

## Don't Spoil Me: Oklahoma District Court Rules Against Spoliation Sanctions

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In *Okla. Farm Bureau Mut. Ins. Co. v. Omega Flex, Inc.*, No. CIV-22-18-D, 2023 U.S. Dist. LEXIS 197755, the United States District Court for the Western District of Oklahoma (the District Court) determined spoliation sanctions were not warranted after a home was demolished for repair following a joint scene examination.

The insurer, Oklahoma Farm Bureau Mutual Insurance Company (Insurer) provided a policy of insurance to Michael and Sondra Diel (the Diels). On July 11, 2020, the Diels' home was struck by lightning and their attic caught fire. Following the loss, Insurer retained both counsel and fire origin and cause experts to inspect the Diels' property. Insurer's counsel informed in-house counsel for Omega Flex, Inc. (Omega Flex) via a letter dated July 14, 2020, that a preliminary investigation indicated the fire may have been caused by an Omega Flex product—specifically, TracPipe Corrugated Stainless Steel Tubing (CSST). Insurer's counsel invited Omega Flex to inspect the property, noting: "It is anticipated that the loss will exceed \$300,000" and stating that any inspection "must be completed during the next two weeks. **At that time, the homeowner will proceed with demolition to rebuild.**" (Emphasis added).

Omega Flex participated in a joint inspection on July 30, 2020. Following the inspection, Insurer stated it "confirmed with Omega Flex that the joint exam took place as scheduled and the scene was released for repairs." Approximately one month later, the Diels demolished the home and began construction on a new property. Insurer ultimately filed a subrogation action against Omega Flex.

During litigation, Omega Flex moved for sanctions against Insurer, arguing Insurer intentionally spoliated evidence by demolishing the home following the joint examination. Omega Flex argued that it was not told the entire home would be demolished and, thus, was not provided with the opportunity to determine whether "mitigation efforts were adequate, whether a tailored repair was feasible, whether any lingering health concern was reasonable, or what the costs of repair compared to the costs of a demolition and rebuild might have been."

The District Court found the July 14, 2020, letter dispositive of Omega Flex's motion, and rejected the spoliation argument. The District Court determined that Omega Flex was aware of the scope of the loss and knew of the Diels' intention to demolish the home to rebuild it. Given that Insurer clearly stated as such in its July 14, 2020 letter, the court found that Insurer complied with its duty to preserve evidence. The District Court cited several cases in other jurisdictions finding that the duty to preserve evidence is not unlimited and that spoliation sanctions are not warranted where a party had the opportunity to inspect relevant evidence before it was destroyed.

Subrogation professionals must be mindful of their evidence preservation obligations when handling every claim and of the potential of a motion for spoliation sanctions in a suit. At a minimum, every effort must be made to ensure that all potential targets are provided the opportunity to inspect evidence before it is destroyed. If evidence must be destroyed, it is a best practice to ensure that all parties are notified in writing and given ample opportunity to inspect or object prior to its destruction.

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