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Spoliation: How to Stop Trouble from Brewing

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When a business is faced with the potential for litigation, it is imperative that all evidence be preserved to avoid the dreaded "s" word: spoliation. Starbucks Corporation recently learned this lesson the hard way when a court issued sanctions and ruled that Starbucks had engaged in spoliation of evidence when it did not preserve thousands of allegedly defective chairs in relation to a breach of warranty dispute. *See Kettler International, Inc. v. Starbucks Corp.*, C.A. No. 2:14-cv-00189-HCM-LRL, 2015 WL 1544682 (E.D. Va. Apr. 7, 2015).

Spoliation means that if relevant evidence is destroyed before or during a lawsuit, whether deliberately or accidentally, a judge or jury may infer that such evidence was unfavorable to the party who deliberately or accidentally destroyed the evidence. A business' obligation to preserve evidence arises when (1) the business is first on notice that litigation is likely – even prior to the filing of a lawsuit; and (2) the business knows of the potential relevance of the evidence to the issue in dispute. The knowledge requirement is described as mere "institutional notice – the aggregate knowledge possessed by a party and its agents, servants, and employees." *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177-78 (1st Cir. 1998).

In the Starbucks case, at least four Starbucks customers were injured when the leg of the chair in which they were sitting broke. Starbucks' third-party claim administrator notified the distributor of the chairs, Kettler International, Inc. ("Kettler"), of at least two of the claims. Starbucks tested a sample chair, which failed certain impact tests, and then destroyed or discarded that sample 30 days thereafter. In 2014, Starbucks began to remove the chairs from its premises, and sent Kettler a "Notice of Breach of Warranty" letter concerning the failures with the chairs. Starbucks further informed Kettler that it was "collecting and recycling" the chairs, and it would retain a "discrete sampling" of chairs. In response, Kettler requested that Starbucks provide certain information about the chairs and to "preserve ***every chair*** upon which a claim is being made." Kettler then beat Starbucks to the punch and filed a declaratory judgment action seeking a declaration that it did not breach any warranty; did not breach the parties' contract; and that Starbucks is not entitled to rescind the parties' contract. Starbucks filed counterclaims for breach of express and implied warranties; breach of contract; and negligent misrepresentation. During the case, the court found that Starbucks' conduct in relation to the chairs amounted to spoliation because "[a]fter anticipating litigation, Starbucks engaged in a course of conduct that resulted in the destruction of over 7,000 chairs." As a result, the court drastically limited the amount of damages Starbucks could recover on its counterclaims. *See Kettler*, *supra*. The case settled two weeks later.

Bad faith is not necessary to find spoliation; spoliation may exist even where evidence was innocently lost or destroyed, although the existence of bad faith may result in a higher penalty. Sanctions for spoliation range from dismissal or default judgment, to the exclusion of relevant evidence or damages. To determine the appropriate sanction, courts will analyze (1) whether the proponent for spoliation was prejudiced; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the spoliation occurred accidentally or in bad faith; and (5) the potential for abuse if the evidence is not excluded.

In premises liability lawsuits, spoliation arguments are commonly made where a store has a video surveillance system. Although most customer injuries are not captured on video, when an incident is captured, the video must be saved and preserved through the litigation. Otherwise, the business might be faced with an adverse inference that the business is somehow responsible for how the incident occurred.

To avoid spoliation issues, a business must implement a litigation hold to preserve any evidence – including emails, documents, videos, photographs or, in Starbucks' case, chairs – that could be relevant to a potential claim. It is better to be safe than sorry. An innocent business does not want to face an inference at trial that it could be responsible simply by not being able to produce evidence.

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