SPOILAGE MEETS SPOLIATION: DUTY TO PRESERVE PERISHABLE GOODS IN LITIGATION

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Imagine a room full of crates of 16-month-old Greek yogurt. Now imagine that you are a retailer sued over the contents of that yogurt some months ago. What should you do with the yogurt? Is there a duty to keep it indefinitely, or can it be disposed of in good faith without risking spoliation sanctions?

This is, in essence, the quandary that Whole Foods faced in 2014 when it was sued for allegedly misrepresenting the sugar content of its branded Greek yogurt. After the plaintiffs in that litigation had obtained samples for testing, Whole Foods disposed of the rest of the yogurt. Now it faces a spoliation motion claiming that it willfully destroyed evidence.

Restaurants and food retailers should understand the contours of the duty to preserve perishable evidence and the possible consequences of not doing so. While currently there are no specific rules applicable to preservation of perishable items, the duty to preserve in the litigation context provides useful guidance.

A party can only be sanctioned for destroying evidence if it had a duty to preserve it. So, it should go without saying that there is nothing wrong with disposing of perishable items if there is no reason to believe that it is relevant to ongoing or future litigation. Further, a company threatened with litigation does not have a duty to preserve every scrap of paper, email, identical copy, or backup file. But, retailers that anticipate being a party or are a party to a lawsuit have a duty not to destroy unique, relevant evidence that might be useful to an adversary. This means that a party or anticipated party must retain all relevant documents or materials in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.

Still, the duty to preserve not boundless. Preservation efforts need only be reasonable under the circumstances, and do not continue indefinitely. A party's duty to preserve evidence expires when the opposing party has had an adequate and meaningful opportunity to inspect the evidence. If a retailer can no longer preserve important evidence, the most prudent approach to avoid spoliation sanctions is to discuss the issue with opposing counsel.

Spoliation sanctions come in many forms, ranging from monetary fines, adverse inference instructions (informing the jury that it may infer the fact that a party destroyed certain evidence that the evidence, if available, would have been harmful to that party,) or even dismissal of the action. The measure of appropriateness of a spoliation sanction is whether it restores the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence.[1]

In the Whole Foods matter, the plaintiffs claim that Whole Foods knew that that yogurt was the subject of litigation, and could have deduced

that additional samples could be useful to its adversary for further testing. Whole Foods argues that plaintiffs had already amassed some 70 containers of yogurt, and had never requested that Whole Foods retain additional (presumably stinky, spoiled) yogurt for testing. So, plaintiffs arguably had a meaningful opportunity to inspect the evidence prior to its destruction, and Whole Foods did not act in bad faith. The Court has not yet ruled on the plaintiffs' motion, and that ruling is likely to be influenced by circumstances other than simple consideration of Whole Foods' conduct, including the fact that Plaintiffs failed to test their yogurt samples in accordance with FDA standards, and that they may have identified another source of yogurt to test.

No one wants to keep rotting meat, produce, or spoiled dairy around for the duration of a lengthy litigation. But, in some cases, retailers sued over those goods may have a duty to do so. The fact that a product has literally spoiled is likely not a sufficient excuse to avoid the duty to preserve evidence altogether. Best practices dictate that counsel should apprise their opponent that the items are perishable and offer to provide samples for testing prior to discarding them. Whatever the arrangement reached, it is important to document the communications thoroughly in order to avoid potential spoliation sanctions.

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1. *Rimkus Consulting Grp., Inc. v. Cammarata,* 688 F. Supp. 2d 598, 618 (S.D.Tex. 2010) quoting *West V. Goodyear Tire & Rubber Co.,* 167 F.2d 776, 779 (2d Cir. 1999).