



DON'T LET YOUR DEFENSE GET TRASHED BEFORE THE CASE STARTS: ONE COMPANY'S GARBAGE MAY BE ANOTHER COMPANY'S KEY EVIDENCE

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Liability for an act in the course of business operations that allegedly causes damage to another person or organization is something that many people probably see as a serious concern only after a lawsuit is filed.

But as a recent Wisconsin Supreme Court case shows, the groundwork for establishing liability – or for disproving it – can be laid very early after an alleged accident or loss occurs.

The Supreme Court released an opinion this summer that demonstrates the possible consequences when a business ignores early opportunities to preserve evidence related to someone else's potential claim.

In *Ronaldson v. Golke*, brothers who ran a roofing business received correspondence from American Family, which insured a former client of theirs, asserting that they were responsible for a fire that occurred at the former client's residence because of the manner in which their work reduced the clearance between the chimney and flammable materials on the roof.

The roofers sent one of the letters to their insurer, who denied coverage, but the roofers did not contact American Family or demand to inspect the roof after the fire. American Family proceeded to demolish and rebuild the house.

When American Family later sued the roofers to recover the cost of repairing the damage, the roofers moved to dismiss the case on the grounds that American Family had destroyed the evidence that they needed for their defense. The circuit court agreed.

But at the Supreme Court, the roofers lost that argument. The Supreme Court held that American Family's mailings – which explained that the destruction of the damaged building would be delayed for a period of time to allow the roofers to inspect it – were sufficient to require the roofers to do something to preserve their right to collect evidence from the scene before American Family's reconstruction destroyed that evidence.

The practical effect of this ruling is that, on remand, the roofers are likely to have a difficult time defending against American Family's claim. They will have to present testimony through an expert who has not had an opportunity to examine the fire scene. Therefore, the roofers' expert will likely have to testify based on any tests and photographs taken by American Family's expert, which may not include the same tests that a defense-minded expert would conduct, and they may have to rely primarily on attacking American Family's expert's credibility rather than putting on an effective competing analysis of the fire's origin by their own expert.

The problem is that many businesses would react the same way the roofers did. Few business owners would imagine that, at that early stage, they needed to retain an expert and get him or her to the fire scene as soon as possible. Yet, that is the reality, particularly when the damages are claimed to be substantial.

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Businesses also can hurt their ability to pursue claims against others by failing to preserve evidence when it is in their possession after an accident. For example, when an industrial accident occurs, the focus is often on attending to any injuries and cleaning up the site so that production can resume. If evidence is not preserved in this process, and a business destroys it without giving notice in the manner the Supreme Court directed in the *Ronaldson* decision, then it could unwittingly lose the ability to pursue claims against others, such as machine manufacturers.

So what can businesses do? As soon as possible after any serious accident or incident, businesses need not only to notify their insurers and, preferably, to retain counsel to help guide them in protecting their rights, but also to ensure that they take all reasonable steps to attempt to preserve or examine evidence that may be relevant to theirs or other people's potential claims or defenses, no matter who has possession of it at the time.

One postscript: Insurance coverage was not an issue in the Supreme Court's opinion, and so it is difficult to know whether the roofers in the *Ronaldson* case have challenged their insurer's denial of coverage. If their insurer denied coverage wrongly – something that we do not know from this opinion – then the roofers may be able to assert that their insurer should have helped them obtain counsel early enough to recognize that they needed access to the evidence before it was destroyed.