Product Disassembly

Can They Really Take It Apart Without Me?

By Lenae M. Pederson,
John E. Radmer
and Erin D. Doran

A look at how courts analyze spoliation claims, and practical advice on moving for sanctions and cross-examining experts.

Knowing that a plaintiff's team spoliated evidence before the plaintiff's attorney files a lawsuit can be an appetizing thought for many defense attorneys. As a matter of course you answer a complaint and then ask to examine the allegedly defective product. When you are told that it has been examined or disassembled without you, your thoughts may immediately turn to whether you can have the claims dismissed as a spoliation sanction. Does a disassembled or reassembled product automatically entitle you to much-sought-after spoliation sanctions? No, but a court may make sanctions available if you craft a well-thought-out motion. In manufacturing-defect cases, courts can be receptive to spoliation sanctions motions. Courts, however, have been less willing to impose sanctions in design-defect cases, stating that design-defect claims can simply be analyzed by examining exemplar products. But even in a design-defect case, you may obtain sanctions, provided that the right circumstances exist. And even if a court declines to impose sanctions, when an opposing party disassembles a product "ex parte," it can leave that party's expert vulnerable on cross-examination.

This article briefly reviews the factors that many courts consider in analyzing spoliation claims when products have been disassembled or destroyed. It then compares how courts have imposed sanctions in manufacturing-defect cases with how they have imposed them in design-defect cases. The article also offers some practical advice to position a motion for sanctions due to spoliation, as well as for cross-examining a plaintiff's expert.

■ Lenae M. Pederson is a partner and John E. Radmer and Erin D. Doran are associates of Meagher & Geer, P.L.L.P., in Minneapolis, Minnesota. Ms. Pederson is an experienced litigator with a practice area emphasis in product liability lawsuits and defending design professionals. She also serves on DRI's Trial Tactics and Product Liability Steering Committees. Mr. Radmer practices in the areas of product liability, commercial litigation, and catastrophic loss. Ms. Doran practices in the areas of insurance coverage, professional malpractice, and construction law.



Spoliation Factors

Spoliation of evidence is not a new phenomenon. Despite its age, spoliation doctrine continues to evolve. Spoliation can involve more than destruction of evidence, such as when a party disposes of evidence before filing a lawsuit. Spoliation can also involve altering evidence. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citing Black's Law Dictionary

1401 (6th ed.1990)). Alteration can include product disassembly.

Many courts apply similar and generally familiar elemental tests for spoliation, with some variations across jurisdictions. Specifically, many courts ask whether a party spoliated evidence and whether the spoliation has prejudiced the party seeking spoliation sanctions. *See*, *e.g.*, *R & R Insulation Services, Inc. v. Royal Indem. Co.*, 307 Ga. App. 419, 705 S.E.2d 223, 10 (Ga. Ct. App. 2010); *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005); *Luna v. American Airlines*, 676 F. Supp. 2d 192 (S.D.N.Y. 2009). Courts often measure prejudice by the practical importance of the spoliated evidence. *Northern Assur. Co. v. Ware*, 145 F.R.D. 281, 282–83 (D. Me. 1993). Then courts will ask if they can correct the prejudice. *Id.* One notable distinction across jurisdictions is that some courts require bad faith, intentional spoliation, while other courts impose a lower intent or knowledge threshold before imposing sanctions. *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998) (finding abuse of discretion in district court's dismissal of claim as sanction for spoliation of evidence where bad faith was not shown); *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985 (10th Cir. 2006) (holding that a spoliator need not have acted in bad faith in order to impose sanctions).

When balancing the spoliation factors, some courts also consider the foreseeability of litigation. In a product liability context, a plaintiff—either an individual or an insurance carrier considering subrogation—often controls the product. When a product is disassembled in those situations, counsel should find out who caused the disassembly. A court should find that litigation was foreseeable when a plaintiff's attorney hired an expert who ultimately altered or destroyed evidence relevant to a potential lawsuit. *See*, *e.g.*, *Graff v. Baja Marine Corp.*, 2007 WL 6900792, at *1 fn.3 (N.D. Ga. 2007) ("Unlike many cases in which a party, himself, inadvertently or intentionally alters or destroys evidence, here, the experts who spoliated evidence were hired by plaintiffs' lawyers. Obviously, the pre-suit presence of lawyers and experts evidences the foreseeability of this litigation.").

Ultimately, prejudice often becomes the determinative factor in the spoliation calculus, with some courts also greatly emphasizing intent and good or bad faith. The notable difference between disassembly cases and many other spoliation cases is that in disassembly cases the physical evidence often is still available in some form. This distinction makes disassembly a unique subset of spoliation law.

Theories of Recovery and Evidence Disassembly

Product liability lawsuits come in several flavors, generally premised on what the Supreme Court has called "a classic and well known triumvirate of grounds for liability": a failure to warn, a design defect, or a manufacturing defect. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (U.S. 2011). Product disassembly happens frequently in design-defect and manufacturing-defect product liability lawsuits.

A manufacturing defect generally results when something during production goes awry and the finished product deviates from its design. Objectively comparing a finished product to its design specifications can generally uncover a manufacturing defect. *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 305 (11th Cir. 2009). The Restatement of Torts definition of a manufacturing defect highlights the strict-liability grounding of a manufacturing defect, noting that a manufacturing defect, is found "when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product…." Restatement (Third) of Torts: Product Liability §2 (1998). And "[a] claim of manufacturing defect must be supported by evidence that the allegedly defective product did not conform to the manufacturer's own product standards." *Johnson v. Black & Decker (U.S.), Inc.*, 408 F. Supp. 2d 353, 357 (E.D. Mich. 2005).

A design defect generally results when "the product is built in accordance with its intended specifications, but the design itself is inherently defective." *McCabe v. American Honda Motor Co.*, 123 Cal. Rptr. 2d 303, 309 (Cal. Ct. App. 2002). Numerous courts have noted that an entire product line will embody a defective design; it is not limited to a single product. A spoliation claim in a design-defect case is therefore a bit more complex than a spoliation claim in a manufacturing-defect case.

Product Disassembly—Common and Important

Product disassembly frequently will occur with product liability lawsuits. Examining a product and then taking it apart is often a critical step in evaluating a product liability claim. This is logical, as products themselves are aptly described as the "Crown Jewels" of product liability litigation. *Mensch v. Bic Corp.*, 1992 WL 236965, at *1 n.1 (E.D. Pa. 1992). The importance of inspection and disassembly is highlighted in the typical pre-inspection discussions. Frequently, parties exchange numerous inspection protocols, sometimes haggling over the most minor details. Only after a protocol is in place will the parties embark on what is generally termed a "destructive examination."

A court should find that litigation was foreseeable when a plaintiff's attorney hired an expert who ultimately altered or destroyed evidence relevant to a potential lawsuit.

Product disassembly matters. Disassembling a product provides the scientific foundation for a lawsuit. Plaintiffs often sue under alternative theories, including manufacturing-defect and design-defect theories. Disassembling a product often reveals the ultimate theory that a plaintiff will or can proceed under. *See*, *e.g.*, *Kovacic v. Tyco Valves & Controls, LP*, 2011 WL 3289737, at *1 n.1 (6th Cir. 2011) (noting that the plaintiffs proceeded solely on a design-defect theory after the destructive disassembly of the safety valve revealed that the valve did not have a manufacturing defect); *Johnson v. Black & Decker (U.S.), Inc.*, 408 F. Supp. 2d 353, 357 (E.D. Mich. 2005) (expert determining that a switch failed because of a design defect rather than a manufacturing defect based on switch disassembly

and inspection). Product disassembly—taking apart the "crown jewel" of litigation—with its various component parts happens at the crossroads of science and law. If this dispositive inspection occurs before defense experts can attend, then a defendant is stripped of an opportunity to determine for itself what theory should go forward.

Inspecting a product can reveal much about a product's design, manufacture, use or misuse, age, modifications, and maintenance, among other things. This information can prove critical to a defense, particularly regarding causation. But a plaintiff's attorney will not conduct an inspection with the same goals in mind. Further, product sellers, designers, and manufacturers are often different parties in litigation with different goals and focuses. And once a product is taken apart, the ability of a non-participating party to obtain critical evidence may be forever foreclosed.

You must present specific information about the evidence that you could have discovered if your experts could have examined the intact product. If you fail to, a court probably will not sanction the plaintiff.

What Have Courts Said About Disassembly?

Although product disassembly is a narrow aspect of spoliation law, it cannot be examined in a vacuum. Convincing a judge to find that an existing product that has been taken apart is not sufficient evidence will require drawing on other cases. So what have the courts said?

Rockwell Intern. Corp. v. Menzies, 561 So. 2d 677 (Fla. Dist. Ct. App. 1990), is a great example of how important every step of a product disassembly is, and how it can drastically alter the course of litigation. In *Rockwell*, the plaintiff sought recovery under a design-defect theory claiming that the design of a table saw caused it to rise, injuring his hand. Rockwell denied the plaintiff's allegations and argued that the plaintiff installed the wrong motor on the saw.

Everything changed when the defense experts started taking the saw apart to put a different motor on it. During the removal, the defense experts needed to hack off two of the motor's three mounting bolts. The defense experts then put a different motor on the saw, and the saw did not rise. The defense experts then put the original motor back on the saw, and again, the saw did not rise. Apparently noticing some connection with the mounting bolts, the defense experts loosened the bolts, and then the saw rose. For some reason, the defense experts did not retain the two hacked-off bolts. Ultimately, the plaintiff could not proceed to a trial because the defense experts' product disassembly could not be rebutted.

Rockwell highlights how all parts of a product are related—even seemingly simple, boring bolts. Component parts matter. And as engineering and scientific expertise continues to grow in this ever-evolving practice, component parts—even small, seemingly mundane ones—and how they are installed in a final product often matters. *Id.* at 679.

Rockwell's instructional value goes beyond the actual facts in that case. The case illustrates the potential issues that cases can involve when a product designer is distinct from the product manufacturer. Specifically, the *Rockwell* plaintiff sought to proceed on a design-defect theory, showing that the saw blade could rise under certain circumstances. But as the motor installer, the plaintiff also had a manufacturing-type role. And the disassembly revealed that the real issue was a manufacturing issue and not a design issue. The "manufacturer," the plaintiff, Menzies, lost the opportunity to be present when the bolts were examined, removed, and replaced for testing. A similar situation could arise in countless other scenarios when one party manufactures a product designed and sold by another party.

Therefore, a product's designer-seller and the product's manufacturer both have a vested interest in being present when experts take the product apart. If either party is missing, then a plaintiff may be able to pick a defect theory and assign you an incorrect defense.

Product disassembly also raises the issue of reassembly for later inspections. In certain cases, a party that disassembled a product may seek to reassemble it. But after someone disassembles a product implicated in an accident, it can become difficult to reassemble. *Lawrence v. Harley-Davidson Motor Co., Inc.*, 1999 WL 637172 (N.D. Ill. 1999), exemplifies this. In *Lawrence*, the plaintiff, Lawrence, lodged claims that a motorcycle's design, manufacture, and assembly made it inherently unstable in negotiating turns. Just before filing the lawsuit, the plaintiff's expert disassembled the motorcycle, but neither put defendant, Harley-Davidson, on notice nor consulted with Harley-Davidson regarding the proper method for taking the motorcycle apart and also preserving evidence. The plaintiff's expert did, however, videotape his work. Harley-Davidson examined the motorcycle but determined that the expert's disassembly made it impossible to return the motorcycle to its condition at the time of the accident. As such, Harley-Davidson was unable to assess stability-related causes for Lawrence's accident. The original orientation and positioning of the motorcycle's components were crucial. The videotape did not sufficiently compensate for Harley-Davidson's need to examine the motorcycle and perform testing. As a sanction the court prevented the plaintiff from introducing evidence concerning the motorcycle's condition at the time of the accident. This ruling had the practical consequence of leading to dismissal.

National Grange Mutual Insurance Co. v. Hearth & Home, Inc., 2006 WL 5157694 (N.D. Ga. 2006), further exemplifies the difficulties associated with handling disassembled products. It also shows that some courts will consider spoliation less egregious if some component parts remain after someone botches disassembly so that reassembling a product becomes impossible than if disassembly completely destroys the entire product. *National Grange* involved a Heatilator fireplace. In this case, National Grange's insureds suffered a house fire soon after a Heatilator fireplace was installed. An expert performed a scene examination to determine the origin and cause of the fire

on behalf of National Grange. The examination led the expert to conclude that the fire originated at the connection between the house's gas service and the Heatilator's gas line. In particular, he determined that a leak must have existed at that location, and the fireplace heated the leaking gas to ignition, causing the fire. A few weeks later, the house cleaning company hired by National Grange removed the Heatilator and its supply lines. During removal, the lines at the suspected point of fire origination became detached, and one gas line became twisted in two locations.

Hearth & Home's expert later sought to examine the then-disassembled artifacts. The plaintiff's and the defendant's experts agreed that the fireplace's component parts could not be reassembled for testing. In short, dismantling the fireplace and its gas supply lines precluded the defendant's expert from having an opportunity to determine the exact cause of the fire. And the photographs taken by the plaintiff's expert were not sufficient to determine the fire's cause.

The court found that dismantling the fireplace and its related components had been prejudicial to the defendant. However, the court specifically noted that dismantling them had not destroyed the evidence entirely. Dismantling the fireplace and gas lines had salvaged some component parts. After weighing the spoliation factors, the court imposed sanctions. While refusing to dismiss the case, the court excluded all testimony related to observations made during the onsite examination that predated dismantling and removing the fireplace. In addition, the court also excluded the plaintiff's expert's opinions related to those observations. But the court refused to dismiss the case, noting that a court should dismiss cases sparingly, reserving dismissal for cases involving some element of bad faith when lesser sanctions would not suffice. It appears that the court deemed the playing field leveled by restricting testimony and expert opinions that both parties could offer to testimony about evidence to which both parties had access: the disassembled fireplace and component parts.

Some courts have been reluctant to go that far in leveling the playing field. For example, some courts may exclude evidence for the purpose of a dispositive motion but then revisit the issue at trial. *Wade v. Tiffin Motorhomes, Inc.*, 686 F. Supp. 2d 174 (N.D.N.Y. 2009) (excluding testimony for summary judgment purposes based on pre-disassembly observations of a recreational vehicle that had its gas lines removed after a fire). As with any spoliation case, a court will try to fashion an appropriate sanction. Of course when a product is lost or destroyed completely, it becomes impossible to determine if it had a manufacturing defect. But in a disassembly case some amount of product will remain. That very point caused the *Wade* court to decline dismissing the complaint due to the product disassembly. Instead, the court excluded certain evidence for purposes of summary judgment noting that it could revisit the issue again before the trial.

Product Disassembly in Design-Defect Cases

The courts have been less willing to impose sanctions in design-defect cases than in manufacturing-defect cases. *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23 (1st Cir. 1998) (holding "the fact that the plaintiff asserted a design defect claim and not a manufacturing defect claim is relevant to the degree of prejudice the defendant experienced by the loss of the automobile…."). The courts frequently conclude that when someone has destroyed a product, a defendant accused of a design-defect does not suffer prejudice because the defendant can test other products that allegedly have the same faulty design. *See, e.g., Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79–80 (3d Cir. 1994) (noting that defendants usually are not prejudiced by spoliation in design-defect cases because they can test other products of same design); *Green v. Ford Motor Co.*, 2008 WL 5070489, at *4 (S.D. Ind. Nov. 25, 2008) (denying spoliation sanctions because the party had not experienced prejudice because an examination of the vehicle in question is "irrelevant to the issue of whether it, and the thousands of others like it, were designed improperly…."); *Rodriguez v. Pelham Plumbing & Heating Corp.*, 20 A.D.3d 314, 799 N.Y.S.2d 27 (N.Y. App. Div. 2005) (upholding a refusal to grant sanctions in a design-defect case because the defendant could examine an exemplar of the allegedly defective stove). This unwillingness to sanction can lead courts to dismiss potentially valid claims against manufacturers while retaining claims against product designers.

Despite court decisions failing to recognize it, a defendant still needs to examine the actual product allegedly designed defectively by the defendant. With a design-defect claim, a plaintiff must establish that the product was (1) defectively designed, and (2) the proximate cause of the harm.

Admittedly having the ability to examine the product at issue is less important to the first element of a design-defect claim because a defendant may refute a plaintiff's argument that the product was defective by examining other products of the same design. *See, e.g., Van Buskirk, by Van Buskirk v. West Bend Co.*, 1997 WL 399381 (E.D. Pa. 1997) (refusing to sanction the plaintiff's disposal of a deep fryer that injured a child when he allegedly pulled the hanging cord of the deep fryer causing the fryer to fall and hot oil to spill all over him). But the inability to examine a product at issue may significantly hamper a defendant's ability to show that the allegedly defective product did not proximately cause a plaintiff's injuries. In particular, when the litigating parties dispute the identity of a product at issue and whether the alleged defect proximately caused a plaintiff's injuries, examining the actual product can be critical.

When a defendant disputes that its product was the product that caused a plaintiff's injury, the product itself is evidence critical to determining whether the defendant may bear liability. Clearly, even if a defendant's product has a design defect, if the defendant's product did not cause a plaintiff's injury, the defendant would not be liable. Courts have recognized that the product itself provides the best evidence of its identity. *See Pennsylvania Trust Co. v. Dorel Juvenile Group, Inc.*, 2011 WL 2789336 (E.D. Pa. 2011) (holding that the plaintiff's failure to preserve a product warranted sanctions when the defendant disputed the identity of the product at issue); *but see Chapman ex rel. Estate of Chapman v. Bernard's Inc.*, 167 F. Supp. 2d 406 (D. Mass. 2001) (refusing to dismiss the plaintiff's claims due to spoliation even though the identity of product was at issue because the defendants could use circumstantial evidence to show that it was not their product).

When a defendant shows that what

caused a plaintiff's injuries is seriously disputable, a court should be more inclined to hold that an "ex-parte" disassembly of a product warrants a sanction. When defending a client facing a claim that the client's product had a design defect, if the defendant believes that examining the actual product would provide evidence showing that the product may not have caused a plaintiff's injury, you must present specific information about the evidence that you could have discovered if your experts could have examined the intact product. If you fail to, a court probably will not sanction the plaintiff. *See*, *e.g.*, *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994) (recognizing examination of the product could provide evidence regarding causation but holding speculation that an earlier examination of the saw might have provided some evidence helpful to it on the causation issue is not sufficient to warrant sanctions); *Greco v. Ford Motor Co.*, 937 F. Supp. 810 (S.D. Ind. 1996) (recognizing that examination of the actual vehicle may be important to a manufacturer's defense that a design defect did not cause a vehicle to rollover but finding prejudice did not justify the sanction of dismissal); *Glover v. BIC Corp.*, 6 F.3d 1318 (9th Cir. 1993) (refusing to sanction a plaintiff without evidence that his expert's examination did not materially affect the product); *Alvarez v. Pneumoabex, Corp.*, 2005 WL 2033472 (N.D.N.Y. 2005) (refusing to sanction a plaintiff for disassembly because the missing components did not cause the malfunction). The courts have also refused to impose sanctions when a plaintiff has made a thorough record of a disassembly. *Donohoe v. American Isuzu Motors, Inc.*, 157 F.R.D. 238 (M.D. Pa. 1994) (holding that no sanctions were required because the plaintiff "conducted all aspects of the disassembly and re-assembly procedure in a competent and professional manner and harmed no evidence of any possible relevance in this matter….")

If an expert cannot follow basic notification procedures, how can a jury trust that he or she understands and can discuss complicated engineering concepts?

Positioning a Motion for Sanctions

You should move for sanctions due to spoliation only with some forethought. Pursuing a spoliation motion is expensive and can expend considerable credibility with a court. However, you should file a spoliation motion when warranted. The trend among cases shows generally that a spoliation motion in a manufacturing-defect-based case has a higher likelihood of success than a motion in a design-defect-based case.

The initial take-away from the cases discussed in this article is that some courts believe that "mere disassembly" is not too prejudicial. But as discussed above, in some cases courts have recognized the importance of the product itself, including the case-altering consequences of unilateral disassembly and the potential shortcomings of photographs. In moving for sanctions due to spoliation it is important to draw on factually analogous spoliation cases and to show a court specifically why what the other party's expert deemed important fails to tell the whole story. It is also important that a spoliation motion include more than just your brief and argument on behalf of a defendant. An affidavit from your expert can become powerful and necessary evidence of the prejudicial effect of spoliation. *See*, *e.g.*, *Wade v. Tiffin Motorhomes, Inc.*, 686 F. Supp. 2d 174, 197 (N.D.N.Y. 2009) (opining that the prejudice suffered by the defendant was somewhat limited by three facts and then specifically noting that there "is no evidence from any of [the defendant's] four experts to suggest that any one of them was prevented from reaching any conclusions or formulating any opinions based on [the plaintiff's expert's] removal of the gas line piping….").

If a Court Denies Sanctions, Cross-Examine an Opponent's Expert

Sometimes courts refuse to impose sanctions. However, the product disassembly story need not end there. Instead, you still have an opportunity to cross-examine vigorously the expert of the party that disassembled a product. Courts may allow parties to present the circumstances of an expert's product disassembly to a jury during a trial. For example, the plaintiff's expert in *Victor v. Makita U.S.A., Inc.* disassembled a saw and its power switch. 2007 WL 3334260, at *4 (M.D. Fla. 2007). Makita's attorney argued that the plaintiff's expert's disassembly of the saw was prejudicial to Makita because Makita (1) would have been able to supply power to the saw to find out if it really did operate when the switch was in the off position, (2) would have tested the switch with an ohmmeter to measure electrical resistance, and (3) could have x-rayed the saw to inspect the switch. Instead of focusing on prejudice, the court focused on bad faith, finding none. Based on that finding, the court refused to impose spoliation sanctions.

But the court specifically noted that Makita's attorney could question the reliability of the expert's examination and to question him about the fact that he did not perform tests that the manufacturer would have performed. So even though the court refused to impose sanctions, the defense attorney could present evidence about the disassembly circumstances to the jury.

In addition to challenging test reliability and highlighting methodology shortcomings, look for evidence that an expert who disassembled a product may have failed to follow product inspection standards, such as those developed by ASTM International. Showing that an expert is ignorant of simple standards can become powerful testimony in front of a jury. After all, if an expert cannot follow basic notification procedures, how can a jury trust that he or she understands and can discuss complicated engineering concepts?

ASTM E860, which relates to product examinations, provides a useful framework. This standard promulgates guidelines for examining and testing evidence reasonably expected to be the subject of litigation. ASTM E860 §1.1. Product disassembly is particularly noted in the standard and falls within the definition of destructive testing. And according to the standard, an expert should notify his or her client before disassembling a product, and the standard even recommends that the cli-

Disassembly, continued on page 88

Disassembly, from page 50
ent place other interested parties on notice. While some product attributes necessary to place a designer or manufacturer on notice can only be discovered through product disassembly, that situation is the exception and not the norm.

While this type of existing standard will not necessarily control the outcome of a defense spoliation motion, it can help establish the framework for what an expert should have done, and then provide an engineering undergirding for a cross-examination. Employing this type of standard can help you to show jurors what the engineering community deems important in product disassembly.

Conclusion

The product itself obviously becomes the focus of a product liability lawsuit. Therefore, a product liability lawsuit will require parties to examine the product early. If you learn that a product has been disassembled, pay particular attention to how the disassembly could have altered product attributes important to the lawsuit. This may require having your client teach your expert about a product at the earliest stages of litigation if the expert is not yet familiar with the specific product.

A court may make sanctions available to you, but you will decrease your success if you base a motion for spoliation sanctions on bare assertions without affidavits or testimony to support the motion. Worse yet, an unsupported spoliation motion can contribute to the jurisprudence that all that took place was a "mere disassembly." But even if a court denies a motion for sanctions, or when you think moving for sanctions is inadvisable, remember that an expert will still have to answer for his or her actions during a deposition or at trial, and you have ample time to prepare to ask questions directly targeting the expert's methodology, as well as the expert's basic qualifications and knowledge of industry standards. FD