Toxic Torts and Environmental Law

Summer 2002

The newsletter of the DRI Toxic Torts and Environmental Law Committee

DRI The Voice of the Defense Bar

In This Issue…

A LITIGATOR'S GUIDE

Using Spatial Information

Part 1

Rick C. Crowsey
Crowsey Incorporated
Charlottesville, VA

Introduction

Your client is facing a class action lawsuit with thousands of claimants located anywhere from next door to the incident to more than 15 miles away. The plaintiffs all submit fear and fright claims, and most of them submit claims for personal injury and property damage. With more than 3,000 potential claimants spread over 100 square miles, how are you going to understand and communicate the *de minimis* nature of these claims? How will you show similarity or the lack of similarity among claims? What approach will you use to understand and communicate the complexities of the case to co-counsel, underwriters, and clients? What strategy will you use to review risk systematically and to structure a settlement offer?

Spatial information tools can allow you to understand quickly the nature of all the claims, to assess numerous scenarios, and to communicate the complexities of the case simply and persuasively. Spatial information has a geographic content; in other words, the location, or the where, is a key relational component of spatial information. "But my cases aren't spatial," you say. Oh, really? Cases involving property damage, environmental issues, trespass, substance spill or leak, electromagnetic field exposure, and both natural and manmade disasters are just a few examples of cases that have substantial spatial content and that are well served by the use of spatial information. Many of your clients will face or pursue litigation that has a substantial spatial component.

The use of spatial information will increase your likelihood of success, depending on how effectively you understand, visualize, and communicate the facts of the case. Spatial information enables this same type of visual understanding persuasiveness as a photo or video of the defendant in the act of the crime. If a picture is worth a thousand words, spatial information is worth thousands of pictures.

What is Geospatial Information?

Geospatial information comprises three

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Chair

Brickford Y. Brown
Moran, Kiker & Brown
4112 E Parham Rd, Ste A
Richmond, VA 23228
(804) 421-6250
(804) 421-6251 – fax
bbrown@morankikerbrown.com

Vice Chair

Robert P. Scott, Jr.
Abrams, Scott & Bickley
600 Travis St, Chase Twr, Ste 6601
Houston, TX 77002-3007
(713) 228-6601
(713) 228-6605 – fax
rscott@asbtexas.com

Membership Chair

Timothy Allen Clark
Vickers Riis Murray
106 Saint Francis St, 11th Fl
Mobile, AL 36602-3419
(334) 432-9772
(334) 3432-9781 – fax
tclarke@vickersriis.com

Corporate Co-Chair

Carl B. Epps III
Nelson, Mullins, Riley & Scarborough
1330 Lady St, 3rd Fl
Columbia, SC 29201-3332
(803) 255-9751
(803) 256-7500 – fax
bce@nmrs.com

Corporate Co-Chair

Robert E. Meadows
King & Spalding
1100 Louisiana, Ste 4000
Houston, TX 77002-5219
(713) 276-7370
(713) 751-3290 – fax
rmeadows@kslaw.com

Insurers

Michelle I. Schaffer
Campbell Campbell Edwards
One Constitution Plz, 3rd Fl
Boston, MA 02129
(617) 241-3000
(617) 241-5115 – fax
mschaffer@campbell-trial-lawyers.com

Private Practice

Stephen J. Imbriglia
Hecker, Brown, Sherry and Johnson
18th and Arch Sts, Ste 1700
Philadelphia, PA 19103
(215) 446-6209
(215) 636-0366 – fax
simbriglia@heckerbrown.com

Marketing Chair

TBA

Publications Chair

George P. Pappas
Sheehy, Serpe & Ware
909 Fannin St, Ste 2500
Houston, TX 77010-1003
(713) 951-1067
(713) 951-1199 – fax
gpappas@sswpc.com

***For The Defense* Committee Perspectives Section August 2002**
George P. Pappas

Program Chair

Barbara Arras
Phelps Dunbar
365 Canal St, Ste 2000
New Orleans, LA 70130-6534
(504) 566-1311
(504) 568-9130 – fax
arrasb@phelps.com

Expert Witness Chair

TBA

Legislative/Rulemaking Liaison

Mary H. Terzino
The Dow Chemical Co.
2301 N Brazosport Blvd
Freeport, TX 77541
(409) 238-9308
(409) 238-3587 – fax
mhterzino@dow.com

State Liaison Chair

TBA

Diversity Liaison

Demarcus J. Gordon
Johnson & Bell
55 E Monroe St, Ste 4100
Chicago, IL 60603-5896
(312) 372-0770
(312) 372-0522 – fax
gordond@jbltd.com

Web Page Chair

Marc E. Williams
Huddleston Bolen Beatty
611 Third Ave
Huntington, WV 25701
(304) 691-8306
(304) 522-4312 – fax
mwilliams@huddlestonbolen.com

Subcommittee Chairs

Agricultural Chemicals & Pesticides Co-Chair

Burton M. Harris (Burt)
Dow AgroSciences
9330 Zionsville Rd
Indianapolis, IN 46268
(317) 337-4845
(317) 337-4848 – fax
bmharris@dowagro.com

Agricultural Chemicals & Pesticides Co-Chair

P. Gerhardt Zacher (Gary)
Gordon & Rees
101 W Broadway, Ste 1600
San Diego, CA 92101
(619) 696-6700
(619) 696-7124 – fax
gzacher@gordonrees.com

Asbestos/Silicosis

F. Grey Redditt, Jr.
Vickers Riis Murray
106 Saint Francis St, 11th Fl
Mobile, AL 36602-3419
(334) 432-9772
(334) 432-9781 – fax
gredditt@vickersriis.com

Communications Hotline

Patrick T. Garvey
Johnson & Bell
55 E Monroe St, Ste 4100
Chicago, IL 60603-5896
(312) 984-0203
(312) 372-9818 – fax
garveyp@jbltd.com

Environmental & Regulatory Law

Brian J. Clark
Buchanan Ingersoll
213 Market St, 3rd Fl
Harrisburg, PA 17101
(717) 237-4823
(717) 233-0852 – fax
clarkbj@bipc.com

Environmental Coverage

Robert B. Jaskowiak
Rider Bennett Egan
333 S Seventh St, Ste 2000
Minneapolis, MN 55402
(612) 340-7984
(612) 340-7900 – fax
rbjaskow@riderlaw.com

Indoor Air Quality/Mold

Ronald E. Hurst
Montgomery McCracken Walker
123 S Broad St, 26th Fl
Philadelphia, PA 19109
(215) 772-7242
(215) 772-7620 – fax
rhurst@mmwr.com

Lead
Chair TBA

Mass Tort/Industrywide Litigation
Thomas M. Goutman
White & Williams
1650 Market St, Ste 1800
Philadelphia, PA 19103
(215) 864-7057
(215) 864-7123 – fax
goutmant@whitewms.com

Members Forum Chair
Donald H. Pyle
Lane Powell Spears Lubersky
601 SW Second Ave, Ste 2100
Portland, OR 97204-3158
(503) 778-2100
(503) 778-2200 – fax
pyled@lanepowell.com

Solvents & Chemical Exposures
Chair TBA

Spills, Explosions & Underground Storage Tanks
Christen A. Mattison
Hall & Evans
1200 17th St, Ste 1700
Denver, CO 80202
(303) 628-3300
(303) 628-3368 – fax
mattisc@hallevans.com

Trial Tactics
Kevin C. Mayer
Steptoe & Johnson
633 W Fifth St, Ste 700
Los Angeles, CA 90071
(213) 439-9400
(213) 439-9599 – fax
kmayer@steptoe.com

White Collar Crime
William A. Coates
Roe Cassidy Coates
100 E North St
Greenville, SC 29601
(864) 349-2603
(864) 349-0303 – fax
wac@roecassidy.com

Public Relations Contacts

East
Carl B. Epps III

Central
H. Patrick Morris
Johnson & Bell
55 E Monroe St, Ste 4100
Chicago, IL 60603-5896
(312) 984-0244
(312) 372-9818 – fax
morrisp@jbltd.com

West
TBA

Young Lawyer Liaison

Thomas V. McCarron
Semmes, Bowen & Semmes
250 W Pratt St
Baltimore, MD 21201
(410) 539-5040
(410) 539-5223 – fax
tmccarron@mail.semmes.com

Newsletter Editor

Eric K. Falk
Davies, McFarland & Carroll
One Gateway Ctr., 10th Fl
Pittsburgh, PA 15222-1416
(412) 281-0737
(412) 261-7251 – fax
efalk@dmcpc.com

Substantive Committee Advisory Board Liaison

E. Wayne Taff
Sherman, Taff & Bangert
1100 Main St, Ste 2950
Kansas City, MO 64196
(816) 471-6900
(816) 474-7346 – fax
ewt@stb-law.com

Law Institute Liaisons

2002 Seminar
Randall R. Riggs
Locke Reynolds
201 N Illinois St, Ste 1000
Indianapolis, IN 46204-4210
(317) 237-3800
(317) 237-3900 – fax
rriggs@locke.com

2003 Seminar
Robert E. Scott, Jr.
Semmes, Bowen & Semmes
250 W Pratt St
Baltimore, MD 21201
(410) 576-4725
(410) 539-5223 – fax
rscott@mail.semmes.com

William G. Gandy
Saperston & Day
2000 HSBC Plz 20th Fl
Rochester, NY 14604-2404
(716) 325-7570
(716) 325-5458 – fax
wgandy@hiscockbarclay.com

Patrick T. Garvey
Johnson & Bell
55 E Monroe St, Ste 4100
Chicago, IL 60603-5896
(312) 984-0203
(312) 372-9818 – fax
garveyp@jbltd.com

Cameron F. Kerry
Mintz Levin Cohn
One Financial Ctr.
Boston, MA 02111
(617) 542-6000
(617) 542-2241 – fax
cfkerry@mintz.com

William A. Ruskin
Shipman & Goodwin
One Landmark Sq, Ste 1700
Stamford, CT 06901
(203) 324-8113
(203) 324-8199 – fax
wruskin@goodwin.com

FROM THE CHAIR

BRICKFORD Y. BROWN

Moran, Kiker & Brown
4112 E. Parham Rd., Ste. A
Richmond, VA 23228
(804) 421-6252
(804) 421-6251 – fax
bbrown@moran-kiker.com

A Strong and Active Committee

I am pleased to report that the Toxic Torts and Environmental Law Committee continues to be strong and active. The Committee held its 2002 annual seminar in Miami on March 14-15, with the second highest attendance in history. The program was, as always, very well received with balanced presentations on science, law, and medicine. The American Chemistry Council, as co-sponsor of the program, had a very large presence at the seminar, and the expectation is that the relationship will continue to next year's program. We are finalizing the 2003 program scheduled for the Hotel del Coronado in San Diego. Please mark your calendars for March 20–21. The program was held previously in San Diego in 1999, and the city proved to be an outstanding location with its wonderful climate and proximity to Mexico providing a beautiful backdrop.

We have had participation from a number of companies, most significantly DowAgro Sciences and Syngenta Specialty Chemicals, in the panel/counsel program, which provides corporate attendees special incentives to hold a meeting of their outside counsel in conjunction with the seminar. For the terms of the arrangement, please contact me. This initiative is only available to five corporate participants, and one of the Committee's goals for the 2003 program is to have full participation. Please let me know of any companies that might be interested in this initiative.

I would encourage every Committee member to join a subcommittee, whether it be a Substantive Law Committee ("SLC") or an administrative subcommittee. This will allow more active participation in the Committee for those who would like to take full advantage of what the Committee has to offer. Steering Committee and subcommittee assignments are currently being made, with a particular need for help on the membership and marketing subcommittees. The current list of subcommittees includes: Corporate Membership, General Membership, Marketing, Web Site, Programs, Publications, Expert Witness Database, Trial Tactics, Environmental and Regulatory Law, Spills Explosions and Underground Storage Tanks, Asbestos/Silicosis, Solvents and Chemical Exposures, Mass Torts and Industrywide Litigation, Agricultural Chemicals and Pesticides, White Collar Crime, Indoor Air Quality, Environmental Coverage, and Young Lawyers. Please let me know if you have any interest in serving on any of the subcommittees or if you have a suggestion for a new subcommittee. (Warning: If you suggest it, you are at risk of chairing it!)

Barbara Arras, who now serves as our Program Chair, has chaired the Expert Witness Database subcommittee since its inception. Because of her duties with the annual program, it has been necessary to find a replacement. When the call went out, more than two dozen committee members responded immediately with a willingness to help. Kirk Marty of Shook, Hardy and Bacon has agreed to take on this responsibility. If you haven't already, you should receive an e-mail explaining how to get in touch with Marty to distribute any inquiries you may have.

The Web Site subcommittee is soliciting Committee members for comments for the Committee's web page. Please contact Marc Williams at mwilliams@huddlestonbolen.com with any suggestions or offers to help.

One of our goals this year is to increase the committee's membership by 20 percent, taking it to 900 members. Please encourage those whose practices touch on toxic tort and/or environmental law to join our Committee and take advantage the unique opportunities it offers.

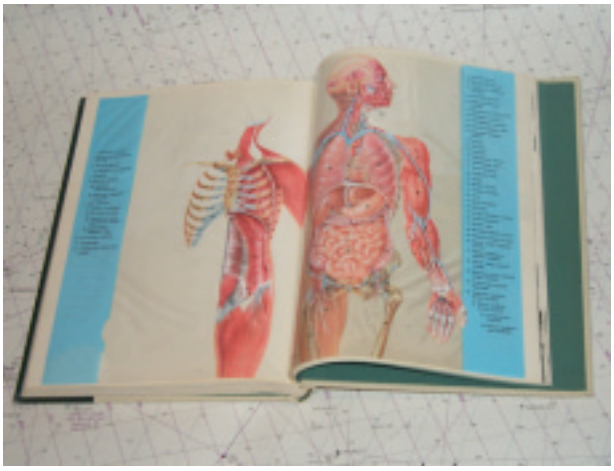
Finally, please consider attending the DRI Annual Meeting in San Francisco from October 2–6. There will be a meeting of the Toxic Torts and Environmental Law Committee from 4:30 p.m. to 6:00 p.m. on Thursday, October 3. I look forward to seeing you there.

Using Spatial Information, from page 1

basic components: geographic information systems, remotely sensed imagery, and the Global Positioning System.

Geographic Information Systems

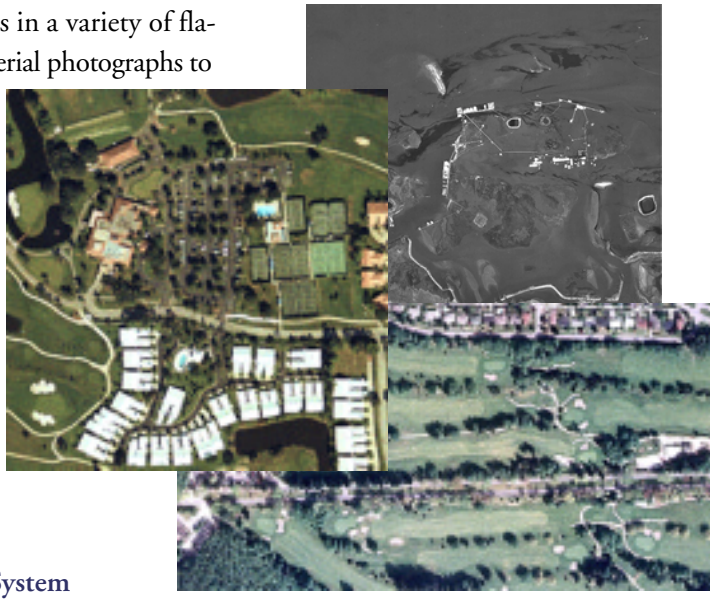
A geographic information system, or GIS, combines layers of information about a place to yield a better understanding of that place. A GIS is commonly defined as a system of hardware and software used for storage, retrieval, mapping, and analysis of geographic data. Most people think of maps when the term GIS is used, but a GIS can encompass areas as large as a planet or as small as a cell. A hard copy manifestation of a GIS is the human body overlays found in the H Volume of the World Book Encyclopedia.



Each transparent sheet contains a thematic "map" of different parts of the body. One sheet's theme is the circulatory system, another sheet's theme is the bones, and so on. A computer-based GIS allows for much more flexibility in analysis and visualization than a hard copy.

Remotely Sensed Imagery

Remotely sensed imagery is often used as one or more themes in a GIS, as a backdrop, as an overlay, or for extraction of various themes of information. Remotely sensed imagery comes in a variety of flavors, from common aerial photographs to the various kinds of satellite imagery. Remotely sensed images are simply pictures. These images are useful for identifying a condition or for verifying the existence of an object at a specific location.



Global Positioning System

The Global Positioning System, or GPS, was developed by the United States military to assist in the location and targeting of assets and resources. The GPS is composed of ~24 satellites in orbit around the Earth, all transmitting a signal that includes a precise time code. GPS receivers calculate their location on the Earth by using signals from several satellites to triangulate their location. The Global Positioning System has been a boon to geospatial information by making it possible to determine location precisely anywhere on the globe.

How Can Geospatial Information Be Used?

Until recently, satellite imagery had been the exclusive province of governmental agencies and the military. Now, however, it's a commercial reality. As a result, incredibly sharp Earth photos from space platforms reveal spatial, temporal, and spectral information about our world in ways never before possible or even imagined. Satellites circling the Earth from 400 miles in space at 16,000 miles per hour transmit data to the ground at high-speed rates. Aided by the Global Positioning System, these satellites know their orbital positions precisely. This precision permits very accurate positioning of ground features for mapping and for other applications to within a few meters. Moreover, space cameras with high-resolution and multispectral (blue, green, red, near-infrared, and so on) imaging capabilities can identify objects on the ground that have never before been visible to the human eye. Detection and identification of objects as small as 24 inches in size is now possible. Consequently, satellite imagery has the clear potential to become not only a staple for industries such as land use, hydrocarbon exploration, agricultural, environmental, and disaster assessment, but also a powerful tool for litigators.

Remote sensing, and in large measure geospatial information, activities in the U.S. are governed by three distinct information regimes: national security, civilian government, and commercial.

The national security space assets are regulated as a closed information system with the goal of collecting as much information as possible about the world while preventing the release of this information or the technology necessary to collect this information. The civilian government sphere of activity includes the operational meteorological satellites and the scientific research satellites and is governed as an open system. Its main objective is to collect and disseminate broadly environmental data as a public good and to maximize technological efficiency toward that end. Commercial remote sensing is regulated as a conditionally open system. Like the civilian government, the commercial sector seeks to collect and distribute spatial information on a wide scale.

Applications of geospatial information, and likewise remotely sensed images, to the legal process can be grouped according to three broad general categories: 1) applications aimed at the development of public policy and at the creation of international agreements, legislation, or administrative regulations; 2) investigatory applications used in the monitoring of compliance with existing treaties, laws, and regulations; and 3) evidence admissible in litigation. See also *Remote Sensing Evidence and Environmental Law*, 64 Calif.L.Rev. 130 (1976), for a detailed discussion of these applications areas in environmental law.

The use of geospatial information in support of a legal matter is the same as its use for any other application. Geospatial information provides for understanding and for persuasively communicating complex and difficult to understand issues. The following examples show a few of the potential legal applications of geospatial information.

Examples of Legal Uses of Geospatial Information

Bossier City, Louisiana, Aerial Photography

This spatial analysis of the temporal use of land in the Bossier City, Louisiana, area was performed by NASA's Commercial Remote Sensing Program Office at the John C. Stennis Space Center. The use of this information can be as simple as reviewing the historical aerial photographs over a particular location or as complex as performing sophisticated image processing and decision analysis. The figure above shows an example of the power of examining historical imagery over a particular location.

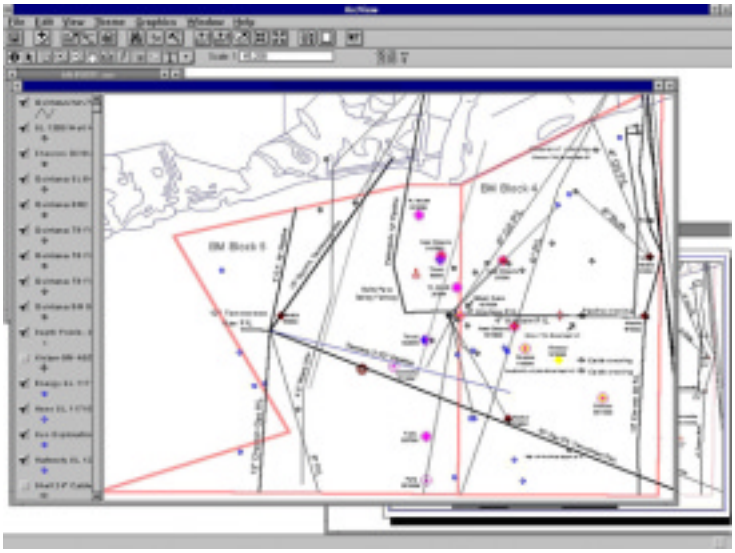
Consider the following hypothetical: In the mid-1990s, the residents of the apartment complex (shown in the lower right, labeled 1994) begin to experience a large number of debilitating illnesses. They band together and sue the apartment complex. The Environmental Protection Agency and the Louisiana Department of Environmental Quality are involved in the case. It occurs to these agencies to review the historical use of the land, whereupon they discover that the apartment's gunnite swimming pool is located on top of what appears to have been a petroleum refinery waste pit.

This use of imagery to discover and understand the historical use of land is commonly referred to as temporal (or time series) analysis. The series of aerial photographs shown in the figure at left illustrate the Bossier City Citgo refinery buildup and dismantlement and the subsequent development of an apartment complex on land that was previously a refinery. This type of analysis and visualization is very powerful in helping decision makers to understand the factors of a case that are correlated to location. Many legal matters have a significant tie to location. A NASA program manager looking at the use of spatial information in commerce stated that 85 percent of business documents contain a significant geographic content. This suggests that legal professionals might be well served to consider geography and spatial information in most cases.

Rowan Odessa Geographic Information System

This "picture" (a 135+ layer geographic information system built by Crowsey Incorporated for defense counsel), page 7 at top, illustrates the effectiveness of a spatial information exhibit at persuasion. This case involved two tugboats that moved an offshore drilling rig near Belle Pass (on the Louisiana shore south of New Orleans). Upon lowering the jack

up legs, a 16-inch diameter natural gas pipeline was punctured. The lawsuit for which this GIS was created sought damages from the two tug companies. The GIS illustrated that the captain parked perilously close to pipelines in this area on previous occasions. Once this was disclosed to the plaintiff team via this spatial information exhibit, they entered settlement discussions with the defense team and quickly reached a settlement.

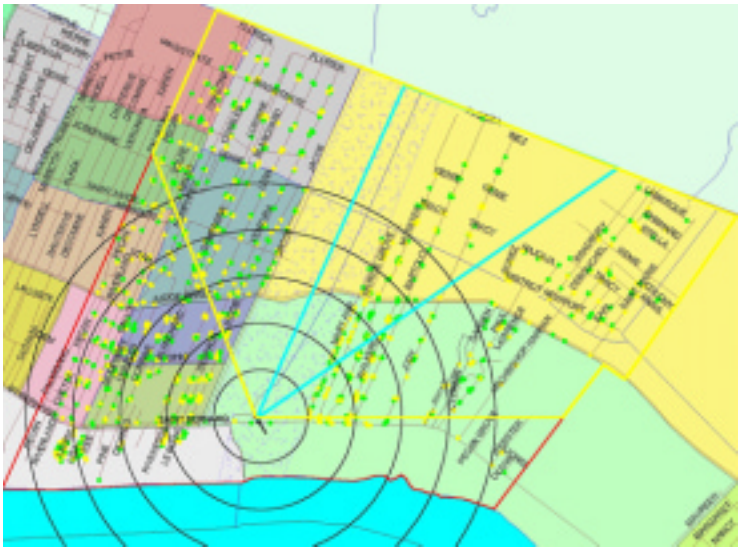


Geospatial Information in Class Action Cases

An extensive geographic information system can provide various visualizations and analyses in support of a defense team in class action cases. What is a reasonable class boundary? How many potential claimants are enclosed within the class boundary? How far are the plaintiffs from the incident? How many residents in the class boundary did not make a claim? What is the nature of the claims with respect to each claimant's location? How can a toxicologist best describe the potential danger area? How can an air dispersion expert best show the fate and transport of the fire and plume? Where is the fire and plume with respect to the claimants? These are just a few of the many questions that can be answered and visualized by the legal team using geospatial information.

Class Certification Assessment

In a class action case, one of the first questions frequently asked is, "Where are the claimants and what are reasonable class boundaries given the facts of the case?" Geospatial information is the best, and really the only, way to visualize the information that answers this question. The illustration below was used to begin to understand what happened and to answer these questions in this case. One of the next questions asked is, "How many potential plaintiffs fall within the proposed class boundaries?" Either side of a class action will find the answer to this question critical to its strategy and tactics when considering settling and evaluating the nuisance level of a frivolous claim.



Claimant Information

One of the requirements of a class action suit is multiplicity; in other words, there must be a significant number of claimants. Geospatial information is really the only approach available to visualize, analyze, and consider efficiently various scenarios of multiple geographic locations. The example above is a product liability case with over 23,000 claimants across the United States. The defense team needed to know not only where the claimants were located but also where they sought remedy and from whom. A geospatial information exhibit, such as the one above, allows the legal team to visualize where the claimants are with respect to the other pertinent facts of the case. In addition, once the geographic information system is created, counsel can quickly create and consider various scenarios of risk and settlement, as well as explore relationships and correlate factors in ways that otherwise would be impossible to perform in a reasonable manner.

Recommended Reading

Visual Explanations, Edward R. Tufte, Graphics Press, 1997, 158 pp.

The Visual Display of Quantitative Information, Edward R. Tufte, Graphics Press, 1983, 200 pp.

Envisioning Information, Edward R. Tufte, Graphics Press, 1990, 128 pp.

Tracking Spills and Releases: High-Tech in the Courtroom, Wilson, Jones, Smith and Liles, Tulane Environmental Law Journal, Volume 10, 1997, at 371-96.

Photographs and Maps Go to Court, edited by Larry Gillen, American Society for Photogrammetry and Remote Sensing, 1986 (now out of print, but ASPRS can provide a copy upon special request).

Earth Observation Systems: Legal Considerations for the '90s, jointly published by American Society for Photogrammetry and Remote Sensing and the American Bar Association, 1990.

Satellite Imagery: The Space Odyssey Arrives in the Courtroom, Krouse, Ferry, and Crowsey, For The Defense, June 2000, at 18-23.

How to Lie with Maps, Mark Monmonier, The University of Chicago Press, Chicago and London, 1991.

A New Dance to an Old Song

Spoliation of Evidence and Subsequent Remedial Measures

Michael J. Pietrykowski
Gordon & Rees
San Francisco, CA
mpietrykowski@gordonrees.com

Introduction

The well-defined legal concepts of spoliation of evidence and subsequent remedial measures usually offer little challenge to the practitioner. However, when applied against the backdrop of mold litigation, these evidentiary concepts offer new twists and turns. This article reviews spoliation of evidence and subsequent remedial repairs and discusses their application in the context of mold litigation.

Spoliation of Evidence

Definition

The loss, destruction, fabrication, alteration, or suppression of evidence is known as "spoliation." In the context of litigation, spoliation of evidence is commonly understood as the failure to preserve property that could be used as evidence by another party in pending or future litigation. The elements of a viable spoliation claim are: (1) the accused spoliator has notice of pending or future litigation; (2) the evidence is within the accused spoliator's possession, custody, or control; and (3) the spoliated evidence is relevant. *Dillon v. Nissan Motor Co.*, 986 F.2d 263 (8th Cir. 1993).

With regard to the first element of a spoliation claim, a party need only be concerned with the preservation of evidence if it knows or has reason to know that the threat of future litigation is a reality. *Shimanovsky v. General Motors Corp.*, 181 Ill.2d 112, 692 N.E.2d 286 (1998).

The second element applies not only to the actual spoliator but also to the agent and includes experts, attorneys, and accountants. *Vodusek v. Bayliner Marine Corps.*, 71 F.3d 148 (4th Cir. 1995).

Remedies

If spoliation occurs, the prejudiced party will have several remedies against the spoliator. Arguably, the most severe remedy allows the prejudiced party to prosecute a legal claim seeking damages for the spoliation. At least ten jurisdictions have recognized spoliation of relevant evidence to be an independent tort cause of action. In these jurisdictions, the independent tort cause of action may be asserted against the spoliator, and the party presenting the claim is entitled to monetary damages. These damages are usually difficult to prove and require the moving party to show that it suffered a loss (*e.g.,* judgment) because evidence was not available to them. The remaining majority of jurisdictions have either considered and rejected spoliation of evidence as a separate cause of action or have routinely ignored the possibility of spoliation as a separate cause of action.

Although the majority of jurisdictions refuse to recognize spoliation of evidence as an independent cause of action, these states still provide considerable remedies for the victims of spoliation. These remedies include sanctions, adverse jury instructions, exclusion of evidence, and even dismissal of the underlying lawsuit. For a more detailed listing of the remedies permitted by each state, refer to the state survey chart beginning on page 19 of this newsletter, which is taken from "Spo-

liation of Evidence: Trend to a New Tort," reprinted with permission of author.

The range of court-imposed sanctions upon a finding of intentional spoliation varies widely, and includes striking defenses, precluding evidence, and dismissing claims on the entire action. Some states, including Texas, allow a jury instruction that if a party has destroyed evidence, there is a presumption that the evidence would have been unfavorable to that party's case. *Malone v. Foster*, 956 S.W.2d 573 (Tex. 1997).

Negligent spoliation of evidence is the more common allegation underlying court-imposed sanctions because bad faith or willfulness of the spoliator need not be proven. Generally, courts consider the following factors in determining whether a charge of negligent spoliation exists and the imposition of sanctions is just: (1) Was relevant evidence lost, destroyed, altered, or suppressed?; (2) Is the mishandling of evidence prejudicial to the opponent?; (3) Can the prejudice be cured?; and (4) What is the appropriate method by which the prejudice may be remedied? *Tracy v. Cottrell*, 206 W.Va. 399, 524 S.E.2d 879 (1990). Sanctions for negligent spoliation are often limited to the exclusion of expert or lay testimony and the barring of any evidence derived from the spoliated evidence. *Travelers Insurance Co. v. Dayton Power & Light Co.*, 76 Ohio Misc.2d 17, 663 N.E.2d 1383 (1996).

Spoliation of Evidence in the Mold Litigation

In the context of mold litigation, both plaintiffs and defendants are faced with unique and difficult challenges as they determine what and how evidence should be preserved. These challenges involve evidentiary issues and litigation strategies, and can be further complicated by plaintiffs' ongoing health problems and defendants' economic concerns.

Pre-Litigation Setting

As discussed above, spoliation claims are not limited to spoliation during pending litigation. Parties and their lawyers should be particularly wary of possible spoliation claims even if renovation and/or remediation efforts are made prior to litigation. Although visual testing, air sampling, and limited bulk sampling are not likely to lead to allegations of spoliation, remediation is destructive and may expose the unwary tester to allegations of intentional or negligent destruction or alteration of relevant evidence. Several years ago, the statement "I didn't know that this mold stuff could be the basis for a claim" would not likely be challenged. Today, however, once mold is so much as mentioned, the potential for litigation must be realized, and all parties are thereafter put on notice that future litigation is a likely possibility.

If an individual determines that abatement, remediation, or destructive testing must be performed, the individual should consider whether it is necessary to provide written notice to potential claimants and adversaries. Although this may seem burdensome and may be rejected for strategic reasons, an individual who unilaterally abates, remedies, or otherwise destroys evidence, regardless of intent, faces the possibility of a court imposing sanctions such as striking pleadings, imposing adverse evidentiary presumptions in jury instructions, or, at the very minimum, excluding any future expert or lay testimony pertaining to the destroyed evidence.

Even in the event that none of the potential parties objects or refuses to participate in the abatement, remediation, or destructive testing efforts, the acting party should retain a consultant who can participate in the remediation, abatement, or destructive testing. The consultant can thereby collect, chronicle, identify, and even preserve any potential evidence. If evidence is to be destroyed, the consultant's inspection record and analysis of that evidence can, if necessary, be offered as the evidence and will likely prevent or minimize later sanctions for spoliation.

Plaintiff Tenants

Many mold plaintiffs are tenants—commercial or residential—and are usually limited in their ability to collect evidence. They are typically not entitled to perform any destructive testing or to engage in investigation that may result in some destruction. This is a significant limitation for plaintiffs who suspect that the mold is more extensive than what is visible and accessible. In the pre-litigation setting, the tenant is usually without recourse. However, once litigation commences, the tenant may seek a court order permitting such destructive investigation or testing. In this scenario, the court will likely require that the evidence be made available to defendant.

Short of these extreme measures, plaintiff tenants will have to limit the evidence gathering process to visual observations (photographs, videos, eyewitness accounts, etc.) and rely on air and bulk sampling for counts and species identification. It is unlikely that spoliation of evidence will become an issue under these circumstances because defendant will have access to the same evidence. Still, the safest approach to ensure that the evidence will be admissible at trial is to make sure that the physical evidence is either preserved or well documented.

Plaintiff tenants will most likely have

damage claims for contaminated personal property. In many instances, these claims can be adjusted and resolved immediately. However, when that is not the case and when it is not economical to store the property, the tenant should provide the landlord with the opportunity to examine the items before they are destroyed. Regardless, the tenant will want the property recorded, photographed, and examined by an appropriate consultant who can later provide sufficient testimony and documents in lieu of presenting the actual items.

Defendant Landlords

While plaintiff tenants face the challenges of limited access, the defendant landlords arguably have the contrary problem of having too much available information. This unlimited access and information can create quite a dilemma for the landlord and requires an analysis that balances evidentiary issues, litigation strategies, economic concerns, and tenant health issues.

A typical mold defendant is a property manager or building owner ("landlord") who has or can obtain complete access to the subject space or building. As such, this defendant faces difficult decisions at an early stage about whether any evidence should be obtained. The landlord runs the risk of creating "bad evidence" which, if not preserved, will invite a sanction remedy for spoliation of evidence.

The evidentiary issues and litigation strategy may also be colored by the likely scenario that there is an alleged ongoing risk to the occupants. As such, the failure to act may become the basis of further claims of negligence, fraud, and even punitive damages. Thus, the landlord is faced with the situation that if it aggressively explores and investigates the mold contamination claims, it may be memorializing evidence that will be detrimental in future or subsequent litigation. On the other hand, if the landlord fails to investigate the claim, it will be portrayed as the "heartless landlord" who failed to respond to tenant's complaints. This latter claim is particularly problematic for defendants because there are no accepted guidelines for admissible exposure levels and the mere presence of any mold may be sufficient to maintain an action for mold contamination.

If, while investigating the claim, the landlord discovers evidence of mold contamination, it must decide whether and how the evidence will be preserved. If the landlord decides to proceed with abatement, and litigation is imminent or ongoing, it will have to provide plaintiff with the opportunity to inspect before the abatement.

Although a landlord's intent may be renovation, not remediation, the landlord must still consider whether it has an obligation to preserve the evidence. Similar to the scenario in asbestos property litigation, defendant (or plaintiff, if the ownership roles are reversed) may avoid a claim of spoliation if it puts plaintiff on notice and provides an opportunity to examine and, as appropriate, test the discovered mold.

Plaintiff Property Owners

In some situations, the mold plaintiff will be the property owner (*e.g.*, bad faith cases and claims against the developer or contractor responsible for the water intrusion). Like the defendant property owner, plaintiff property owner faces decisions concerning the preservation of evidence. However, unlike defendant, plaintiff is usually not concerned with collecting "bad evidence." Rather, the focus will typically be on whether and how evidence should be preserved. Failure to maintain the evidence, even if it is favorable, could result in dismissal, evidentiary sanction, or a negative inference at trial.

An extreme example of this arose in a recent mold case in Eugene, Oregon, where plaintiff homeowners abandoned their home and then burned it down. Mealey's Litigation Report: Mold, June 2001, Vol. 1, Issue No. 6, citing Oregon case *O'Hara v. Stangland*, No. 16-00-12848 (2001). Plaintiffs alleged that the construction company defendant performed faulty work that allowed moisture to be drawn into the structure, facilitating the growth of "toxic mold." Plaintiffs, who claimed that their home and belongings were so contaminated that they were unsalvageable, burned their home down prior to bringing the suit. Defendant claimed that plaintiffs intentionally committed spoliation of evidence and sought dismissal of the case for the "misconduct," alleging that this intentional act was done to "inflame and prejudice the entire jury community."

In response to defendant's allegations, the court ordered that all of plaintiffs' consultant reports, which were made before the house was burned and before litigation began, had to be disclosed. Although the case settled before trial, the disclosure of otherwise non-discoverable reports was arguably detrimental to plaintiffs' case.

Subsequent Remedial Measures

General Rule

A subsequent remedial measure is an action taken after the occurrence of an event that, if taken previously, would have made the event less likely to occur. The overwhelming majority of states follow the subsequent remedial mea-

sures exclusion set forth in Federal Rule of Evidence 407, which provides:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The subsequent remedial measures exclusion, which is the model exclusion in the majority of jurisdictions, rests on three main policy grounds. First, the conduct is not in fact an admission because the conduct is equally consistent with injury by mere accident or through contributory negligence. Second, social policy encourages people to take, or at least not discourage them from taking, steps in the furtherance of added safety. The third, and perhaps most important, policy ground underlying the subsequent remedial measures exclusion is that people who err on the side of caution and take measures to protect fellow citizens from even the possibility of future injury should not be expected to bear the risk that a jury will read more into a repair than is warranted.

Therefore, in every state except Rhode Island, mold abatement and remediation measures will not be admissible to prove that the abating or remediating defendant was negligent. While the subsequent remedial measures exclusion provides considerable protection for the well-meaning defendant, the mold litigator must beware of the four significant exceptions to the exclusionary rule.

The Exceptions and the Mold Litigation

In the majority of states, all evidence of subsequent remedial measures is excluded and is inadmissible unless evidence of such conduct is presented under one of the four exceptions to the exclusion. The first exception provides that evidence of subsequent remedial measures may be admitted if the party performing the remedial conduct denies ownership of the instrumentality causing the injury or harm. In the mold context, if a defendant denies that it had any ownership interest in the mold-infested building, plaintiff will be allowed to present evidence of abatement and/or remediation efforts that were made by defendant, funded by defendant, authorized by defendant, or even so much as acknowledged by defendant.

The second exception to the exclusionary rule provides that evidence of remediating conduct may be admitted if the remediating party denies having control over the instrumentality, circumstances, or event causing the injury or harm. Thus, a court may admit any evidence of mold abatement or remediation measures taken by mold defendant if it is to rebut defendant's denial of control.

Under some circumstances, parties may wish to stipulate on the control issue, rather than cause the issue to be "controverted" and open the way for admission. By stipulating that defendant indeed was in control of a given area, defendant will later be protected from a plaintiff trying to produce evidence of defendant's subsequent remedial measures under the guise of trying to prove that the area or instrumentality was within defendant's control. However, such an admission may be particularly problematic if there is a dispute amongst co-defendants (*e.g.*, property owner, property manager, and homeowners association) regarding who was in a position of control.

The third exception allows that evidence of subsequent remedial measures may be admitted in the event that the remediating party challenges or controverts the feasibility of precautionary measures. If a party relying on the exclusion denies that the injury could have been prevented if it had taken appropriate action, evidence of defendant's subsequent remedial measures will be admissible to illustrate how precautionary measures were possible and yet not performed until after the injury or harm occurred. In a mold case, defendant's reconstruction, remodeling, rebuilding, or rehabilitating of the mold-infested property could be evidence of subsequent remedial measures and admissible if that same defendant denies that any precautionary measures could have been taken to prevent the growth of mold in the subject building.

The fourth and most important exception to the exclusionary rule provides that evidence of subsequent remedial measures may be admitted if it tends to impeach the testimony of a witness. For example, evidence of such measures may be used to impeach a witness, if, after having testified that the instrumentality allegedly causing the accident was in proper condition, he is shown to have ordered the remedial measure. In this instance, the witness can then properly be asked whether such action was not at variance with his prior statement of proper condition.

Even if one of the exceptions is applicable, the court must find that the evidence is probative of a permissible

purpose that is actually in controversy. In the event that ownership, control, or the feasibility of precautionary measures is controverted, and a party seeks to present evidence of the subsequent remedial measures, that evidence may still be subject to exclusion when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence. This balancing test, however, establishes a strong presumption in favor of admitting probative evidence.

Investigation? Renovation? Remediation?

The rule excluding evidence of subsequent remedial measures encourages individuals and entities to remedy hazardous conditions without fear that their actions will be used as evidence against them. However, to qualify for exclusion under the rule, the action taken by defendant must in fact be a "remedial measure," and not simply investigations or reports made after the event.

For example, in *Prentiss & Carlisle v. Koehring-Waterous* (1st Cir. 1992) 972 F.2d 6, plaintiff was injured when a product manufactured by the defendant caught fire. Defendant sent employees to the site of the accident to investigate. These investigations resulted in reports concerning the cause of the fire. The court held that the reports were not subject to the exclusion because they did not constitute remedial measures. According to the court, it "would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports." *Id.*

Plaintiff may also argue that defendant's purported remediation was actually a renovation that was not responsive to plaintiff's claims or complaints. If plaintiff can convince a judge of this claim, the discovery of more mold made during renovation may become admissible. One way for defendant landlord to combat plaintiff's characterization is to have an Operations and Maintenance Plan ("O & M plan") that clearly sets forth landlord's response plan to complaints. The landlord's strict and consistent compliance with the O & M plan can help bolster its assertion that it was reacting to a claim.

Additionally, evidence of subsequent repairs might not be admissible to show negligence; however, the type, location, and extent of the mold may become admissible as the parties dispute the level of contamination and causation. Therefore, documents created by landlords and their consultants in the remediation process may become discoverable. Cautionary landlords will consult legal counsel regarding the preparation of reports, memoranda, and other documents created during a remediation.

Fraud-Related Claims

The general rule excluding subsequent remedial repairs does not apply to fraud-related claims. In the mold context, the subsequent remedial repairs may become critical evidence to determine when defendant landlord became aware of contamination. Although the work may be subsequent repairs, plaintiff will argue that the information gathered during the process should be admissible to prove the landlord's knowledge and subsequent failure to disclose information. Moreover, other plaintiff tenants may argue that the work was not subsequent repairs as to them, rather just investigation and therefore discoverable.

Conclusion

Spoliation of evidence in the context of mold litigation imposes significant demands on both parties and presents a number of new challenges. Practitioners in mold litigation must be wary of pre-suit spoliation in each and every circumstance where litigation is reasonably foreseeable. Both plaintiffs and defendants must painstakingly chronicle, track, and preserve evidence. Moreover, the initial discussion as to whether to investigate and collect evidence should consider litigation strategies, economic concerns, and ongoing health concerns. If the desire is to avoid a spoliation of evidence claim, whether before or during litigation, the parties need to provide notice of any destructive testing and conscientiously chronicle, track, record, and preserve evidence with the assistance of experts.

Evidence of abatement measures and remediation will not be admissible to prove that the remediating party was negligent. However, defense counsel for a party who has performed subsequent remedial measures must be vigilant and avoid controverting matters of control, ownership, or feasibility of precautionary measures. Witnesses in mold litigation must be made aware of the risks of their own testimony and, particularly party witnesses, must be apprised of the impeachment exception to the exclusionary rule.

New Requirements in 2002 Benefit Defendants

Frederick J. Ufkes
Kirkpatrick & Lockhart, LLP
Los Angeles, CA
fufkes@kl.com

Before January 1, 2002, anyone "acting in the public interest" could file a Proposition 65 ("Prop 65") action in California against any business entity with ten or more employees claiming a violation of the statute and requesting penalties of $2,500 per day for each alleged violation. In what is clearly a victory for corporations and individuals conducting business in California, changes in Prop 65 legislation make it more difficult for private "bounty hunters" to initiate and settle lawsuits brought under the private enforcement provision. The new requirements, effective January 1, 2002, were designed to curb frivolous lawsuits, but may generate more litigation in the near future.

Background of Prop 65

The Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Prop 65, was an initiative statute adopted by 63 percent of California voters in November 1986, and is codified in California Health & Safety Code §25249.5 *et seq.* The intended purpose of Prop 65 was to protect consumers from harmful chemicals being released in the air and water and used in various products and food.

The principal component of Prop 65, which is the subject of the 2002 legislative reforms, requires that an employer with ten or more employees who "knowingly or intentionally" "exposes" another individual to a chemical known to the state to cause cancer or reproductive toxicity must give such individual "clear and reasonable" warning. The scope of the warning requirement is sweeping. As of April 2002, there were 739 chemicals subject to Prop 65 warning requirements, including such common chemicals as aspirin, tobacco smoke, and paint fumes.

Defendants have challenged these alleged violations by asserting numerous defenses including the safe-harbor provision set forth in the statute. Cal. Health and Safety Code §25249.10(c). For chemicals listed as carcinogens, employers are exempt from the warning requirement if the claimed exposure poses "no significant risk." A significant risk exists when there is *one* excess cancer for every 100,000 people exposed (assuming exposures occur over a 70-year lifetime), per Cal. Code Regs., title 22, §12705. For chemicals listed as causing reproductive harm, no warning is required if the exposure level in question is below the "no observable effect level" ("NOEL"), divided by 1,000. Cal. Code Regs., title 22, §12805. The high threshold for proving the applicability of the exemption often leaves businesses without an effective defense against a Prop 65 claim.

Prior to January 1, 2002, private individuals could file a Prop 65 action on behalf of the general public after satisfying relatively few requirements. Under the former law, the plaintiff had to provide a 60-day notice of the claimed violation to the alleged violator, the Attorney General, and other appropriate law enforcement agencies. If such law enforcement officials had not commenced and "diligently prosecuted" an action against the violator, the private individual could file his or her own action after 60 days. A successful plaintiff could collect 25 percent of the civil penalties.

The California legislature finally targeted this "private bounty hunter" provision after years of complaints from businesses that plaintiffs' attorneys were forcing them into settlements despite the lack of evidence supporting the alleged violation. Effective January 1, 2002, SB 471 added certain safeguards to protect businesses against meritless and unsubstantiated claims. The most important reforms include the certificate of merit requirement, court approval of settlements, and expanded notification requirements.

Certificate of Merit

The "certificate of merit" requirement is one of the most important changes in Prop 65. In the certificate of merit, the plaintiff or the plaintiff's attorney must declare that he or she has consulted with a person who possesses relevant and appropriate experience or expertise and has reviewed the "facts, studies, or other data" relating to exposure to the listed chemical that is the subject of the action. Cal. Health & Safety code §25249.7(d)(1). Based upon this "expert's" investigation, the declarant must assert that there are reasonable and meritorious grounds for instituting the action. The plaintiff must

serve the certificate of merit, along with the 60-day notice, to the Attorney General and the alleged violator. The factual information making up the "facts, studies, or other data" must be attached to the certificate of merit served on the Attorney General. The statute does not specify the type or quantity of factual information that is sufficient to establish the basis for the certificate of merit.

To clarify the requirement, the Attorney General has proposed additional regulations to be codified in Title 11 of the California Code of Regulations ("Regulations"), addressing the contents of the certificate of merit and its supporting documentation. First, the declarant must recite in the certificate of merit that he or she believes, and has factual support for the belief, that the case is "reasonable and meritorious." This standard is satisfied if the plaintiff's information provides a credible basis that *all* elements of the plaintiff's case can be established *and* that the information does not provide the alleged violator with any affirmative defenses. Thus, the declarant must have evidence that (1) the claimed violator is subject to the act (an employer with ten or more employees); (2) an exposure to a listed chemical occurred; and (3) the "violator" failed to give adequate warning. The "facts, studies, or other data" provided to the Attorney General includes the identification of the person consulted, his or her relevant background, training, and expertise, and the factual information relied upon by the consultant to determine that an exposure of a listed chemical occurred or is occurring.

Placing the initial burden on the plaintiff to provide factual evidence supporting the certificate of merit does not, however, shift the burden of proof from the defendant, who must prove that the alleged violation falls within the safe-harbor exemption. In a recent judicial decision, the California Court of Appeal noted that the exemption is an affirmative defense, meaning the defendant has the initial burden of proving that the exemption applies to its conduct. See *Consumer Cause, Inc. v. SmileCare,* 91 Cal.App.4th 454 (2001) (holding that plaintiff does not have to provide a "scintilla of evidence" to prove the exposure is not exempt from the warning requirement).

The changes under SB 471 and the Regulations do not abrogate the holding in *Consumer Cause*; the defendant still has the burden to prove that the exposure is lawful and does not require a Prop 65 warning. However, in the situation where the plaintiff's initial investigation reveals information showing that the exposure comes within the exemption, the plaintiff would be precluded from asserting that there are "reasonable and meritorious" grounds for the claim. Consequently, the plaintiff would be barred from issuing the certificate of merit, and presumably, initiating a private action under Prop 65.

Thus, in theory, the required consultation with appropriate experts to initially determine the validity of a Prop 65 claim will likely screen out cases that have scant scientific support. To date, however, there has been no judicial review of the certificate of merit requirement or the adequacy of the supporting factual evidence. Further, defendants are still burdened by the ruling in *Consumer Cause* that permits plaintiffs to move forward on their claims despite the lack of evidence that the exposure exceeds the "no significant risk" level or would cause an observable effect at 1,000 times the level in question. These issues, among others, will likely generate significant litigation in the near future.

A defendant cannot challenge the factual information supporting the certificate of merit during the course of litigation. SB 471 expressly precludes discovery of the information, classifying it as confidential official information pursuant to Section 1040 of the California Evidence Code. To the extent that general discovery tools are employed to circumvent this limitation, it is possible that a defendant may not be hindered by such limitation. Further, the plaintiff is prohibited from objecting to a general discovery request solely on the ground that the discoverable information was used in support of the certificate of merit.

At the conclusion of the litigation, a successful defendant may challenge the basis for the certificate of merit and request sanctions against the plaintiff or the plaintiff's attorney for filing a "frivolous" action pursuant to California Code of Civil Procedure §128.5, the California equivalent to Federal Rules of Civil Procedure, Rule 11. Upon a motion by the defendant or the court itself, the court may review the factual basis for the certificate of merit to determine whether there was a credible basis for the claim. If the court finds that the factual evidence is insufficient to support a credible claim, the court may impose sanctions pursuant to Section 128.5. Thus, while the certificate of merit is a welcomed reform for business owners threatened with unsubstantiated and meritless claims, the new requirement may generate more litigation and present additional challenges to potential defendants.

Court Approval of Settlements

SB 471 requires that the court, upon noticed motion, approve all settlements brought by a private individual under Prop 65. The plaintiff must also submit

the settlement, and all supporting papers, to the Attorney General. Cal. Health & Safety Code §25249.7(f)(5). The Attorney General may participate in the hearing without intervening in the case.

To approve the settlement, the court must find that the Prop 65 warnings required by the settlement comply with the "clear and reasonable" standard set forth in Section 25249.6 and the penalties and attorneys' fees provided under the settlement are "reasonable." Cal. Health & Safety Code §25249.7(f)(4). The plaintiff has the burden of providing evidence sufficient to establish each of the required findings. The new legislation provides the court with certain criteria to determine whether the civil penalties awarded are reasonable. Such criteria include: (1) the nature and extent of the violation; (2) the number of, and severity of, the violations; (3) the economic effect of the penalty on the violator; (4) whether the violator took good faith measures to comply and the time these measures were taken; (5) the willfulness of the violator's misconduct; and (6) the deterrent effect of the penalty. The statute also provides a catchall provision allowing the court to consider "any other factor that justice may require." Cal. Health & Safety Code §25249.7(b)(2). The proposed Regulations set forth various factors that compose the "[other factors] which justice may require." One such factor is whether an additional payment is made in lieu of a civil penalty, including payments to fund public education programs or environmental activities. These types of "*cy pres*" payments are proper only when the funded activity has a nexus to the public harm addressed by the litigation, the recipient of the funds is a non-profit, governmental organization or other publicly accountable entity, and the recipient selection procedure is set forth in the settlement or in a public document referenced by the settlement.

The Regulations provide settlement guidelines for attorneys and courts alike. These settlement guidelines have no legally binding effect, but are useful in determining the Attorney General's position on acceptable settlements. The guidelines suggest, among other things, that the plaintiff provide evidence to establish that the proposed warning satisfies the "clear and reasonable" requirement, including the text, appearance, and location of the warnings and proof that the listed chemical is present in the product or environment in which the warning is posted.

With respect to the award of attorneys' fees for the first time, the proposed Regulations provide guidelines for the recovery of attorneys' fees in a Prop 65 settlement. The guidelines are drafted consistent with the criteria set forth in the Code of Civil Procedure §1021.5, which provide for the recovery of attorneys' fees for a private litigant who is successful in enforcing an important public right. First, the plaintiff must be the "successful party" in the action. The plaintiff is the "successful party" if the action was the cause or catalyst of change in the defendant's conduct. Second, the plaintiff's action must have conferred a "significant benefit" on the public. A significant benefit is measured by the necessity of the warning and the degree of risk of exposure. Third, the plaintiff must show that the action was necessary to enforce the requirements under Prop 65. Fourth, the attorneys' fees must be reasonable such that the hourly fees are comparable to those charged by an attorney of similar skill and experience in the same market area. Finally, the fees must be documented with contemporaneously kept records. Cal. Health & Safety Code §25249.7(j).

Because SB 471 requires the submission of settlement by noticed motion to the court, the Attorney General has issued emergency regulations that require, among other things, the submission of the settlement and supporting papers to the Attorney General 45 days before the hearing on the settlement. According to the Attorney General, this regulation will provide the Attorney General with sufficient time to review the evidence offered in support of the motion.

Expanded Notification Requirements

Proposition 65 requires that private plaintiffs notify the Attorney General when they have filed a Prop 65 action and when the action has been resolved, either by settlement or judgment. Cal. Health & Safety Code §25249.7(e), (f). The reporting form submitted to the Attorney General upon the filing of a complaint must include the date the complaint was filed and the nature of the relief sought. Cal. Health & Safety Code §25249.7(f)(3). Upon settlement or entry of judgment, the plaintiff must submit a reporting form indicating the final disposition of the case, the amount of settlement or civil penalty assessed, other financial terms of the settlement, and any other information that the Attorney General deems appropriate. *Id.* At the time of filing any judgment with the court, the plaintiff must also submit an affidavit to the court indicating that the reporting form was accurately completed and submitted to the Attorney General. Cal. Health & Safety Code §25249.7(f)(1).

SB 471 expands the notification requirements to the filing and settlement

of claims brought under other statutes, including Business & Professions Code §17200 *et seq.*, which nonetheless allege a Prop 65 violation. Consequently, private enforcers are precluded from utilizing alternative statutes to avoid the reporting requirements of Prop 65. The plaintiff is required to submit any proposed settlement of an action not directly based on Prop 65 to the Attorney General 30 days before submitting the settlement to the court. During the 30-day period, the Attorney General has the opportunity to object.

Conclusion

The new reforms in Prop 65 provide defendants with additional protections against private bounty hunters utilizing Prop 65 as a form of judicial extortion. However, there is no guarantee that the reforms, or the proposed CCR regulations, will remedy the widespread abuse of private actions brought under Prop 65. Only time, and significant litigation, will tell.

Staying Out of Trouble in the Courtroom

Bruce J. Berger
Spriggs & Hollingsworth
Washington, DC
bberger@spriggs.com

The concept of "staying out of trouble" in the courtroom is an oxymoron. The only reason ever to step into a courtroom for a trial is because trouble has occurred (some event has happened that presumably no one wanted to occur), more trouble has followed (someone thinks that your client's product was the cause), even more trouble then followed (someone discovered documents that, taken out of context, of course, make it seem like your client really did want the untoward event to happen), and then yet more trouble (plaintiffs' lawyers have made outrageous settlement demands). So, a lawyer who thinks he or she is going to try a case but wants to "stay out of trouble" in the largest sense of that term should not be going to bat for the client. Rather, the effective trial lawyer is one who relishes the idea of trouble, *i.e.*, loves the challenge of meeting trouble and trying to face it down. The effective trial lawyer is one who also realizes that, despite best efforts, sometimes trouble will prevail.

Trouble in the courtroom can come from a variety of directions and affect many aspects of one's presentation. Because the trial lawyer is always in the spotlight, trouble often arises from two inclinations in tension with each other, when one or the other gets the upper hand. The first is the "killer instinct," which we have all heard about and which requires making every point that can be made, in as forceful a manner as possible. The "killer instinct" wants to take no prisoners; it wants to annihilate the opposition; it wants to humble the judge (if by chance the judge has made a mistake); it wants blood on the floor of the courtroom; it wants, at the end of the day, to see the trial lawyer, sword upraised, victorious, standing upon a heap of discarded bodies. The second inclination is the "good guy instinct" (for want of a better term). The "good guy instinct" wants everyone to like the trial lawyer; it wants to show humanity; it wants to show consideration to everyone, including the opposition; it *never* wants to make the judge angry or cross or annoyed and will do everything in its power to avoid such an occurrence; at the end of the case, the "good guy instinct" wants only to make sure that he or she is on the top of everyone's list as a collegial and pleasant comrade.

Needless to say, each of these instincts is important but must be kept in check by the other. They must exist in balance with each other, and the impression that they leave together must be an integrated whole, where their separate identities merge and cannot be distinguished.

How can these platitudes be translated into practical ideas? Clearly, a trial lawyer must be sensitive to needs of the important people in the courtroom: the jury, first; the judge, second; and one's own witnesses, third in importance. So, one element of trial practice truly is being concerned and considerate. Appropriate behavior encompasses an appropriate tone of voice, *e.g.*, talking to judge in a respectful manner. It involves making sure that the key participants in the trial are kept in mind constantly and made to feel that their involvement is meaningful and their time is precious. A jury has to hear the testimony and the objections to understand anything about the trial, and if one's voice drops or one's witnesses do not pay attention to the jury, this reflects disrespect of the jury's needs.

Similarly, not making sure that breaks occur when they're supposed to occur, going on too long on a particular issue when a point has been made, not having documents in order, and not being able to run high-tech demonstrative equipment reflect disrespect to the important people in the courtroom. And, without showing the most possible respect for one's own witnesses, one cannot expect them to perform well on the stand. The witness who has needlessly been kept waiting from 9:00 am until 4:00 pm to testify cannot be expected to be at his or her top form when the chance to testify finally comes.

On the other side of the coin, the trial lawyer has to be aggressive to be successful. She cannot let the other side's experts appear to be in control or to know more; she cannot let the opposing lawyers walk over her, *i.e.*, back down unnecessarily when an objection is made or let the opposing lawyer get away with outrageous conduct. Nor can she let the judge think that she can be pushed around. The judge must be made to understand that, when the lawyer speaks, serious and well-thought-out points will be made that must at least be considered carefully.

How can these two completely different sides of trial lawyering be made to balance each other in any individual trial lawyer? What does one do to make sure that the instinct on one side of the spectrum does not overbalance the instinct from the other side? How does one achieve firmness and resolution on key points, without falling into nastiness or ridicule? Each trial lawyer must decide these questions for himself, and the answer will be different for everyone. Yet, there are some general lessons to be learned.

First, anticipate that many rulings in general and some of the most important rulings in particular will go against one's position. Expect some bad testimony to emerge from the mouths of plaintiffs' witnesses whom you thought you had negated completely in deposition and from the mouths of your own witnesses. This does not mean that one must keep one's expectations low about ultimate success in the trial. It means that the path to success in any trial is going to be strewn with hidden land mines, some of which will inevitably explode. It is more important to know how to react when the mine explodes than to put all one's energies into avoiding them in the first place, because complete avoidance is impossible. Anticipating the occasional blast is important because a trial lawyer's natural human tendency to react visibly with disappointment when things go poorly must absolutely be warded off. Whatever happens during a trial, the best visage to convey to the jury is that one planned the event oneself or, if not planned, anticipated it with a planned response.

Second, anticipate outrageous conduct on the part of one's adversary that somehow the judge doesn't seem to find objectionable. Figure out in advance how one is going to respond to such conduct. Often, too much concern is voiced by trial practice instructors about the effect of objections on jury, *i.e.*, about whether objections will be considered obstreperous or intended to hide damaging evidence. Clearly, objections *can* go too far and must be used judiciously. But objections do more than just preserve records for appeal. Objections educate a jury, whether or not they are sustained, on the lawyer's theory of the case, and the mere fact that the judge may overrule an objection, *e.g.*, as to relevance, does not mean automatically that the jury will believe the evidence now being heard is relevant. The jury may in fact perceive the irrelevance, disagree with the judge, and award the lawyer points for making the objection. This is a corollary of a larger principle of trial practice that, for the jury to understand the lawyer's story, the lawyer's conduct must be consistent throughout the trial. If the lawyer's position is, *e.g.*, that reports of similar accidents are not relevant to the accident at issue, the jury will not understand this point if it hears it for the first time during closing argument. The jury *will* understand, however, if appropriate objections to plaintiffs' evidence are made throughout the trial. And, of course, all objections should be made politely, but firmly.

Talking about politeness leads to another issue, *i.e.*, when, if ever, objections are appropriate during an opponent's opening statement and closing argument. The author will not object unless the impropriety of the argument is immediately clear and likely to result either in an admonishment, a mistrial, or reversal of an adverse verdict. Usually one's opponents are not so obliging. This position is not motivated so much by politeness as practicality. Typically, objections during opening statements and closing arguments will be overruled, *e.g.*, on the theory that "what the lawyers say is not evidence," and even limiting instructions, if obtained, may not be that useful unless they are well thought out. The best response to an opening statement or closing argument that is packed with lies is to point out the most egregious lie in one's own opening statement or closing, and imply that nothing the jury heard can be relied upon.

Politeness, like any virtue, can be carried too far. It is carried too far when it makes no sense in the context of the case. When an opponent acts inappropriately and one does not respond, jurors will justifiably start to think that perhaps the

conduct was appropriate or the accusation just. So, don't pull punches unnecessarily when it comes to the conduct of the opposing attorney. With a witness on the stand, if the opposing attorney makes a statement not supported by the record and—in fact—inconsistent with the record, jump on that immediately. Even anger can be an appropriate response, depending upon the seriousness of the impropriety.

It is not necessary to use the most invective words, *e.g.*, "liar," and, indeed, the "L" word should be avoided in all but the most extreme circumstances. But one's tone, facial expressions, and body language can reflect the same feelings about improper conduct as the choice of words. It is a good idea—almost always—to allow jurors to think the "L" word about one's opponent for themselves. Jurors appreciate a lawyer who can cut up her opponent and appear courteous while doing so.

Finally, have a sense of humor about what is happening. This is often very difficult to do, given the incredible amount of effort put into a trial and the importance of each trial to one's client and firm. Yet, there must be some detachment if one is to keep an even keel. When something really funny happens in the courtroom, as it inevitably will at least once during the course of a trial, it is inhuman not to laugh. A joke can be on one's opponent, so don't laugh too hard, but it can often be on oneself, and the trial lawyer needs to be human in order to be credible.

Now you know most of what I know about trial practice. Keep facing down those troubles. Good luck.

Trend to a New Tort[1]

state survey chart[2] (as of September 1, 2001)

This chart below is a guide to the application of sanctions for spoliation, the intentional or unintentional destruction or disappearance of evidence in anticipation of or during litigation. The common law doctrine is several hundred years old, but the law has developed substantially in the past few years. Articles on Spoliation can be found at The FICC Quarterly, Vol. 49, No. 2, Winter 1999; and FICC Quarterly, Fall, 1997. Courts apply different sanctions for spoliation based upon several factors, including 1) whether the conduct was intentional; 2) the prejudice to the other side; and 3) the availability of alternative evidence. Moreover, some courts have recognized the dependent tort of "spoliation." The chart below identifies the current state of the law in 47 states with respect to the types of sanctions that are imposed, and further identifies each state's position with respect to the tort of spoliation.

State	Case	Adverse Inference	Expert or Evidence-Preclusion	Dismissal	Tort—Negligent	Tort—Intentional	Tort—Rejected
Alabama	Verchot v. General Motors Corp., 2001 Ala. LEXIS 188 (May 25, 2001)			X			
	Environmental Monitoring & Testing Corp. v. Kidd, 623 So.2d 1031 (Ala.1993)						
	Smith v. Atkinson, 771 So.2d 429 (Ala. 2000)				X		
	Wal-Mart Stores, Inc. v. Goodman, 789 So.2d 166 (Ala. 2000)	X					
Alaska	Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986)					X	
Arizona	Southwest Cotton Co. v. Clements, 213 P. 1005 (Ariz. 1923)	X					
	LaRaia v. Superior Court, 722 P.2d 286 (Ariz. 1986)						X
Arkansas	Middleton v. Middleton, 68 SW.2d 1003 (Ark. 1934)	X					
	Viking Ins. Co. of Wisconsin v. Jester, 836 S.W.2d 371 (Ark. 1992)			X			

[2] Rebecca Levy Sachs is special counsel to Podvey Sachs. She is the principal of LawSHIFT, a legal consulting firm, and is on the DRI Board of Directors. Lisa J. Trembly is a litigation associate at the law firm of Podvey Sachs, Seton Hall University School of Law, J.D., 1994; Helaine Wexler is a law clerk at the law firm of Podvey, Sachs, Fordham University School of Law, J.D., anticipate in May 2002. Rebecca can be reached at rlsachs@earthlink.net. Podvey Sachs' web site is located at www.podveysachs.com.

State	Case	Adverse Inference	Expert or Evidence-Preclusion	Dismissal	Tort—Negligent	Tort—Intentional	Tort—Rejected
	Wilson v. Beloit Corp., 725 F.Supp. 1056 (W.D.Ark. 1989), *affd*, 921 F.2d 765 (8th Cir. 1990)						X
California	Pate v. Channel Lumber Co., 59 Cal.Rptr.2d 919 (App.Ct. 1997)		X				
	Temple Cmty. Hosp. v. Superior Ct., 20 Cal.4th 464 (1999)						X
	Williamson v. Superior Court of Los Angeles County, 582 P.2d 126 (Cal. 1978)	X					
Colorado	Lauren Corp. v. Century Geophysical Corp., 953 P.2d 200 (Colo.App.Ct. 1998)	X					
Connecticut	Beers v. Bayliner Marine Corp., 675 A.2d 829 (Conn. 1996)	X					
Delaware	Collins v. Throckmorton, 425 A.2d 146 (Del. 1980)	X					
Florida	Bondu v. Gurvich, 473 So.2d 1307 (Fla.Dist.Ct.App. 1984)					X	
	Continental Ins. Co. v. Herman, 576 So.2d 313 (Fla.App.Ct. 1990)				X		
	New Hampshire Ins. Co. Inc. v. Royal Ins. Co., 559 So.2d 102 (Fla.App.Ct. 1990)	X					
	Sponco Manufacturing Co., Inc. v. Alcover, 656 So.2d 629 (Fla.App.Ct. 1995)			X			
Georgia	Lane v. Montgomery Elevator Co., 484 S.E.2d 249 (Ga. App. Ct. 1997)	X					
	Gardner v. Blackston, 365 S.E.2d 454 (Ga.Ct.App. 1988)						X
Hawaii	Akiona v. U.S., 938 F.2d 158 (9th Cir. 1991)	X					
Idaho	Houser v. Austin, 10 P. 37 (Idaho 1886)	X					
Illinois	American Family Ins. Co. v. Village Pontiac-GMC, Inc., 585 N.E.2d 1115 (Ill.App.Ct. 1992)		X				

State	Case	Adverse Inference	Expert or Evidence-Preclusion	Dismissal	Tort—Negligent	Tort—Intentional	Tort—Rejected
	Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995)				X		
	Graves v. Daley, 526 N.E.2d 679 (Ill.App.Ct. 1988)			X			
	Haynes v. Coca Cola Bottling Co. of Chicago, 350 N.E.2d 20 (Ill.App.Ct. 1976)	X					
	Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Products Co., 634 N.E.2d 1319 (Ill.App.Ct. 1994)					X	
Indiana	Porter v. Irvin's Interstate Brick and Block Co., Inc. 691 N.E.2d 1363 (Ind.App.Ct. 1998)	X					
	Murphy v. Target Prods., 580 N.E.2d 687 (Ind.Ct.App. 1991)						X
Iowa	Kilker v. Mulry, 437 N.W.2d 1 (Iowa 1988)		X				
	State v. Langlet, 283 N.W.2d 330 (Iowa 1979)	X					
Kansas	In re Grisell's Estate, 270 P.2d 285 (Kan. 1954)	X					
	Foster v. Lawrence Memorial Hosp., 809 F.Supp. 831 (D.Kan. 1992)					X	
	Koplin v. Rosel Well Perforators, Inc. 734 P.2d 1177 (Kan. 1987)						X
Kentucky	Crook v. Schumann, 167 S.W.2d 836 (Ky. 1942)						
	Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988)						
Louisiana	Moorehead v. Ford Motor Co., 694 So.2d 650 (La.App.Ct. 1997)	X					
	Edwards v. Louisville Ladder Co., 796 F.Supp. 966 (W.D.La. 1992)						
Maryland	Larson v. Romeo, 255 A. 2d 387 (Md. 1969)	X					

State	Case	Adverse Inference	Expert or Evidence-Preclusion	Dismissal	Tort—Negligent	Tort—Intentional	Tort—Rejected
	Miller v. Montgomery County, 498 A.2d 1185 (Md. 1985)						X
Massa-chusetts	Capital Bank & Trust Co. v. Richman, 475 N.E.2d 1236 (Mass.App.Ct. 1985)	X					
	Nally v. Volkswagen of America, Inc., 539 N.E.2d 1017 (Mass. 1989)		X				
Michigan	Trupiano v. Cully, 84 N.W.2d 747 (Mich. 1957)	X					
	Panich v. Iron Woods Prods. Corp., 445 N.W.2d 795 (Mich.Ct.App. 1989)						X
Minnesota	Fonda v. St. Paul City R. Co., 74 N.W. 166 (Minn. 1898)	X					
	Himes v. Woodings-Verona Tool Works, Inc., 565 N.W.2d 469 (Minn.App.Ct. 1997)		X				
	Patton v. Newmar Corp., 538 N.W.2d 116 (Minn. 1995)			X			
	Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 (Minn. 1990)						X
Mississippi	DeLaughter v. Lawrence Cty. Hosp., 601 So.2d 818 (Miss. 1992)	X					
Missouri	Brown v. Hamid, 856 S.W.2d 51 (Mo. 1993)	X					
	Baugher v. Gates Rubber Co., 863 S.W.2d 905 (Mo.Ct.App. 1993)						X
Montana	Livingston v. Izuzu Motors, Ltd., 910 F.Supp. 1473 (D.Mont. 1995)	X					
	Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mt. 1999)				X	X	
Nebraska	Scout v. City of Gordon, 849 F.Supp. 687 (D.Neb. 1994)	X					
Nevada	Fire Ins. Exchange v. Zenith Radio Corp., 747 P.2d 911 (Nev. 1987)		X				

State	Case	Adverse Inference	Expert or Evidence-Preclusion	Dismissal	Tort—Negligent	Tort—Intentional	Tort—Rejected
	Reingold v. Wet'n Wild Nevada, Inc., 944 P.2d 800 (Nev. 1997)	X					
	Stubli v. Big D International Trucks, Inc., 810 P.2d 7 85 (Nev. 1991)			X			
New Hampshire	Rodriquez v. Webb, 680 A.2d 604 (N.H. 1996)	X					
New Jersey	Aetna Life & Cas. Co. v. IMET Mason Contractors, 309 N.J.Super. 358, 707 A.2d 180 (1998)			X			
	Hirsch v. GM Motors Corp., 266 N.J.Super. 222, 628 A.2d 1108 (1993)		X				
	State v. Council in Div. Resource Development of the Dept. of Conserv. & Economic Dev., 287 A.2d 713 (N.J. 1972)	X					
	Viviano v. CBS, Inc., 597 A.2d 543 (N.J.Super.Ct.App.Div. 1991), *cert. denied*, 606 A.2d 375 (N.J. 1992)					X	
	Callahan v. Stanley Works and Home Depot, U.S.A., Inc., 703 A.2d 1014 (N.J.Super.Ct.App.Div. 1998)				X		
New Mexico	Gonzales v. Surgidev Corp., 899 P.2d 594 (N.M. 1995)		X				
	Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995)					X	
New York	Kirkland v. NY City Housing Auth., 666 N.Y.S.2d 609 (A.D. 1997)			X			
	Laffin v. Ryan, 162 N.Y.S.2d 730 (A.D. 1957)	X					
	Squitieri v. City of NY, 669 N.Y.S.2d 589 (A.D.1998)		X				
	Fada Indus., Inc. v. Falachi Bldg- Co. 2001 N.Y. Misc. LEXIS 225 (N.Y. Gen. Term June 22, 2001)				X		
	Pharr v. Cortese, 559 N.Y.S.2d 780 (A.D. 1990)			X			

State	Case	Adverse Inference	Expert or Evidence-Preclusion	Dismissal	Tort—Negligent	Tort—Intentional	Tort—Rejected
	Silverstri v. General Motors, 4th Cir., applying N.Y. law, Nov. 2001			X			
North Carolina	Henderson v. Hoke, 21 N.C. 119 (1835)	X					
North Dakota	Bachmeier v. Wallwork Truck Centers, 544 N.W.2d 122 (N.D. 1996)		X	X			
	Krueger v. North Am. Creameries, 27 N.W.2d 240 (N.D. 1947)	X					
Ohio	Bright v. Ford Motor Co., 63 Ohio App.3d 256 (1990)	X					
	Travelers Ins. Co. v. Dayton Power & Light Co., 76 Ohio Misc.2d 17 (1996)		X				
	Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993)						
Oklahoma	Harrill v. Penn, 273 P. 235 (Okla. 1927)	X					
Oregon	Whitney v. Canadian Bank of Commerce, 374 P.2d 441 (Or. 1962)	X					
Penn-sylvania	McHugh v. McHugh, 40 A. 410 (Pa. 1898)	X					
Rhode Island	Rhode Island Hospital Trust Nat. Bank v. Eastern General Contractors, Inc., 674 A.2d 1227 (R.I. 1996)	X					
South Carolina	Wisconsin Motor Corp. v. Green, 79 S.E.2d 718 (S.C. 1954)	X					
Tennessee	Murphy v. Reynolds, 212 S.W.2d 686 (Tenn.App.Ct. 1948)	X					
Texas	Malone v. Foster, 956 S.W.2d 573 (Tex. 1997)	X					
	San Antonio Press, Inc. v. Custom Built Machinery, 852 S.W.2d 64 (Tex. 1993)		X				
Vermont	F.R. Patch Mfg. Co. v. Protection Lodge, No. 215, International Assn. of Machinists, 60 A. 74 (Vt. 1905)	X					

State	Case	Adverse Inference	Expert or Evidence-Preclusion	Dismissal	Tort—Negligent	Tort—Intentional	Tort—Rejected
Virginia	Hoier v. Noel, 98 S.E.2d 673 (Va. 1957)	X					
Washington	Walker v. Herke, 147 P.2d 255 (Wash. 1944)	X					
West Virginia	Kirchner v. Smith, 58 S.E. 614 (W.Va. 1907)	X					
Wisconsin	Jagmin v. Simonds Abrasive Co., 211 N.W. 810 (Wis. 1973)	X					
	Sentry Ins. Co. v. Royal Ins. Co. of America, 539 N.W.2d 911 (Wis. 1995)		X				
Wyoming	Hay v. Peterson, 45 P. 1073 (Wyo. 1896)	X					