The Spoliation Doctrine in Maryland

*By Michael D. Berman and Alicia Shelton**

The spoliation doctrine has been described as the "flip side" of the duty to preserve potentially responsive information when litigation is reasonably anticipated. Oversimplified, spoliation occurs when a potential litigant destroys or allows relevant information to go missing. The spoliation doctrine effectuates the principle that, when a person anticipates litigation, he or she must use reasonable efforts to preserve potentially responsive information. If unique information is lost, a court may take remedial action, i.e., impose a sanction. However, under the January 2008 amendments to the Maryland Rules, the outcome of a spoliation motion may differ from the outcome under the December 2015 amendments to the Federal Rules of Civil Procedure.

In Maryland, the underlying principle is that: "[A] party should not be allowed to support its claims or defenses with physical evidence that it has destroyed to the detriment of its opponent." *Cumberland Ins. Group v. Delmarva Power*, 226 Md. App. 691, 696-97, 130 A.3d 1183, 1187, cert. denied, 447 Md. 298, 130 A.3d 1183 (2016). Stated differently, the doctrine is based on the notion that a self-interested potential litigant will preserve favorable information, and a failure to do so is an implied admission that the missing data were unfavorable. *See generally*, M. Berman, THE DUTY TO PRESERVE ESI (ITS TRIGGER, SCOPE, AND LIMITS) & THE SPOLIATION DOCTRINE IN MARYLAND STATE COURTS, 45 U. Balt. L.F. 129 (2015). "Grounded in fairness and symmetry," *Cumberland*, 226 Md. App. at 696, 130 A.3d at 1186, the doctrine's objective is two-fold: to level the playing field when significant information is missing, and to deter misconduct. Historically, to achieve these dual objectives, the Maryland Rules and the Federal Rules of Civil Procedure provided courts broad discretion to impose appropriate sanctions for the failure to preserve discoverable information, while litigants were provided a "safe harbor" for loss of ESI as the result of "routine, good-faith operations of an electronic information system." Maryland's "safe harbor," Rule 2-433, was patterned on former FRCP 37(e).

In December 2015, however, the Maryland and Federal Rules parted textual company. At the federal level, there was concern that the "safe harbor" of former FRCP 37(e) was too shallow. As a result, litigants often felt compelled to "over preserve" in order to avoid sanctions. This increased the cost of litigation and was contrary to FRCP 1 (providing for the "just, speedy, and inexpensive" determination of cases). In December 2015, after a National dialogue and extensive study, FRCP 37(e) was amended to replace the "safe harbor" with a comprehensive framework for sanctions analysis in the ESI context. See Advisory Committee Note to FRCP 37(e). Further, the Advisory Committee Note to Rule 37(e) states that the Rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used."[1]

The Maryland Rules retain the "safe harbor." As such, Maryland courts tend to analyze sanctions under both a rule-based and common-law approach using their inherent powers. See e.g., *Cumberland*, 226 Md. App. at 701, 130 A.3d at 1189. In a series of recent decisions from the Court of Special Appeals of Maryland, the intermediate appellate court has continued to

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formation. Likewise, the trustee's counsel presented evidence that the defendants were on notice and understood their duty to preserve ESI. Perhaps most importantly, the trustee's counsel presented compelling evidence that the acts of spoliation corresponded to key moments in the litigation – for example, just before the debtor was required to produce documents. This timeline was instrumental in demonstrating that the destruction of evidence was not inadvertent but rather was intentional.[8]

After the hearing and post-hearing briefing and argument, the Court held that the defendants who were the subject of the spoliation motion acted in bad faith and for the purpose of depriving the trustee and creditors of evidence. Accordingly, the Court awarded the severe sanction of default judgments on the bulk of the trustee's claims, as well as attorneys' fees and costs.[9] This case study shows how a vigilant lawyer, armed with objective forensic computer science, can protect a client's rights even in the face of an adversary who is determined to evade the law.

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[1] The data may be automatically overwritten over time as hard drive space becomes needed. In the case of a device with a large amount of storage, automatic overwriting may only become necessary after a long time, if ever. Therefore, "deleted" information may remain on a computer indefinitely.

[2] Mr. Greetham also explained the challenges ahead in light of the exponential expansion of the amount of data created in the world every day. With the rise of the "Internet of Things" — the proliferation of objects like home appliances that have Internet connectivity — the rate of data creation will only rise.

[3] The defendants' motion to dismiss was denied as to forty of the forty-three counts in the complaint. *Schlossberg v. Abell (In re Abell)*, 549 B.R. 631, 677 (Bankr. D. Md. 2016).

[4] *See* Fed. R. Bankr. P. 2004.

[5] Ricoh deployed a device called a Remlox (invented by Mr. Greetham) that plugs into a computer and creates a bit-by-bit image. The Remlox is sent to the owner of the computer, with simple instructions to connect the Remlox at the end of the work day, without the need to disconnect or move the machine. Thus, there was no credible argument to be made that imaging the computers would disrupt the defendants' business or otherwise impose a burden. From the images, Ricoh produced reports like lists of deleted and active files, and the history of external hard drives that had been connected to a given computer, to help counsel plan discovery.

[6] The Trustee's ESI consultant, Ricoh's David Hendershott, summarized the forensic evidence in a detailed affidavit.

[7] "[T]here is a particular need for [spoliation sanctions] motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are fact intensive, requiring the court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved." *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 508 (D. Md. 2009).

[8] Proving an adversary's state of mind is often very difficult; spoliators will rarely admit that they destroyed evidence for the purpose of keeping it from the opponent. The case law on spoliation has developed to identify the type of indirect evidence that can show bad faith that justifies the harshest sanctions. In particular, the volume and timing of data deletion can be highly probative of a spoliator's bad faith. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 531 (D. Md. 2010). The timeline in the Abell case also showed a long period between 2012 and 2015 where wiping was not done, undercutting the defense argument that the wiping program was part of normal computer maintenance or used in the ordinary course of business.

[9] *Schlossberg v. Abell (In re Abell)*, No. 13-13847, Adv. No. 14-0417, 2016 WL 1556024 (Bankr. D. Md. Apr. 14, 2016).

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rely on the "broad discretion" of trial courts in sanctioning spoliation. C*umberland*, 226 Md. App. at 699, 130 A.3d at 1188.

Initially, Maryland courts, like Federal courts under FRCP 37(e), insist that, for there to be spoliation, litigation must be reasonably anticipated when ESI goes missing. For example, in *Clar v. Muehlhauser*, No. 0851, 2017 WL 2962816 (Md. Ct. Spec. App. July 12, 2017) (unreported), the Court of Special Appeals rejected the appellants' request for an adverse inference as a sanction for the appellee's destruction of alleged surreptitious videos of a women's rest room, because the destruction occurred before litigation was reasonably anticipated. In doing so, the Court looked at the four-factor test set forth in *Klupt v. Krongard*, 126 Md. App. 179, 199, 728 A.2d 727, 737 (1999) (citing *White v. Office of the Public Defender*, 170 F.R.D. 138, 147-48 (D. Md. 1997)) ("*White* test")[2]. Contrary to FRCP 37(e)(1), the Court noted that the elements of the spoliation test include "an intent to destroy the evidence…." But, consistent with FRCP 37(e) (providing an "anticipation… of litigation" requirement), because the "destruction occurred before the lawsuit was filed and even before discovery of the subject camera that gave rise to such lawsuit," the elements of the *White* test had not been met. *Clar*, 2017 WL 2962816, at *7.

In *Cumberland*, 226 Md. App. at 691, 130 A.3d at 1183, the Court addressed, as a matter of first impression, how to apply the spoliation doctrine where the evidence or physical object that was destroyed, in this instance a house, was itself the subject of the case. The litigation arose from a house fire. The plaintiff home insurer maintained access to the meter box that it argued was responsible for the fire, but demolished the remains of the house itself. The defendant power company moved for sanctions in the form of dismissal, arguing that by demolishing what remained of the house, the plaintiff had irreparably prejudiced the defendant from developing possible defenses. The trial court dismissed the plaintiff's claims and in affirming the trial court, the appellate court weighed "the degree of fault (or, in some instances, intent) on the part of the spoliator, on the one hand, with the level of prejudice that inures to the defense because the evidence has

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been destroyed, on the other." *Id*. at 699, 130 A.3d at 1188. It would appear that Cumberland stands for the proposition that "game ending" sanctions are justified where there is a knowing destruction of relevant information after a duty to preserve attached. That would comport with FRCP 37(e)(2)(C).

In *Tyler v. Judd*, No. 0610, 2016 WL 3570467 (Md. Ct. Sp. App. June 30, 2016) (unreported), a woman underwent a sterilization procedure. Prior to the procedure, the treating physician had allegedly assured her that the procedure was 100% effective and painless. After suffering pain and becoming pregnant, the woman sued the physician for, inter alia, lack of informed consent. During discovery, the physician committed suicide and the plaintiff moved for sanctions under Maryland Rule 2-433, asserting that "by taking his own life, [the physician] had intentionally destroyed evidence that would have been obtained through his testimony." *Id*. at *2. The Court determined that four factors in *White* had not been met because the physician had not taken his own life with the intent to destroy evidence. While FRCP 37(e) applies only to ESI, it would not have imposed an intent requirement to justify sanctions. Instead, it would have required evaluation of whether reasonable steps to preserve were taken, whether the lost ESI could not be restored or replaced, and whether plaintiff was prejudiced. If so, curative instructions could have been issued.

Castruccio v. the Estate of Castruccio, 230 Md. App. 118, 146 A.3d 1132 (2016), *affirmed*, __ A.3d __, 2017 WL 3667724 (2017), arose out of a contest to a will, with the contestor arguing that, because a beneficiary had destroyed a flash drive which may have contained files related to the will, the will could not be presumed valid.[3] The beneficiary explained that the flash drive contained documents with confidential information related to her volunteer work as well as other documents concerning the testator and his businesses. The trial court rejected the contestor's argument and denied by implication the contestor's motion for sanctions, noting that "'[t]here is no doubt that [the beneficiary's] ill-considered actions have made the discovery process more difficult.' 'However,' given the witnesses' 'undisputed testimony' concerning the execution and attestation of the will, as well as 'the totality of the record,' the [trial] court could 'not conclude that her actions would supply the clear and convincing basis upon which a trier of fact would be able to overturn the presumed Will.'" *Id*. at 150, 146 A.3d at 1150. Relying on the court's "broad discretion to fashion a remedy for spoliation," the intermediate appellate court affirmed the trial court's granting of summary judgment against the contestor. *Id*. at 150, 146 A.3d at 1151. Under FRCP 37(e)(1), if there was a finding of both negligence and prejudice, a court could have imposed measures no greater than necessary to cure the prejudice. Under FRCP 37(e)(2), if there was a finding of "intent to deprive another party of the information's use," more stringent sanctions could have been imposed.

In *Martin v. Meyer*, No. 1796, 2016 WL 3406052 (Md. Ct. Spec. App.) (unreported), *cert. denied*, 450 Md. 124, 146 A.3d 473 (2016), a custody modification proceeding, the mother argued that the father "had acted in bad faith by deleting his internet browser history, thus unnecessarily prolonging discovery, and accordingly, entitling her to fees." *Id*. at *11. The father argued that the mother's "claim of spoliation of evidence as the basis for a finding of bad faith is meritless because the trial court affirmatively found that Father's conduct was not improper." *Id*. at *12. In affirming the trial court's ruling, the appellate court noted that the trial court did not find any bad faith on the father's part. Under Rule 37(e)(1), if the mother was prejudiced and the information irreplaceable, it does not appear that bad faith would be required for measures no greater than necessary to cure the prejudice. Further, under Rule 37(e)(2), if the father acted with intent to deprive the mother of the information's use, more stringent sanctions may have been available.

FRCP 37(e) was amended after thorough study. If one accepts the premise that the December 2015 amendment to FRCP 37(e) has been successful in limiting the problems of over preservation and unpredictable imposition of sanctions, the presence of a somewhat different doctrine in State courts undermines the value of that benefit. Preservation obligations often arise before litigation commences, and the preserving potential party may not know which judicial system will be entertaining the lawsuit and which set of principles will apply.

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[1] The impact of that provision is open to question: "Defendants argue that the recent amendments to Fed. R. Civ. P. 37(e) and its advisory notes limit a court's ability to exercise inherent powers to remedy spoliation. However, even after the 2015 amendments, courts have continued to recognize powers to sanction the destruction of evidence outside of Rule 37(e)…." *Ronnie Van Zant, Inc. v. Pyle*, No. 17 CIV. 3360 (RWS), 2017 WL 3721777, at *8 n.16 (S.D.N.Y. Aug. 28, 2017) (*dicta*).

[2] Under *White*, the elements of spoliation are: "(1) An act of destruction; (2) Discoverability of the evidence; (3) An intent to destroy the evidence; (4) Occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent." *Clar*, 2017 WL 2962816, at *7 (citing *Klupt*, 126 Md. App. at 199, 728 A.2d at 737) (citing in turn, *White*, 170 F.R.D. at 147-48). "Constructive knowledge [of destruction] could also suffice to satisfy [the intent] element." *Cumberland*, 226 Md. App. at 698, 130 A.3d at 1189.

[3] Spoliation issues were not addressed by the Court of Appeals in this case. *Castruccio v. the Estate of Castruccio*, __ A.3d __, 2017 WL 3667724 (2017). Interestingly, one of the first Maryland spoliation decisions arose out of a will contest. Berman, SPOLIATION, 45 U. Balt. L.F. at 138-39.