A recent reported decision underscores the importance of properly handling construction defects that need to be corrected prior to resolution of a dispute. The message for owners is clear: provide full, timely notice of construction defects and a realistic opportunity to inspect those defects and any corrective work. The message for contractors is also clear: take full advantage of opportunities to inspect alleged defects and remedial work. Either party that ignores these principles does so at its peril.

In many commercial construction projects in which defects are alleged, the parties may have to deal with the issue of spoliation of evidence, in which a party either intentionally or negligently destroys evidence that could assist the opposing party in proving or defending against claims. Although the principles of spoliation and the problems that it presents are recognized in most jurisdictions the remedies for such conduct vary greatly. On August 3, 2010, the Supreme Court of the State of New Jersey issued a decision designed to provide greater future guidance for potential spoliation claims.

In Robertet Flavors, Inc. v. Tri-Form Construction, Inc. (A70/71-08), the Supreme Court was called upon to deal with a factual scenario in which an owner had performed substantial time-sensitive remediation work to a newly constructed building. However, the owner acknowledged that through inadvertence it had failed to provide full and timely notice of the remedial measures to the parties who were claimed to be responsible for the defects, thereby potentially compromising the defense of those parties. In addressing the problem of spoliation, the court reaffirmed its commitment to having courts fashion remedies for spoliation that 1) make the non-spoliating party whole, as nearly as possible; 2) punish the wrongdoer; and 3) deter others from such conduct.

While recognizing the importance of remedies for spoliation, the court declined to establish a bright-line mechanical rule and instead emphasized the need for flexibility based on the facts of each situation. For example, in Robertet the court allowed the owner to present certain claims concerning defects that were alleged to have caused water infiltration in windows even though the window installer was not permitted to inspect the initial window removal and replacement. The court, however, allowed the claim to proceed based on the evidence available to the window installer as a result of inspecting earlier complaints together with the information that was available at the time of instal-
While the court cautioned trial courts to tailor spoliation remedies to each factual situation, and to avoid imposing harsh sanctions, it explicitly noted that some events of spoliation may be so prejudicial, or undertaken in such bad faith, that suppression of pleadings may be appropriate.

The decision in Robertet serves as a cautionary tale for all parties to a construction project that they must be vigilant in notifying other parties of claimed defects and any plans to repair those defects. Furthermore, those who are accused of defective work must be vigilant in demanding inspection and evidence-gathering rights and availing themselves of those opportunities. The Robertet decision confirms another important principle: even for instances in which spoliation occurs, a party will not automatically be precluded from recovering for or defending against alleged construction defects.

M&E’s construction attorneys, who are listed below, can assist you with construction defect and spoliation issues. The author of this alert, Francis A. Kirk, concentrates in construction law and is resident in our Newark office.