

Product Liability Law and Strategy

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**Evidence: A Plaintiff's War Story**

**AGGRESSIVE PURSUIT OF SPOILIATION REAPS REWARDS**

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MANY PRODUCT liability attorneys believe that destruction, hiding or alteration of data may take place during discovery but it is hard to "prove" such misconduct in a particular case unless someone on one side of a lawsuit defects to the opposing side. Even worse, many practitioners believe that the issue of spoliation is not worth pursuing because many judges treat such abuses mildly and seldom impose any meaningful sanctions on a violator. Our recent experience, however, shows that aggressive pursuit of suspected spoliation can be worthwhile and that some trial judges are treating this sort of misconduct more seriously than they did in the past.

In a recent product liability lawsuit, these authors discovered that the defendant manufacturer altered documents produced in discovery by deleting test results. As a result, the court imposed severe sanctions on the defendant. The sanctions severely crippled its principal defenses and the case was settled (with no admission of wrongdoing) shortly thereafter. *Richardson v. Union Oil Co. of California*, No. 94-0098 (GK) (D.D.C. dismissed as settled Dec. 3, 1996).

The authors represented Mary E. Richardson, the widow of a worker who developed acute myelogenous leukemia (AML) following exposure to benzene. She initiated a wrongful death suit against Union Oil Co. of California (Unocal), the manufacturer of the principal components of a solvent used by the worker. There is little dispute that exposure to benzene can cause AML, but there is sharp disagreement in the medical community regarding the level of exposure required to cause the disease. As such, determining the amount of benzene in Unocal's products became the obvious focus of the plaintiff's initial discovery, as well as the central issue in the case.

In response to the plaintiff's discovery requests, Unocal produced a limited number of documents purporting to demonstrate that its products contained no more than zero to 15 parts per million of benzene during the relevant period. We were skeptical of this response, particularly since the test data were incomplete and, as we later learned, information from one of Unocal's refineries had been omitted.

Make Them Swear to It

On behalf of the plaintiff, we filed a motion to compel discovery that articulated our suspicion that Unocal had not produced all the relevant tests. Our motion also pointed out that the company had produced almost no test data for the products at issue for many of the years in question. The court then ordered the company to produce all the test results it had or to execute an affidavit outlining the nature of its search efforts and stating that it had no more data.

Unocal elected to produce additional test results. When the documents Unocal produced pursuant to the court order were compared with those it had originally produced, we discovered that test results from one of Unocal's refineries had been deleted from the first produced documents. The deleted data showed that, at times, one of Unocal's products actually contained benzene at levels hundreds of times higher than Unocal had initially claimed. Unocal explained that the deletions were based on a good-faith mistake as to which of its refineries had produced the products.

### One Step Forward, Two Steps Back?

We opted to pursue this issue aggressively with the court. We believed that Unocal's actions were of evidentiary significance—an admission by the company, in our view, that the test results were harmful to its defense. At the same time, the fact that some appellate courts had placed tough burdens on those seeking sanctions against a spoliator was a cause for concern. E.g., *Shepherd v. American Broadcasting Co. Inc.*, - 62 F.3d 1469 (D.C. Cir. 1995). Some of these cases place higher burdens of proof on the party seeking sanctions and limit the remedies a court can impose on a spoliator. These decisions force the victim of spoliation to bear the expense of proving spoliation without a compensating reward for its efforts.

Nevertheless, we felt that the alteration of a document to delete test results is a serious offense that both the court and the jury should know about. We initially sought leave of the court to conduct discovery on the issue, and the court allowed us to take the depositions of the in-house paralegal responsible for the alterations and her attorney supervisor. Those depositions proved to be the foundation of the motion for sanctions we later filed.

U.S. District Judge Gladys Kessler of the District of Columbia granted the plaintiff's motion for sanctions and all relief requested except a default judgment. She entered an order (1) precluding Unocal from presenting any evidence or argument at trial that there was insufficient benzene in its products to have caused the decedent's AML, (2) permitting the plaintiff to admit evidence at trial regarding Unocal's document alterations and misrepresentations to the court and (3) awarding the plaintiff her attorney fees and costs. *Richardson, supra* (Memorandum-Opinion and Order filed May 17, 1996).

Unocal responded to Judge Kessler's order by retaining a new law firm to represent it solely on the sanctions issues. Unocal's special counsel filed a motion for reconsideration of the sanctions order along with new affidavits from its in-house personnel and outside trial counsel. The court reaffirmed its original findings concerning Unocal's conduct, but vacated that portion of its original order permitting the plaintiff to introduce evidence of Unocal's document alteration and misrepresentations to the court at trial. The court also narrowed the scope of its issue-preclusion sanction.

## Due Diligence

The court's ruling was disappointing; however, we continued to press the matter and uncovered other lawsuits in which Unocal had deleted the same type of test data in documents produced to opposing counsel.

Armed with this new information, we went back to court seeking even harsher sanctions. While this motion was pending, Unocal, which opposed the imposition of additional sanctions on the grounds that no new facts or arguments had been raised, settled the wrongful death case.

We believe that the settlement amount was substantially increased by Judge Kessler's prior order and the pending motion for even stronger sanctions. Our experience shows that counsel should not be discouraged by recent appellate cases on spoliation. The Richardson case demonstrates that, when actual proof of document alteration is established, trial courts will severely sanction violations in a fashion that makes pursuit of the issue worthwhile for the victim and his or her counsel.

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