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P.C.

January 2007

## SPOILIATION OF EVIDENCE

### Connecticut Supreme Court Recognizes New Duty to Preserve Evidence in Civil Cases

In the wake of the Enron document-shredding spree, Congress passed the Sarbanes-Oxley Act (SOX). The aim was to reduce corporate fraud. Among other things, SOX makes it a crime to destroy documentary evidence to obstruct a government inquiry. Reaching beyond corporate fraud, government inquiries and documentary evidence, the Connecticut Supreme Court recently recognized a new tort of intentional "spoliation" (destruction) of evidence in civil cases.

#### *The Decision*

*Rizzuto v. Davison Ladders, Inc.*, 280 Conn. 225 (2006), concerned Leandro Rizzuto, a customer at The Home Depot in Norwalk, Connecticut. Mr. Rizzuto climbed a ladder while shopping and became injured when the ladder suddenly collapsed. He then sued Davison, the ladder manufacturer, as well as The Home Depot. During the litigation, Mr. Rizzuto repeatedly asked the defendants to preserve the ladder so he could examine it. Instead, they did their own examination, claimed to find no defects, and destroyed the ladder without ever making it available to Rizzuto. In response, Rizzuto added a claim for intentional spoliation of evidence, a new theory of liability in Connecticut.

The Connecticut Supreme Court agreed with Rizzuto and recognized the new tort. The Court emphasized that intentional destruction of evidence is particularly harmful where another party needs the evidence to establish the basic elements of its case. This reasoning applies equally if the case is already pending or if it is reasonably likely to be brought. Intentional destruction of evidence in either situation can now give rise to a new claim for damages separate from the liability that might be involved in the underlying lawsuit.

#### *Five Elements*

1. Knowledge of a pending or impending civil action
2. Destruction of evidence
3. "Bad faith" or intent to deprive another party of its cause of action
4. Inability of the other party to establish a legal claim without the destroyed evidence
5. Damages

#### *Award of Damages*

According to the Connecticut Supreme Court, the awarding of damages in spoliation cases is guided by the purpose of compensatory damages, which is "to restore an injured party to the position he or she would have been in if the wrong had not been committed." This means that a spoliation victim may be

entitled to recover the same amount of compensatory damages as if he or she won the underlying case.

The rationale for awarding full compensatory damages appears to be that, if someone intentionally destroys crucial evidence with the intent to preclude the victim from establishing a legal claim, the court may presume the evidence would have supported the victim's case. This presumption can produce remarkable results. It means that a spoliation victim can recover his or her full compensatory damages even if there is no direct proof that he or she would have won the underlying case. That's the power of the new spoliation tort!

The *Rizzuto* case has been sent back to the trial court for further proceedings. If Mr. Rizzuto succeeds in proving that the destruction of the ladder was done in "bad faith" – that is, with the intent to interfere with his ability to bring his products liability action – then he could win his full compensatory damages without ever proving that the ladder was defective. This is a powerful judicial warning to everyone who could be subject to litigation in Connecticut not to destroy evidence that could be helpful to an adversary.

#### *What Steps Should You Take?*

- As soon as you believe that you or your company may bring a lawsuit or be sued, identify all people who may have relevant information and all places where relevant evidence may be located. This includes documents in hard-copy *and* electronic form, plus physical evidence.
- Give written instructions to all relevant personnel to preserve all relevant items and not to destroy anything likely to be relevant. Stress that if there is any doubt on a relevance determination, the advice of counsel should be obtained before acting.
- Specifically instruct personnel not to delete any e-mail or other files.
- Instruct your information technology personnel to make backup copies of electronic files.
- Segregate and safeguard all potentially relevant electronic, documentary, and physical evidence.
- Periodically remind personnel of the "litigation hold" and the duty to preserve any evidence relating to the matter.

If you have questions or would like to discuss these issues further, please contact **Frank J. Silvestri** or **Janna D. Eastwood** of our office at (203) 222-0885.