

# Client Alert **Product Liability Law**

## *Spoliation and Adverse Inferences: Paper Documents Count Too!*

Generally, the law of spoliation requires litigants to preserve relevant documents through a litigation hold in cases where litigation is reasonably anticipated, or to face potential litigation sanctions. However, is litigation reasonably anticipated and does the duty to preserve attach where a company has a general awareness that it may be sued in the future for its products, and was not sued until approximately twenty five years after the company stopped selling the product in question? Apparently, the answer is yes, at least in the context of asbestos litigation.

On November 5, 2015, Justice Peter H. Moulton, presiding judge over the New York City Asbestos Litigation (NYCAL), ruled in *Warren v. Amchem Products, Inc.*, that defendant J-M Manufacturing Company, Inc. (“J-M”), was subject to spoliation sanctions for the destruction of corporate documents in two separate incidents occurring 14 and 7 years prior to plaintiff’s lawsuit.<sup>1</sup> The Court imposed an adverse inference jury instruction sanction, allowing the jury to infer that the missing documents would have supported the plaintiff’s claims and would not have supported defendant’s position.

### **Background**

In 2014, plaintiff filed suit against numerous defendants, including J-M, alleging that he developed mesothelioma as a result of asbestos exposure during his employment, including exposure to J-M’s asbestos cement pipe product in the mid-1980s. J-M had

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1. *In re N.Y. Asbestos Litigation*, 190281/2014, NYLJ 1202743252635 (Sup. N.Y., Decided Nov. 5, 2015).

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acquired the cement pipe product business from Johns Manville in 1982, after Johns Manville declared bankruptcy because of the explosion of asbestos litigation. As part of that sale, J-M agreed to cooperate with Johns-Manville regarding pending and future asbestos related lawsuits. J-M started selling the cement pipe product in January 1983, and stopped in 1988, during which time the evidence, according to the Court, demonstrated that J-M knew that there was a reasonable probability of future lawsuits.

During discovery of plaintiff's case, plaintiff learned that J-M had lost approximately 10-50 banker's boxes of documents in 1990 when it moved its corporate headquarters from California to New Jersey (although other boxes made it safely), and lost documents again in 1997, when an employee discarded 27 banker's boxes during the renovation of a J-M production facility.

### Court's Decision

The Court determined that plaintiff successfully established the elements for spoliation sanctions. The Court held that plaintiff established that J-M: (1) had a duty to preserve the evidence at the time it was destroyed; (2) destroyed the documents with culpable state of mind; and (3) destroyed evidence relevant to the plaintiff's claim, which the jury could find would support plaintiff's claim. In so holding, the Court reasoned that the 1990 documents were lost because of "gross negligence", and that the 1997 document loss was the result of J-M's bad faith because they failed to instruct employees to preserve relevant evidence even though they had a document retention policy. The Court based these findings on J-M's "lackadaisical, if not intentional, approach to a litigation hold" starting with J-M's purchase of Johns-Manville's business, a company in the thick of asbestos litigation, and overwhelming evidence demonstrating that J-M knew in 1983 and thereafter of the dangers and long latency periods associated with asbestos exposure.

After finding that J-M had a culpable state of mind, the relevance of the documents was presumed, and the burden shifted to J-M to show that the "innocent party had access to the evidence or that the evidence would not have supported the claim." J-M, however, was unable to meet this standard despite pointing out that the lost documents were likely irrelevant or duplicative of other documents produced in discovery. Moreover, the Court rejected J-M's argument that it did not have a duty to preserve because it did not anticipate litigation until it had been served with a complaint, or have notice of a claim. In rejecting this argument, the Court explained that in 1983, J-M knew of mesothelioma's potential dangers and long latency periods when one of its employees filed a workers' compensation claims for asbestosis. In addition, J-M knew in 1986 that its liability insurance broker advised in writing that J-M's underwriters were "seriously concerned

with the Liability and Workers' Compensation exposures" for its cement pipe product business. As a result, the Court held that the plaintiff was entitled to the "strongest adverse inference" based on J-M's "bad faith and disturbing behavior" and ordered that plaintiff was entitled to a jury instruction permitting the jury to infer that the missing documents would have supported the plaintiff's claims and would not have supported the defendant's defense.

### Analysis

The Court's broad view of the defendant's preservation obligations here may be a function of the unique aspects of asbestos litigation, namely the long latency periods associated with asbestos exposure, and the particular knowledge and conduct of this defendant. However, there are some important take-aways for any potential party. First, it is important to remember that preservation obligations extend to both paper and electronic documents. Recent court decisions have focused on sanctions as a result of gaps in preservation of e-discovery, but this case reminds us that sanctions can be levied for failure to preserve paper documents and other tangible evidence as well. It follows that any litigation hold should include preservation of paper documents. Second, the decision illustrates the fact sensitive nature of what it means to reasonably anticipate litigation. In a perfect world, parties will err on the side of caution when evaluating when the duty to preserve attaches. Yet there are practical challenges and significant costs associated with preservation, and it is simply not reasonable to require parties to "hold" paper or electronic documents into perpetuity. It will be interesting to see whether this Court's decision will be sustained on appeal.

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