

REMEDIES AVAILABLE

Courts have broad inherent authority to impose sanctions on spoliators through their power to control litigation.

These sanctions are determined on a case-by-case basis and will not be disturbed on appeal absent a clear abuse of authority. The purposes of such sanctions are to:

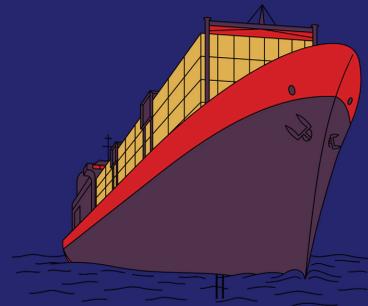
- *Deter parties from engaging in spoliation*
- *Place the risk of an erroneous judgment on the party who wrongfully created the risk*
- *Restore the prejudiced party to the same position it would have been in absent the wrongful destruction of evidence*

When determining the appropriate sanction for spoliation, courts look to the following factors:

- *Degree of fault of the destroying party*
- *Degree of prejudice suffered by the non-spoliating party*
- *Availability of lesser sanctions that avoid unfairness to the non-destroying party, while serving as a sufficient penalty to deter future conduct*

New York courts have previously ordered the following sanctions for spoliation of evidence:

- *Preclusion of evidence related to the destroyed evidence*
- *Charging of an adverse inference*
- *Imposition of fines*
- *Dismissal of the cause of action or defense*



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Executive Summary

PRESERVATION OF EVIDENCE / THE RISK OF SPOILIATION



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THE NEED FOR POST-CASUALTY INVESTIGATIONS

Conducting a prompt post-casualty investigation is paramount in order to preserve physical evidence and testimony. Thus, the following key steps should be implemented as soon as possible in the wake of a serious casualty:

1. **Appoint** a surveyor early on to ascertain the possible causes of the casualty and to memorialize the damage and the extent of the damage.
2. **Coordinate** with local P&I correspondents or agents to obtain vessel voyage records and other documentary evidence and testimony or statements.
3. **Consider** obtaining written statements or memoranda of interviews with members of the crew. However, be aware that statements made by a Master can be used against the owners of a vessel, and statements given by other witnesses might be admissible if the witnesses are later deemed to be unavailable to testify.
4. **Gather** evidence from other parties through the use of pre-action discovery under Rule 27 of the Federal Rules of Civil Procedure.

RULE 27

Pre-action discovery can be used not only to preserve the testimony of a witness or to obtain documents, but also to obtain the right to inspection of cargo or a vessel.

Rule 27 of the Federal Rules of Civil Procedure provides an often overlooked mechanism for engaging in limited discovery before a lawsuit or arbitration has been commenced. Here are points to consider in deciding whether to use Rule 27:

AN OFTEN OVERLOOKED TOOL

1. Rule 27 is not a substitute for normal discovery, and unlike ordinary discovery there is no absolute entitlement to it.
2. Pre-action discovery can be used not only to preserve the testimony of a witness or to obtain documents, but also to obtain the right to inspection of cargo or a vessel.

OBTAINING PERMISSION

3. A verified petition must be filed in the district where any expected adverse party resides. If the adverse party doesn't reside in the U.S. then the petition can be filed in any district so long as notice and service of process is made on the adverse parties.
4. The verified petition has to set forth the precise facts that are to be established with the sought testimony and/or documents and why preservation is necessary.
5. The testimony sought must be known and the purpose of perpetuating the testimony cannot be to ascertain unknown information. In other words, no fishing expeditions!

REQUIRED SHOWING

6. Whether or not to grant a petition for preaction discovery is within the “sound discretion” of the court.

7. Typically preservation is claimed to be necessary on the grounds that the evidence or testimony might be lost unless obtained immediately without having to wait for a lawsuit or other legal proceeding to commence.

8. Generally, pre-action discovery is not available in arbitrations, unless “extraordinary circumstances” can be demonstrated.

9. Courts have held that “extraordinary circumstances” were shown where a vessel with crew members possessing particular knowledge of the dispute was about to leave port.

10. Similarly, “extraordinary circumstances” have been found where the condition of a ship was at issue and said ship was being repaired and about to leave the United States.

SPOILIATION SIDEBAR

THE DESTRUCTION OF EVIDENCE

Spoilation is 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.

Courts recognize that physical evidence is often the most eloquent and impartial witness and that destruction of such evidence often leaves the non-spoiliating party without a defense or cause of action.

Under New York law, the definition of spoliation includes non-intentional, or negligent, destruction of evidence.

Once a party knew or should have known that the evidence sought is relevant to future litigation, the obligation to preserve such evidence attaches and precludes its intentional or negligent destruction.