usually would be relevant to any personal injury lawsuit arising therefrom. This would be especially true if the plaintiff was alleging that the driver was fatigued or that the tractor-trailer was not properly maintained.

Because the tracking and recording technologies are new and developing and because attorneys may not be familiar with the operation of these complex systems, plaintiff's attorneys may insist on the production of information which simply does not exist. For example, although Qualcomm provides a carrier with contemporaneous information as to the location of a given driver, a carrier's computer system may not be set up to save this information. This fact was made clear in *Arctic Express, Inc. v. United States*.(36) In that case, the FHWA subpoenaed all Qualcomm data reports "retained by Arctic which are generated in the course of business . . . includ[ing] all records retained on computer or other electronic means and all hard copies." Arctic argued as follows: [I]t has never archived information from the Qualcomm records, which are accessed on screen, and then lost forever. Arctic claims that keeping the records would impose huge cost and space burdens, such as \$5,000 per month in extra fees.(37) The court required Arctic to produce the Qualcomm records, but as the subpoena requested, only those records which it retained, not any extra records.(38)

Trucking companies employing the new technologies are still required by the FHWA regulations to maintain the driver's record of duty status and any supporting documents for six months. As stated above, carriers arguably also have to maintain computerized data obtained from satellite tracking and on-board recording devices which may be considered "supporting documents" for six months.(39) Due to the expense of retaining this computerized information, most trucking companies will only maintain computerized information for six months as required by the regulations. Most personal injury lawsuits arising from trucking accidents will be filed long after six months from the date of the accident. Claims of spoliation against trucking companies, therefore, will be pervasive in personal injury lawsuits as plaintiff's attorneys speculate as to the extent of computerized information available and trucking companies routinely delete the information from their files as part of their business custom and practice.

V. DEFENDING CLAIMS OF SPOLIATION OF COMPUTERIZED DATA

The first defense by a trucking company to a claim of spoliation of computer data obtained from satellite tracking is that the information was never retained and simply does not exist. As the motor carrier in *Arctic Express, Inc. v. United States* made clear, Qualcomm tracking data is not archived in most trucking companies' computers. As stated above, plaintiff's attorneys may still pursue such a claim due to their lack of understanding of the technologies involved. Defense attorneys should be prepared with testimony from either Qualcomm representatives or persons familiar with the carrier's computer system to affirmatively establish the non-existence of such information and bar plaintiff's attorneys from advancing a theory of spoliation at trial. In sum, a trucking company should not be held accountable for failing to preserve data that never existed in its computer's memory. Unfortunately, the burden to establish the non-existence of the data may fall upon the defense.

The real battleground over spoliation of computer data is more likely to occur over data obtained from on-board recording devices and log scanners and computer program interpretations of this data. Because carriers will retain this information for six months in compliance with federal regulations, plaintiff's attorneys will argue that the information existed and was destroyed with the knowledge of pending litigation. Defense attorneys should raise the ordinary course of business exception to these claims of spoliation. The elements to this defense will be that the information was deleted from the computer files (1) as a matter of routine business and (2) in the absence of bad faith. Routine practice can be established through the testimony of a trucking company employee responsible for the maintenance of computer files or through an expert witness familiar with the routine practices of the trucking industry. The FHWA regulations regarding the six month retention policy should be raised as vindication of the company's policy. The absence of bad faith could be established through the fact that there was no lawsuit on file or any requests to preserve the data before the data was deleted. The lack of bad faith can further be shown by arguing that although a lawsuit based on the truck driver's negligence was foreseeable, it was not foreseeable that the potential plaintiff would be claiming driver fatigue or that the company was negligent in its supervision.

It should be noted, however, that the "ordinary course of business" defense to spoliation claims may not always be successful. If a court determines that a trucking company's duty to preserve the computer data arose before the deletion, sanctions may be imposed even in the absence of bad faith.(40) In the event that a pre-litigation duty is imposed, the trucking company would then be subject to sanctions for the destruction of the data. The most likely sanction would be the imposition of a presumption that the computer evidence, if produced, would have been adverse to the position of the trucking company. As an alternative sanction, the court could exclude testimony which could have been impeached with information obtained from the destroyed records. For example, a driver could be prevented from testifying as to his average speed before the accident if the Qualcomm system in place had provided this information but the trucking company deleted it. Finally, in states which recognize such a cause of action, a defendant trucking company could be subject to a separate cause of action for negligent or intentional spoliation for the deletion of computer data.

Defense attorneys, in contesting the imposition of sanctions, may be able to successfully argue that the destroyed computer data was cumulative of other evidence resulting in little to no prejudice on the part of the plaintiff. In the event that hard or original copies of driver's logbooks are available, this line of argument should be successful in countering claims of spoliation for the destruction of the same computer information. The existence of other "supporting documents," such as fuel receipts, toll receipts, weigh station tickets, or bills of lading, may be put forth as evidence of a driver's whereabouts thus eliminating the prejudice resulting from the loss of computerized data. Additionally, it might be argued that the driver's own testimony regarding his hours of driving is cumulative evidence of the deleted data thereby eliminating any prejudice.(41)

CONCLUSION

The developing law of spoliation is becoming less tolerant of destroyers of evidence. Trucking companies are acting at their peril, therefore, in destroying computerized log information relating to drivers involved in accidents. Because this information is saved for six months, jurors and judges will be very suspicious as to why this information was not saved in anticipation of a lawsuit. Such sentiments will likely lead to the imposition of an adverse presumption. The non-existence of information obtained from satellite tracking devices which is not archived, however, should not lead to the imposition of sanctions. Trucking companies might be able to escape the imposition of sanctions by raising the "in the course of business" defense. The trend in the law of spoliation towards less tolerance for spoliators, however, may derogate this defense.

Attorneys should counsel their trucking clients, therefore, to save all available computer data relating to driver and vehicle performance in the event of an accident. The potential damages for failing to save this information will greatly outweigh the costs of retention.

Defense counsel should also determine whether spoliation issues exist at the outset of the initial investigation or receipt of the case. It is better to be forewarned and forearmed before plaintiff attempts to exploit a potentially dangerous weapon which has unpredictable responses from the courts. Counsel should prepare witnesses in advance of their depositions so spoliation questions are not spring on them. Courts appear less likely to overreact when satisfactory and plausible reasons explain the missing or purged information. The driver or company risk/safety manager is usually in the best position to assist you in defeating a spoliation claim.

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1. Willard v. Caterpillar, Inc., 48 Cal.Rptr.2d 607, 616 (1995); Black's Law Dictionary, 1401 (6th ed. 1990).

2. Henderson v. Tyrell, 910 P.2d 522, 531 (Wash. Ct. App. 1996).

3. David A. Bell, Margaret M. Koesel, & Tracey L. Thurnbell, Let's Level the Playing Field: A New Proposal for Analysis of Spoliation of Evidence Claims in Pending Litigation, 29 Ariz. St. L.J. 769, 771 (1997) (citing John William Strong, McCormick on Evidence 265, at 193-94 (4th Ed. 1992)).

4. See Strong, supra note 3.

5. See In re. Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598, 616-17 (D.N.J. 1997) (ordering insurer to pay one million dollars as discovery sanction for destroying documents relevant to a class action lawsuit); Viviano v. CBS, Inc., 597 A.2d 543, 549-52 (N.J. Super Ct. Ap. Div. 1991) (upholding trial court's \$215,000 punitive damage award for concealment of evidence).

6. Wm.T. Thompson Co. v. General Nutrition Corp., 593 F.Supp. 1443, 1455 (C.D.Cal. 1984); see also Dillon v. Nissan Motor Co., 986 F.2d 263, 267 (8th Cir. 1993); Unigard Sec. Ins. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 365-69 (9th Cir. 1992); Welsh v. United States, 844 F.2d 1239, 1241-42, 1246-48 (6th Cir. 1988).

7. Blinzler v. Marriott Int'l Inc., 81 F.3d 1148, 1158-59 (1st Cir. 1996); Dillon, 986 F.2d at 267; Welsh, 844 F.2d at 1241-42, 1246-48; Capellupo v. FMC Corp., 126 F.R.D. 545, 551 (D.Min. 1989); Fire Ins. Exch. v. Zenith Radio Corp., 747 P.2d 911, 914 (Nev. 1987).

8. Trevino v. Ortega, 969 S.W.2d 950, 955 (Tex. 1998)(J.Baker, concurring); see also Fire Ins. Exch., 747 P.2d at 913.

9. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1992); McGuire v. Acufex Microsurgical, Inc., 175 F.R.D. 149, 153 (D.Mass. 1997); ABC Home Health Servs., Inc. v. IBM, Corp., 158 F.R.D. 180, 182 (S.D. Ga. 1994); Turner v. Hudson Transit Lines, 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991); Computer Assocs. Int'l., Inc. v. American Fundware, 133 F.R.D. 166, 169 (D. Colo. 1990).

10. Blinzler, 81 F.3d at 1159; White v. Office of the Public Defender, 170 F.R.D. 138, 148 (D. Md. 1997); Rice v. United States, 917 F. Supp. 17 (D.D.C. 1996).

11. Wm. T. Thompson, 593 F. Supp. at 1455 ("While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, [or] is the subject of a pending discovery sanction.").

12. Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir. 1992); Headley v. Chrysler Motor Corp., 141 F.R.D. 362 (D. Mass. 1991); Henderson v. Tyrrell, 910 P.2d 522 (Wash. Ct. App. 1996).

13. Schaffer v. RWP Group, Inc., 169 F.R.D. 19, 25 (E.D.N.Y. 1996).

14. Battochi v. Washington Hosp. Ctr., 581 A.2d 759, 767 (D.C. Ct. App. 1990); Schmid v. Milwaukee Elec. Tool Corp., 13 F. 3d 76, 70 (3d Cir. 1994).

15. Only six states - Alaska, California, Florida, New Jersey, New Mexico, and Ohio have recognized a cause of action for negligent or intentional spoliation. See Hazen v. Municipality of Anchorage, 718 P.2d 456, 463 (Alaska 1986) (intentional); Velasco v. Commercial Bldg. Maintenance Co., 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985) (negligent); Smith v. Superior Court, 198 Cal. Rptr. 829, 832-33 (Cal. Ct. App. 1984) (intentional); Bondu v. Gurvich, 473 So.2d 1307, 1312-13 (Fla. Dist. Ct. App. 1984) (negligent); Callahan v. Stanley Works, 703 A.2d 1014, 1017-19 (N.J. Super. Ct. Law Div. 1997) (negligent); Coleman v. Eddy Potash, Inc., 905 P.2d 185, 189 (N.M. 1995) (intentional); Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993) (intentional).

16. TransAmerican Natural Gas Corp. v. Powell, 811 S.W. 2d 913, 917 (Tex. 1991).

17. Computer Assoc. Int'l v. American Fundware, 133 F.R.D. 166 (D. Colo. 1990); Cabnetware, Inc. v. Sullivan, No. Civ. 5-90-313, 1991 US Dist LEXIS 20329 (E.D. Cal 1991).

18. Hartford Ins. Co. of the Midwest v. American Automatic Sprinkler Systems, Inc., 23 F. Supp. 2d 623 (Md. 1998); see also Cole v. Keller Industries, Inc., 132 F.3d 1044, 147 (4th Cir. 1998) (noting that remedy of dismissal was "simply too severe" in case where the plaintiff, without bad faith, destroyed the ladder at issue in the case); Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78-81 (3rd Cir. 1994) (reversing the district court's judgment for the defendant because the plaintiff did not intentionally destroy the evidence at issue nor had suit been filed at the time evidence was destroyed). Cf., e.g., Allstate Ins. Co. V. Garcia, 53 F.3d 804 (7th Cir. 1995) (affirming dismissal as sanction for negligent spoliation); Farley Metals, Inc. v. Barber Colman Company, 645 N.E.2d 104 (Ill. App. Ct. 1994) (affirming dismissal as sanction for spoliation in absence of bad faith and recognizing that "when crucial information or evidence is destroyed, the offending party's intent becomes less germane in determining the proper sanction.").

19. Sacramona v. Bridgestone/Firestone, Inc., 106 F.3d 444, 446 (1st Cir. 1997); Dillon, 986 F.2d at 263; Unigard Sec. Ins. v. Lakewood Eng'g & Mfg., 982 F.2d 363, 368-69 (9th Cir. 1992) (upholding exclusion of expert testimony as a sanction for spoliation); Hammond v. Ridge Tool Co., 539 N.W. 2d 753 (Mich. Ct. App. 1995) (holding that trial court erred in allowing plaintiff to offer expert testimony about evidence that it lost, even though it was inadvertently lost); Cincinnati Ins. Co. v. General Motors Corp., No. 94OT017, 1994 Ohio App. LEXIS 4960, at *14-15 (Ohio Ct. App. Oct. 28, 1994) (finding exclusion of expert testimony proper where evidence has been intentionally or negligently destroyed).

20. Giant Food Stores, Inc. v. K Mart Corp., 1996 U.S. Dist. LEXIS 17831 (E.D. Pa) (citing Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3rd Cir. 1994).

21. Anderson v. Litzenberg, 694 A.2d 150, 156 (Md. App. 1997). See note 24 for jurisdictions that will not direct any presumptions without a showing of bad faith.
22. Id. See also Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (holding that an adverse inference about a party's consciousness about the weakness of its case requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction).
23. Constans v. Choctaw Transport, Inc., 712 So.2d 885, 902 (La. App. 4 Cir. 1997).
24. Hartford Ins. Co. of the Midwest v. American Automatic Sprinkler Systems, Inc. 23 F. Supp. 2d 623 (D.C. Md. 1998) (refusing to allow adverse inference against defendant for spoliation where there was no evidence that defendant intentionally destroyed evidence at a time when it knew the evidence would be relevant to a potential lawsuit); see also S.C. Johnson & Sons, Inc., v. Louisville & N.R. Co., 695 F.2d 253 (7th Cir. 1982); Delchamps, Inc. v. N.L.R.B., 588 F.2d 476, 480 (5th Cir. 1979); Commercial Ins. Co. v. Gonzalez, 512 F.2d 1307, 1314 (1st Cir. 1975); Eaton Corp. v. Appliance Valves Corp., 790 F.2d 874, 878 (N.D. Ind. 1986). For authorities recognizing that a showing of bad faith is not required in order to raise a presumption against the spoliator, see, e.g., Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993); Nation-wide Check Corp. v. Forest Hills Dist., 692 F.2d 214 (1st Cir. 1982); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991); Rhode Island Hosp. Trust Nat'l Bank v. Eastern General Contractors, Inc., 674 A.2d 1227 (R.I. 1996).
25. Gumbs v. International Harvester, 718 F.2d 88, 96 (3d Cir. 1983) (citing Smith v. Uniroyal, Inc., 420 F.2d 438 (7th Cir. 1970); see also Coates v. Johnson & Johnson, 756 F.2d 524, 550 (7th Cir. 1985) (holding in employment discrimination case that destruction of employment records under routine procedures and in absence of bad faith did not give rise to adverse inference that defendant's were conscious of a weak case); Bergstein v. Jordache Enterprises, Inc., 841 F. Supp. 546 (S.D.N.Y. 1994) (same ruling in wrongful discharge case).
26. Turner, 142 F.R.D. at 73. Turner is particularly relevant to the topic of this paper. In Turner, the defendant bus company destroyed the maintenance records of its bus that had been involved in the subject accident. The defendant argued it destroyed the records after the Federal Highway Administration regulation which mandated the retention of the records for a certain amount of time had expired. The court stated in its opinion that the federal regulation upon which the defendant relied did not excuse the destruction of records. Id. This case could be used analogously against trucking companies which have disposed of logbooks after six months as authorized by 49 C.F.R. § 395.8(k).
27. 427 S.E.2d 499 (Ga. App. 1992).
28. Id. at 500.
29. Id.
30. LEXIS 4967 (1st Dist. Tex. App. August 13, 1998).
31. 1991 Ohio App. LEXIS 1338.
32. On June 10, 1998, the FHWA officially authorized Werner Enterprises to adopt its new PLS and discontinue the use of the paper logbooks.

33. Section 395.8(k) of the Federal Motor Carrier Safety Regulations (49 C.F.R.) states as follows: Retention of driver's record of duty status. (1) Each motor carrier shall maintain records of a duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt.

34. Jim Park, CyberCops, Hot Topic, Werner Enterprises, Inc. Website.

35. Rule 26(b)(1) of the Federal Rules of Civil Procedure, for example, provides that the scope of discovery is as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of person having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

36. No. 96-4095, 1997 U.S. App. LEXIS 36748 (6th Cir. December 23, 1997).

37. *Id.* at *5.

38. It should be noted that this opinion was issued before the FHWA's April 1998 letter to the trucking industry stating that it does not need to retain electronic tracking data.

39. Section 395.15 of the Federal Motor Carrier Safety Regulations, which authorizes the use of automatic on-board recording devices, also provides as follows: The motor carrier must maintain a second copy (back-up copy) of the electronic hours-of-service files, by month, in a different physical location than where the original data is stored. 49 C.F.R. § 395.15(i)(10).

40. See, e.g., *Turner*, 142 F.R.D. at 73 (holding that destruction of bus maintenance records could not be excused simply because the federal requirement for their retention had expired).

41. See, e.g., *Temple v. CCC Highway, Inc.*, *supra*. Plaintiff's attorneys, however, may likely make the conflicting argument that a driver's testimony regarding hours of service should be barred as a sanction for the spoliation of the computerized log information.

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