

## Securing the Evidence: Critical Steps in Investigation of a “Crashworthiness“ Case

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The initial investigation of a claim and collection of evidence related to that claim can often make or break the case. This is particularly true when it comes to “crashworthiness” cases, products liability claims against the manufacturer or designer of a motor vehicle for not selling a reasonably safe vehicle that fails to adequately protect an occupant during a car accident. These complex and expensive cases require proper preservation of the evidence and prompt investigation of the facts if the claim is going to be successful.

Early evaluation to determine the strengths and weaknesses of an automotive product liability case thus becomes absolutely essential. A poorly run crashworthiness case will do nothing but cost the insurer money. When done correctly, it can be a source of a strong subrogation claim and a substantial third party recovery.

The key to insure that you will have a strong potential case is to collect, review and analyze all of the evidence and documentation available. It is best to have a consultant or attorney experienced in the technical and legal aspects of automotive product liability and “crashworthiness” cases review the claim for you, to assist in determining whether a potential case exists. This allows for an educated business decision on whether to spend the substantial amount of time and money to pursue this automotive product liability case. A little money spent up front analyzing the case will save you thousands of dollars in the long run.

Once an experienced legal team identifies a potential crashworthiness or product liability claim, it will then move to insure that the proper procedures are followed to prevent spoliation of evidence. These measures include establishing internal controls, documenting the chain of custody and keeping the evidence safe and secure. It will assemble the right team of experts from the beginning, which will typically include engineers in the field related to the defect, accident reconstruction experts and biomechanical engineers. Getting the job done right from the beginning results in greater efficiency, cleaner presentations, and better settlements and less re-litigation.

### Finding and Securing the Evidence

It is next to impossible to prove a crashworthiness claim without the relevant evidence, i.e. the vehicle. Spoliation laws throughout the country often place the burden of preserving the evidence on the third party plaintiff as the owner/possessor of the vehicle, so that even if you were able to sustain a claim the opposing side could move for dismissal of your claim. The first thought upon identification of a potential crashworthiness claim should be identifying, locating and preserving any potential evidence.

Locating the evidence is usually a matter of persistence and will depend upon the passage of time. Our firm works with Ken Brown of Forensic Safety Group for all location, handling and storage issues. Using a vehicle forensic expert gives us the advantage of their experience and professionalism on many of these tricky issues. For example, Ken's group has traced vehicles that they were told had been crushed to various yards waiting to be crushed. The vehicles were retrieved and were still useful as evidence.

Often the evidence is located but is in the possession of other parties who will not release the vehicle to you nor will they sell the vehicle to you. In those cases, it is necessary to implement a litigation hold. This is accomplished with a litigation hold letter advising those in possession that they are holding potential evidence, that they are under an obligation to preserve that evidence and that they will be subject to a spoliation claim if they tamper with or destroy that evidence. Any litigation counsel who does this type of work is familiar with these letters and the steps necessary to insure that the vehicle and the evidence are preserved. Just make sure that all of the correct parties are contacted. For example, there are cases where the claimant or registered owner of the vehicle were told to hold the vehicle, but the insurance company had paid off the claim on the vehicle and sold it at auction because they were never notified of the hold.

Remember that the evidence may be more than just the vehicle. In tire cases, all pieces of the tire must be recovered and preserved. If there is a child seat involved, then the child seat must be located and preserved. If it is still secured in the vehicle, then you should leave it there and make sure the vehicle is secure so that the installation is not altered. If the child seat is not secured in the vehicle, photograph where it was found, take it out and secure it as you would any piece of valuable evidence. Remember that part of the evidence is the accident scene itself, and having an expert visit the scene at an early stage to photograph and measure marks on the road can be critical, particularly because these marks may not exist six months from the accident date.

Once the evidence is located, you need to document each piece of the vehicle, the part number, the manufacturer, date and other ancillary information. Make sure to collect (usually in the glove box) a copy of the Owner's Manual, maintenance records or installation instructions from anyone who worked on the vehicle, and pay careful attention to noting any warning labels or instructional decals, or if any are missing from the vehicle. All evidence and loose parts must be photographed or videotaped and then clearly labeled, including the date received at the facility.

### Moving and Storing the Evidence

Having an experienced evidence handler who has worked on a similar case and who understands what type of evidence can be collected in a potential or pending civil action is probably the single most important measure that you can have in place. Inexperienced handlers often misplace or alter evidence out of ignorance of its significance, or they do not call someone in the legal department for advice before taking

destructive action. Those handling evidence must be aware of the risks of spoliation claims. Persons may unintentionally “spoil” items by leaving the vehicle out in inclement weather or by “boat wrapping” an already wet vehicle.

Photograph and/or videotape the evidence at every step in the process. This includes first contact with the evidence, before and after transport, during receipt at the storage facility and at each inspection. One issue that comes up with some regularity is whether damage to a vehicle was caused during the accident or during post-accident transport and handling. Proper recording of the process will eliminate many of these issues.

You want to make sure that you use an experienced evidence handler to tow your vehicle. Always use a flatbed truck to tow the vehicle. And make sure that you identify and remediate any hazmat issues before your vehicle is towed.

Always secure the vehicle’s keys. There is electronic data in some vehicles that can be lost if the vehicle is turned on or mishandled with power to the vehicle. In some cases, the simple act of an appraiser turning the key to get the vehicle mileage can result in a loss of data.

For storage of the evidence, you will want to work with an experienced storage facility. You want the vehicle to be in a safe, secure location. It should be kept indoors and dry and covered, as opposed to outdoors in an unsecured yard subject to the elements. Remember that you do not want the evidence to further deteriorate. You are also going to want to store the evidence at a facility where you have room for your expert to conduct their examination and to properly photograph the vehicle. Storage cost is always an issue, particularly when the vehicle may be stored for a period of years if the case goes into litigation. But a secure, indoor storage facility utilized from the beginning will save you a lot of problems down the road.

Security is also a potential issue for evidence storage and preservation. A vehicle left in an open salvage yard is not secure. Parts can be stolen from it and the vehicle can be tampered with and weeks may pass before anyone notices. All of our firm’s vehicles are stored at the indoor facility of the Forensic Safety Group. Their facility is secure so they will know whether someone has entered and tampered with the evidence. If something were to happen, then the police would be contacted immediately and the event documented promptly.

### Chain of Custody

It is essential to establish every element of the chain of custody. Whenever a piece of evidence is recovered, a document that notes the date of recovery, the person recovered from and the place it was recovered at and transferred to should be created. Ideally, the document will be signed by both the person transferring the evidence and the person receiving the evidence. In that way there will be no question how a vehicle got from the scene of the accident to your storage facility. So when your vehicle is towed

from a salvage yard, there should be a record documenting that transfer. Likewise, when the vehicle is taken to your storage facility, then there should be another document recording that event.

The procedural chain of custody should include maintaining a separate record of who has possession of the evidence, when and to whom it is released and when it is returned to its place of safekeeping. Appropriate procedure can include photographing and/or videotaping the evidence at each step, including first contact, before and after transport, receipt at the storage facility and at each inspection.

### Spoliation Claims

Ideally, the evidence should be retained and stored in a location where it will not be subject to further deterioration. But often there is no contact with a carrier or an attorney immediately after an incident, or the defective products claim may go unrecognized.

With auto related claims, after a significant crash the insurance company often declares the vehicle a total loss and relegates the vehicle to a salvage yard or sells it off to another entity. But even though lost, the evidence may have been photographed and examined sufficiently by police to still allow for a claim. Under those circumstances you must be prepared to face a spoliation claim, which means that you have to be prepared to establish one of several facts.

First, you want to establish that the evidence was not in your possession or control (or the claimant's possession or control) at the time it was lost. Simply put, one cannot spoliage evidence that one does not have. There are more complicated issues concerning the degree to which a party has to make efforts to gain possession or control of the evidence to prevent spoliation. But obviously the less ability a party has to preserve the evidence the less blame that can attach to their failure to preserve it.

Second, was the loss of evidence the result of negligence or intentional conduct, and was the loss of evidence the result of the actions of a person who has knowledge that it has to be preserved. There is a big difference when the injured party, who had no knowledge of a potential crashworthiness claim, allows the vehicle to be sold for scrap and when an insurance company representative or their attorneys allows the same thing to happen.

Third, was there prejudice to any potential party. If a car manufacturer is given a full opportunity to view and examine the vehicle before its destruction, then spoliation may not matter since they were not prejudiced by the destruction of any evidence.

What is important when evidence is lost or destroyed, once you determine that you are still moving forward with a third party claim, is to determine exactly what happened. If you are going to survive a spoliation claim, you are going to have to show what actually happened to the evidence. This may entail an investigation into the facts as

well as identifying any witnesses who have knowledge concerning the handling of the evidence. Of course, the most important step to take is to make all attempts to find the missing evidence. Even evidence that has been altered or mishandled is better than none at all.

### Conclusion

Awareness of the need to promptly recover evidence in potential crashworthiness claims is essential. The sooner you consult with an attorney familiar with these types of claims, the sooner you will be able to determine whether you need to identify, recover and store vehicles or other evidence. And when recovering and storing the evidence, it is best to act through forensic investigators and professional storage facilities that are familiar with these types of cases, who have established protocols for securing the evidence, and who have access to facilities that can properly store your evidence.

Prompt and proper action early in the investigation will save you potential headaches when the claim is brought in the future.

*Joel S. Rosen, a leading trial attorney and partner at the law firm of Cohen, Placitella & Roth, and Ken Brown of Forensic Safety Group will be speakers at this year's NASP Conference in Orlando presenting, 'Crashworthiness: The Second Collision' in greater detail. Mr. Rosen is widely regarded for his innovative and superior handling of complex product liability litigation with a focus on automobile crashworthiness and other catastrophic personal injury and wrongful death cases throughout the U.S.*

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