

## Rhode Island District Court Dismisses Plaintiff's Case for Spoliation Due to Potential Unfair Prejudice to Defendant

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In *Amica Mutual Ins. Co. v. BrassCraft Mfg., Co.*, 2018 U.S. Dist. LEXIS 88986 (D.R.I. May 29, 2018), the United States District Court for the District of Rhode Island addressed the question of whether the defendant was so unfairly prejudiced by the subrogating insurer's spoliation of evidence that dismissal of the plaintiff's case was the appropriate Rule 37(b)(2)(a)(i)-(vi) sanction. The court, focusing on the potential for undue prejudice to the defendant, granted the defendant's motion to dismiss.

In *Amica*, Nadine Podgruski suffered flood damage in her home in August of 2013. She reported the damage to her insurance carrier, Amica Insurance Company (Amica), who then investigated the cause of the loss. Amica's experts concluded that the loss resulted from a flexible toilet connector in the insured's second-floor bathroom disconnecting from a fitting. They further concluded that the failure was from loading stress on the coupling nut likely caused by "material deficiencies in the plastics, combined with excess stress from the installation conditions." When Amica's experts reached these conclusions, they had the opportunity to examine the connector.

In 2015, Amica sent a settlement demand to BrassCraft. When BrassCraft requested proof that its product was the cause of the failure, Amica did not respond. Instead, Amica sent another demand along with photographs a year later. BrassCraft again requested proof of the cause of the loss and asked for the connector but Amica denied their request, stating that it would not ship the connector. Amica later admitted that the connector was lost or destroyed. After BrassCraft subsequently denied the claim, Amica filed suit in early 2017, claiming that BrassCraft defectively manufactured the connector.

In April of 2017, Amica's experts issued a joint affidavit opining, based solely on their review of a series of photographs, that BrassCraft defectively manufactured the connector. When they issued their affidavit, Amica's experts failed to mention that they had also viewed the evidence. Subsequently, BrassCraft moved to dismiss the complaint as a sanction for Amica's spoliation of the evidence.

In determining whether the drastic remedy of dismissal was warranted, the court weighed the following five factors: 1) whether the defendant was prejudiced; 2) whether the prejudice could be cured; 3) the practical importance of the evidence; 4) whether the plaintiff acted in good faith; and 5) the potential for abuse if the evidence was not excluded. The court looked closely at the potential prejudice involved, recognizing the importance the evidence had in the case and the inadequacies associated with BrassCraft having to rely on photographs to defend itself. Based on its review of the relevant factors, the court found that BrassCraft suffered prejudice and that there was no potential to cure the prejudice by examining an exemplar since BrassCraft no longer manufactured the connector at issue. The fact that Amica's experts, but not BrassCraft's, were able to view the evidence highlighted the prejudice suffered by BrassCraft. After finding that Amica was a sophisticated insurance company who acted recklessly with respect to preserving the connector, the court granted BrassCraft's motion and dismissed the case.

The holding in this case highlights not only the importance of preserving evidence during and after a subrogation investigation, but also the importance of considering the likelihood of a spoliation sanction when deciding whether to continue pursuing a case. The case also highlights that courts may consider a spoliating party's sophistication when deciding on the appropriate sanction. If a subrogating carrier's experts have viewed evidence that is later lost or destroyed before the defendant has the chance to view it, there is a potential for prejudice and a subrogating insurer may be hard-pressed to survive a motion to dismiss.

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