

## The Ultimate Sanction: Dismissal as a Spoliation Remedy

It will come as no surprise to subrogation professionals that retaining evidence for future inspection is essential to successfully prosecuting a subrogation claim. A new opinion out of the U.S. District Court for the Western District of Virginia demonstrates just how essential evidence retention is. In *Nautilus Insurance Co. v. Appalachian Power Co.*, Case No. 7:19-cv-00380 (W.D. Va.), Nautilus brought an action against the defendant utility for damages to a workshop insured by Nautilus. Nautilus retained a fire investigator, who inspected the scene and advised Nautilus of the importance of preserving the fire scene so Appalachian Power could participate. Nautilus's adjuster acknowledged this, but later told the fire investigator to close his file and advised the insured that demolition could begin. Nearly three months later, Nautilus placed Appalachian Power on notice of a potential claim. Appalachian Power sent an expert to the scene, by which time it had been demolished.

During the subsequent litigation, the court excluded Nautilus's fire investigator's testimony and struck his expert report. In a subsequent motion for summary judgment, however, the court went a step further and dismissed the lawsuit due to Nautilus's spoliation of evidence. In administering the ultimate sanction, the court noted that it is undisputed that Nautilus advised its insured the fire scene could be demolished (as opposed to the insured taking this action without Nautilus's permission, which may have warranted a less severe sanction). The court also dismissed Nautilus's contention that Appalachian Power was clearly on notice of the loss due to its status as utility provider. In dismissing this argument, the court drew a distinction between a subrogation target being aware of a loss and being specifically informed that a potential claim may be made against it.

Subrogation professionals are used to spoliation defenses resulting in adverse inferences or jury instructions at trial, but rarely do courts use their inherent authority to outright dismiss cases as a remedy for spoliation. This decision highlights the importance of retaining all potential evidence and giving all potential targets detailed notice of a potential claim and an opportunity to perform their own forensic investigation. Failure to do so may have an even larger impact on a subrogation claim than originally thought.



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