Jardine, Logan & O'Brien, P.L.L.P.

JLO legal • ease

Spring 2011

Qualified Litigation Attorneys

The Fifth Amendment

by Michael Goodwin

The Fifth Amendment's "right to remain silent" is one of the most well-known constitutional principles in the justice system. Although the self-incrimination privilege applies in civil as well as criminal proceedings, invoking the Fifth Amendment can have significant consequences for a civil litigant, particularly one who seeks to assert the privilege to avoid answering questions from an insurer.

The Fifth Amendment of the United States Constitution provides that "no person shall be compelled in any criminal case to be a witness against himself." The privilege against self-incrimination "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answer might incriminate him in future criminal proceedings." *See Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Invoking the privilege in a civil case may have serious consequences, however; the court may strike pleadings, counterclaims or defenses, and may allow a jury to draw an adverse inference against a civil litigant who takes the Fifth. *See Parker v. Hennepin County Dist. Court*, 285 N.W.2d 81, 83 (Minn. 1979).

In insurance cases, the self-incrimination issue may arise where an insurance policy requires that an insured cooperate with the insurer's investigation of the claim, but the insured fears that doing so may lead to criminal charges. In one case, an insured sought to avoid submitting to an examination under oath because he was suspected of arson in connection with the fire that caused the loss. *See Mello v. Hingham Mut. Fire. Ins. Co.*, 656 N.E.2d 1247 (Mass. 1995). The insured's Fifth Amendment privileges, the court held, did not trump his contractual duty to provide a statement under oath. *Id.* at 1251. Similarly, a federal court in West Virginia found that an insured's refusal to answer questions about a shooting that occurred on his property was a breach of the cooperation clause of the insured's homeowner's policy, relieving the insurer of its duties to defend and indemnify. *See Miller ex rel. Estate of Hott v. Augusta Mut. Ins. Co.*, 335 F.Supp.2d 727, 733 (W.D. W.Va. 2004). A New Jersey court held that an insured who was the target of a widespread criminal insurance fraud investigation could not invoke his self-incrimination privilege to avoid an examination under oath related to his own claim under his no-fault policy. *See State Farm Indem. Co. v. Warrington*, 795 A.2d 324, 330-331 (N.J. Super. - App. Div. 2002).

This rationale applies even where the examination under oath is a statutorily required policy provision, as it is in Minnesota for fire insurance policies. In *Abraham v. Farmers Home Mut. Ins. Co.*, 439 N.W.2d 48, 50 (Minn. Ct. App. 1989), the Minnesota Court of Appeals held that Minnesota's statutory fire insurance provision that requires the insured to submit to an examination under oath did not force the insured to be a witness against himself in violation of the Fifth Amendment. Although the form of the policy is prescribed by statute, the obligation to submit to an examination under oath is nevertheless contractual in nature. *Id.* Minnesota's rule is consistent with that of most other jurisdictions.

The result may be different, however, if a court finds that an insurer is acting as an "agent of the state" in a criminal investigation. In *Weathers v. American Family Mut. Ins. Co.*, 793 F.Supp. 1002, 1022 (D. Kan. 1992), a federal court in Kansas concluded that an insured had properly invoked her Fifth Amendment rights in responding to the insurer's questions where the insurer was required by state law to turn its findings over to

5th Amendment *continued on Page 3*

IN THIS *issue*

Fifth Amendment 1
Spoliation 2
Firm News 3
Case Law Update 3

Subscription Information

A *referral* is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please complete the section below and return it via fax to 651-223-5070. You may also use the section below for a change of address, etc. Alternatively, you may e-mail the information to us at jlolaw@jlolaw.com.

Name:
Company:
Address:
City:
State/Zip:
Phone:
E-mail:

This newsletter is a periodic publication of Jardine, Logan & O'Brien, P.L.L.P. It should not be considered as legal advice on any particular issue, fact or circumstance. Its contents are for general informational purposes only.

Comments or inquiries may be directed to Shannon Banaszewski.

Spoliation: The Destruction of Critical Evidence

by Elisa Hatlevig

The critical elements to any case are who, what and when. When a party destroys a critical piece of evidence that prohibits the adverse party from answering who, what or when, without reasonable notice of that destruction, a motion for sanctions must be considered. If a party provides notice they may be destroying evidence (i.e. making repairs to a home in a construction defect case), it is essential the adverse party immediately provide notice of an inspection to allow its experts to view the evidence or risk losing the opportunity altogether.

Spoliation is the "destruction of evidence" and the "failure to preserve property for another's use as evidence in pending or future litigation." *See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990); and *Wajda v. Kingsbury*, 652 N.W.2d 856 (Minn. Ct. App. 2002). In Minnesota, spoliation need not be intentional to justify sanctions. *See Wajda*, 652 N.W.2d at 862.

The district court has "broad authority" to determine what sanction is to be imposed for spoliation of evidence. *See Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). When evidence is destroyed, the appropriate sanction turns on the amount of prejudice the opposing party suffers by its inability to inspect the evidence. *Id.* When a critical piece of evidence is destroyed, a proper sanction may be the exclusion of expert testimony. *See i.e. Patton,* 538 N.W.2d at 119 and *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 266-267 (8th Cir. 1993).

In *Patton*, the court found spoliation of evidence excluded the testimony of plaintiff's expert witness and other evidence, determined that plaintiff's claim failed as a matter of law without the excluded evidence, and determined that summary judgment for the defendant was appropriate. *See Patton*, 538 N.W.2d at 119. *Patton* involved an allegedly negligently designed field system in a motor home. *Id.* Plaintiff's expert investigated and examined the vehicle approximately six months after the loss occurred. *Id.* After the lawsuit was commenced, the defendant requested to inspect the vehicle and was informed that its location was unknown. *Id.* The defendant moved for spoliation sanctions and the district court excluded plaintiff's expert's investigation and testimony and concluded that, without evidence of the defect, defendant was entitled to summary judgment. *Id.* The court of appeals reversed, ruling that the sanction was too harsh. *Id.* at 118. The supreme court reversed the court of appeals and reinstated the district court order excluding the evidence of the defect and dismissing the plaintiff's case. *Id.* The supreme court reasoned that the defendant:

Would be limited in the preparation of its defense to a reliance upon photos, drawings and testimony of the plaintiff's own investigative expert. Because the critical item of evidence no longer existed to speak for the plaintiff's claims or the defendant's defense, the trial court is not only empowered, but is obligated to determine the consequences.

See Patton, 538 N.W.2d at 119. The supreme court concluded that the district court correctly ruled the expert's investigation and testimony should be excluded and, without the expert's opinions, the defendant was entitled to summary judgment. It is not enough that the defense expert would have access to the plaintiff's experts at investigation or an investigation of a presumably neutral third-party investigator, the defendant would be significantly prejudiced by not being able to conduct his own first hand investigation. *See Hoffman v. Ford Motor Company*, 587 N.W.2d 66, 71 (Minn. Ct. App. 1998).

To avoid sanctions for spoliation of evidence, a party must provide advance notice of any action that would lead to the destruction of evidence and afford a reasonable amount of time from the date of the notice to inspect and preserve the evidence. *See Miller v. Lankow*, 776 N.W.2d 731, 739-41 (Minn. Ct. App. 2009). The issue of notice is currently pending before the Minnesota Supreme Court which accepted review of *Miller v. Lankow*.

In *Miller*, plaintiffs made allegations of defective construction which resulted in moisture intrusion and mold growth. *Id.* at 734. Plaintiff discovered the moisture intrusion and mold in his home on September 20, 2005. *Id.* Plaintiff immediately put the contractors on notice of the damage and the contractors visited the home on September 30, 2005. *Id.* On December 27, 2005, plaintiff's attorney sent letters to the contractors advising that their work was defective and that this defectiveness was a cause of moisture intrusion and mold and provided notice of a possible claim for breach of statutory warranties. *Id.* at 735. The attorney encouraged the contractors to contact him to inspect the property and discuss potential resolutions by January 9, 2006 or plaintiff would put the matter into suit. *Id.* No evidence was presented that any of the parties responded to the letter before the deadline. One of the contractors visited the home on March 10, 2006 to investigate the extent of the moisture damage. *Id.* The contractor claimed he could not identify the cause of the moisture and no agreement was reached at that time to remedy the problem. *Id.* After the March 10, 2006 visit there is no evidence of any written or oral contact between the appellant and contractors until March 2007. *Id.* In a March 15, 2007 letter, plaintiff's attorney instructed the contractors to "immediately schedule any further inspections of appellant's home because appellant planned to proceed with the necessary repairs beginning March 22, 2007." *Id.* However, it was later discovered plaintiff hired a contractor to remediate and repair the home in January 2007 and repairs began that month. One of the contractors visited the home on March 23, 2007 but by that time, the entire exterior of the home, including the stucco and underlying plywood, had been removed. *Id.*

Plaintiff subsequently commenced suit against the contractors alleging defective construction work. *Id.* The contractors moved for summary judgment claiming no issues of material fact existed and that plaintiff had spoliated the evidence of water damage and mold by making repairs to the

Firm News

Congratulations to **Leonard J. Schweich** for being named a Certified Specialist in Civil Trial Law by the Minnesota State Bar Association. •

In *Ansha v. G-8, Inc.*, Ramsey County District Court case number 62-CV-10-3879, after 7 days of a jury trial, **Lawrence M. Rocheford** obtained a defense verdict for a bar/restaurant and its owner in a premises liability case where the plaintiff alleged negligence on the part of the defendants in failing to prevent an assault in its premises. •

5th Amendment *continued from page 1*

the state fire marshal's office. The court also noted that the insured had substantially complied with the policy's cooperation clause by submitting to an examination under oath, and her refusal to answer questions about certain aspects of the investigation during the examination was not a breach of the clause. *Id.* at 1023. On the other hand, the *Mello* court dismissed the insured's argument that the insurer was assisting with the law enforcement investigation, concluding that the insurer was entitled to share information with the government. *See Mello v. Hingham Mut. Fire. Ins. Co.*, 656 N.E.2d at 1252.

The self-incrimination privilege will generally not relieve an insured of the obligation to cooperate with an insurer's investigation. Although it is well-established that the Fifth Amendment self-incrimination privilege applies in civil proceedings as well as criminal, it is also well-established that an individual who invokes the privilege in civil cases may be subject to adverse consequences. •

Spoliation *continued from page 2*

home without providing them a meaningful opportunity to inspect. *Id.* at 736. The district court determined that spoliation had occurred and sanctioned plaintiff by excluding all physical evidence of the alleged damage to the home and any expert reports related to the moisture intrusion and mold. Without use of the excluded evidence, the district court concluded plaintiff was unable to present a genuine issue of material facts for his claim, and summary judgment to the contractor was deemed appropriate. *Id.*

The Minnesota Court of Appeals upheld the district court's decision. *See Miller*, 776 N.W.2d at 736-739. The court determined that "merely discussing the work performed and theorizing about potential causes did not constitute sufficient notice of a breach or claim." *Id.* at 737. The court concluded that the party must provide "actual notice of the nature and timing of any action that could lead to the destruction of evidence." *Id.* at 738. The court noted that plaintiff failed to mention any remediation plans and gave no indication that the contractor's failure to respond would constitute a waiver of any future opportunity to inspect the evidence. *Id.*

The court noted "notice of remediation efforts is essential to avoid spoliation sanctions because it preserves a party's right to correct defects, prepare for negotiation of litigation and protect against stale claims." *Id.* at 738.

With the Minnesota Supreme Court's review of *Miller v. Lankow*, it is unclear how the notice requirements will change. However, once an adverse party gives notice that they will be destroying potentially relevant evidence, it is essential that all parties demand an immediate inspection and provide their experts the opportunity to view the evidence prior to destruction. While a party may be able to allege inadequate notice and claim spoliation if the evidence is destroyed, a case should not hinge on a motion for spoliation. •

Case Law Update

Minnesota Supreme Court Upholds Claim of Marital Status Discrimination

By Vicky A. Hruby

The Minnesota Supreme Court, in the *Taylor v. LSI Corporation of American*, ___N.W.2d ___, A09-1410 (Apr. 13, 2011), held that "[a] claim of marital status discrimination under Minn. Stat. § 363A.08 (2010) does not require the plaintiff to allege the employer's conduct was 'directed at the institution of marriage,'" implicitly overruling its decision in *Cybyske v. ISD No. 196*, 347 N.W.2d 256 (Minn. 1984).

The case arose when LeAnn Taylor was terminated shortly after her husband, Gary Taylor, resigned as president of LSI. LeAnn Taylor was a long-term employee of LSI. She began working for the company in 1988 as a receptionist/secretary and was promoted to Sales & Marketing Coordinator in February 2001. In June 2001, she married LSI President, Gary Taylor. In August 2006, Gary Taylor resigned effective August 31. Between his resignation and its effective date, LeAnn Taylor's employment was terminated. LSI did not hire a replacement, but instead, reassigned her duties to other employees.

LeAnn Taylor claimed that her termination was in violation of the Minnesota Human Rights Act ("MHRA"). The MHRA provides that "it is an unfair employment practice for an employer because of . . . sex [or] marital status . . . [to] discharge an employee." Minn. Stat. § 363A.08, subd. 2 (2010). LeAnn Taylor claimed she was terminated in violation of this provision because LSI ended her employment with the company exclusively because her husband left its employ. She supported her claims by citing statements allegedly made by LSI's CEO as well as the CEO of LSI's parent company to that effect. LSI denies that such statements were made and claims LeAnn Taylor was fired for "legitimate business related-reasons."

When evaluating LeAnn Taylor's allegations, the court considered its prior ruling in *Cybyske v. ISD No. 196*, that a prima facie case of marital status discrimination required the adverse employment action must be "directed at the institution of marriage." The court ruled, however, that it was not bound by this precedent due to the Legislature's 1988 amendment to the MHRA, in which "marital status" was defined as "protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse." Minn. Stat. § 363A.03, subd. 24 (2010).

The court determined that this amendment removed the requirement that marital status discrimination must be directed at the institution of marriage. In contrast, to effectuate the plain language of the statute, it stated that protection extends "to include the identity of the employee's spouse and the spouse's situation, as well as the spouse's actions and beliefs." Thus, LeAnn Taylor's claim of marital status discrimination was remanded to the trial court for further proceedings to determine whether she had established a prima facie case of discrimination. •

Vicki A. Hruby is an associate at Jardine, Logan & O'Brien, P.L.L.P. Ms. Hruby practices primarily in civil litigation, and she is a member of the Employment Law Practice Group. •

JLO legal •ease

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

About The Authors

Elisa M. Hatlevig

ehatlevig@jlolaw.com
651-290-6514

Elisa is a senior associate at Jardine, Logan & O'Brien, P.L.L.P., and practices primarily in civil litigation, assisting clients in the areas of employment law, health care, municipal law & civil rights and general liability/negligence issues. Elisa is a 2004 graduate of the University of St. Thomas School of Law.

Michael P. Goodwin

mgoodwin@jlolaw.com
651-290-6541

Mike is an associate at Jardine, Logan & O'Brien, P.L.L.P., and focuses his practice primarily on civil litigation. Mike is a 2009 graduate of Hamline University School of Law.

Coming in the Summer 2011 Issue...

Legislative Update

WC Legislative Update

If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

JARDINE
LOGAN & O'BRIEN
ATTORNEYS AT LAW
P.L.L.P.
Suite 100
8519 Eagle Point Boulevard
Lake Elmo, MN 55042