

## **Feature article: Preservation of Evidence: Avoiding Allegations of Spoliation of Evidence**

The tort of 'spoliation' is created when vital evidence is accidentally or intentionally lost or disposed of before a party wanting the evidence examined by an expert has the opportunity to do so. Not all states, including Louisiana, recognize the tort of spoliation.

The case of *Reynolds*\* involved an auto accident in which the air bags did not deploy. The injured party brought suit against his auto insurer and a vendor that took custody of the wrecked vehicle. After the vendor disposed of the vehicle, the insured alleged he was unable to have it inspected for defective equipment, thus depriving him of a right of action in a products-liability claim against the auto manufacturer. He also claimed he gave notice to the insurer and salvage company of the need to preserve the vehicle, and that both were aware of his potential litigation. (The insurer may well also have had an interest if the evidence showed a defect that would have allowed subrogation or contribution.)

The defendants' motion for summary judgment was initially denied by the Louisiana trial court, which cited a recent First Circuit Court of Appeals decision. It was later changed by a First Circuit decision. The defendants' exceptions were then accepted by the trial court and affirmed by the appellate court, finding that the cause of action for negligent spoliation did not exist under Louisiana Law.

The Supreme Court of Louisiana granted certiorari in order to rule on the viability of such a cause of action under the state's law, citing the basis for tort actions in Louisiana Civil Code article 2315, which says, "Every act whatever of man that causes damage to another obliges him to whose fault it happened to repair it."

The Court found that negligently spoliating evidence is "so unintentional of an act" that if a negligent spoliation claim existed, it would not deter future spoliation conduct by a third party. Instead, it would penalize a party that is unaware of its potential wrongdoing, has no vested interest in the outcome of the underlying case, and no motivation to destroy or make evidence unavailable. Additionally, Louisiana's comparative negligence rule states that compensating the victim of negligent spoliation would be highly speculative.

Nevertheless, because several states recognize the spoliation of evidence tort, adjusters must carefully preserve physical evidence. Cases such as foreign matter in a soda bottle left sitting on an adjuster's desk that gets thrown away by the custodian, or misplacement of a blown tire that could be evidence in a fatal accident case have illustrated that this unique tort can have serious ramifications. Caution must

also be taken when sending evidence to a laboratory for examination, as it can be lost in shipment or sent to the wrong place.

Physical evidence is often needed for subrogation purposes. That was, perhaps, the key point in *Reynolds* that was missed by the court: Both Reynolds and the insurer had a monetary stake in the potential products claim that disposal of the auto made null and void. Did that potential subrogation value exceed the cost of storing the vehicle or selling the salvage, or was the potential value of the subrogation not worth the salvage recovery? Reynolds and the insurer will never know.

It is precisely because of this type of claims situation that Crawford & Company®'s Educational Services offers both classroom and KMC on Demand courses that cover the intricacies of insurance coverage, contract and liability issues and an understanding of damages and loss.