



# Fixing Defective Work on a Project May Result in Dismissal of Claims

## Client Advisories

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Upon discovery of defective work, an owner's first inclination may be to immediately repair the work. An owner does so at his own risk, however, if he fails to provide adequate notice to the party allegedly responsible for the defective work. If the owner's repair work results in the destruction of evidence, the contractor or insurer may seek to have the owner's claim for defective work dismissed.

In some rare instances, immediate remediation may be necessary, for example, where there is a safety hazard to workers on the site. In most cases, an owner will have the opportunity to notify the contractor or insurer before repairing the work. A contractor should be given the opportunity to inspect and document the allegedly defective work and any repair work which is scheduled to take place. The defective work and the repair work should be documented with photographs and videos where appropriate. Whenever possible, notice requirements set forth in the parties' contract should be followed.

The recent New Jersey Supreme Court decision, *Robertet Flavors, Inc. v. Tri-Form Construction, Inc.*, 203 N.J. 252, 1 A.3d 658 (2010), provides a comprehensive analysis of how courts should consider, evaluate and determine what sanctions are appropriate and should be assessed against a party that causes spoliation to evidence in the context of a commercial construction project.

In *Flavors*, the plaintiff owner sought damages against its construction manager and contractor window installer in connection with water damage caused by leaks from a strip window system. The owner had remedied the faulty window system without proper notice to the defendants. The trial court dismissed the plaintiff's claims because of the alleged prejudice visited on the innocent defendants who claimed they could not defend against the claims because evidence had been destroyed. The Appellate Division reversed, finding that dismissal was too harsh.

On appeal, the New Jersey Supreme Court reiterated the principles governing spoliation claims and emphasized that dismissal of a plaintiff's claim is the ultimate sanction and should be sparingly invoked. The Court

determined the following factors should be considered in determining what type of remedy or sanction should be imposed:

1. the identity of the spoliator, including whether the wrongdoer is the plaintiff, defendant or a third party;
2. the manner in which the spoliation occurred, which must include the “reason for and the timing of the occurrence;”
3. the prejudice to the non-spoliating party, including whether the innocent party “bears any responsibility for the loss of the spoliated evidence;” and
4. the alternative sources of information that are, or are likely to be “available to the innocent party from its own records and personnel, from contemporaneous documentation or recordings made by or on behalf of the spoliator, and from others as a result of the usual and customary business practices in the construction industry.”

These factors should be balanced by the trial court and an appropriate remedy crafted with an “appreciation for the ways in which the construction industry itself provides them with unique tools with which to ‘level the playing field’ and achieve an appropriate remedy for spoliation.”

The Court emphasized that dismissal is a remedy of last resort and that, based on the types and sources of information that should be available in these construction disputes, it will be the rare situation where dismissal is appropriate. The Court then identified the types of remedies that are available to a trial court which include: a) adverse inferences; b) bifurcated proceedings; c) preclusion of evidence; d) dismissal; e) limitation of claims that can only be tried fairly, and dismissal of others; and f) award of costs caused by spoliation.

Despite its emphasis on not dismissing the plaintiff’s claims in these matters, the Court did dismiss the owner’s claims against the construction manager defendant because the “playing field” was not level there. The Court found that the construction manager defendant did not have notice of the plaintiff’s ongoing remediation of the defective window system, whereas the installer contractor did.

Pennsylvania courts similarly recognize that a party cannot benefit from the withholding or spoliation of evidence. In *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038, (Pa. Commw. 1997), the Pennsylvania Commonwealth Court held that the trial court committed prejudicial error when it failed to instruct the jury regarding spoliation. This case involved the construction of a school. After the completion of the project, a water pipe burst and caused a landslide on the property. The school district hired an expert to inspect the ruptured pipe, and thereafter disposed of the pipe without notifying the contractor. The Commonwealth Court noted that the water pipe was material evidence, that under these facts the trial court was required to issue an adverse inference instruction to the jury. The trial court’s failure to do so resulted in reversible error.

### **Practical Tips Once Defective Work is Discovered**

- Review your contract and follow the claims and notice requirements.
- Review your insurance agreements, and contact all relevant insurers about the claim.



- Notify all parties in advance of your intent to repair the work.
- Prior to repair work being performed, provide a date and time for all parties to access the site, take photographs or videos, and perform any testing or evaluation.
- Hire independent expert to assess, document, and estimate cost of repair work.

If you have any questions about the *Robertet Flavors, Inc. v. Tri-Form Construction, Inc.*, decision or its possible impact on you or your business, please contact a member of Archer's Construction and Real Estate Litigation Group at (856) 795-2121 or (215) 963-3300.

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