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Claims
COVERING THE BUSINESS OF LOSS

Feature Story | BY STEPHEN HALBEISEN

Proving Fine Art Damage: It's All in the Details

To Maximize Subrogation Recoveries, Pay Attention



Per Knutas, chief conservator at the Cincinnati Art Museum, works on restoring Vincent van Gogh's 1890 masterpiece "Undergrowth with Two Figures." Knutas himself was on view in the museum as he carefully restored the painting to lengthen its life span and prepare it for loan to the Philadelphia Museum of Art, where the piece is currently on display.

Fine art losses come in many shapes and sizes. Often, fine art is a relatively minor component of a homeowner's or commercial property claim. Occasionally, however, damaged art represents the vast majority of a claim. You may have heard of the story in 2006 about casino mogul Steve Wynn, who accidentally poked a hole in his own Picasso painting, "Le Rêve," which he had previously agreed to sell to another collector for \$139 million. Given the impact of the damage on the painting's value, Wynn decided to keep the painting after conservation.

In the context of subrogation, when a property loss results in damage to real property, personal property, and works of fine art, it is all too easy to focus the investigation solely on causation and responsibility for the loss. For the inexperienced claims or subrogation professional, however, proving damages can be an afterthought. In order to maximize your potential subrogation recovery on a claim that involves works of fine art, understanding the recoverable measure

of damages and hiring the right damages experts are as important as proving the cause of the loss.

When a loss involves damage to a work of fine art, the nature and extent of the damage must be evaluated quickly. Was the art completely consumed in a fire or was it damaged by smoke, humidity, water, or physical impact? The nature and extent of the damage will dictate the response by claims and subrogation professionals. For example, water damage to a Mark Rothko oil painting requires a different response than smoke damage to a rare Ansel Adams photograph.

Handle With Care

Proper handling of the artwork after a loss can significantly mitigate the extent of damage. Stabilizing the art after a loss is critical, so transfer of the art to a temperature-and-humidity-controlled environment is essential. There, the art can be held for inspection and storage, pending determination of a conservation plan. When you are dealing with a multimillion-dollar painting or sculpture, improper handling and/or transportation after a loss can significantly exacerbate the damages. Art handlers experienced in removing, crating, transporting, and storing fine art should be considered depending on the value of the art in question.

Once the art is transferred to a stable environment, a determination must be made as to whether conservation efforts can help mitigate or remediate the damage. The American Institute for Conservation of Historic and Artistic Works (AIC), with more than 3,500 members, encompasses groups and individuals that specialize in specific formats and topics, such as paper, electronic media, objects, painting, photographs, textiles, wood, and so on.

Mitigating the Damage

Hiring the right conservator can greatly

mitigate the damage. The more valuable the work of art, the more critical the selection of a conservator. If the work of art is not totally destroyed and can be treated by a conservator, then a treatment plan should be established before any conservation work is undertaken. In the best-case scenario, the art can be completely restored to its pre-loss condition and the loss in market value can be minimized.

More often than not, however, the damage can be treated only to the extent possible without risking or causing further harm to the artwork. In those cases, the artwork cannot be fully restored and, to a certain extent, will remain permanently damaged.

When a work of fine art is damaged or destroyed, what is the recoverable measure of damage in a subrogation claim, and how do you prove your damages? Works of art are considered personal property, and the common-law rules applicable to personal property damage also apply to works of art. When art is destroyed and cannot be repaired or conserved, the amount that can be recovered in subrogation is market value in most jurisdictions.

Generally, market value is defined as the price the item would bring if it were offered for sale by a willing but not obligated seller and purchased by a willing but not obligated buyer. See *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 246 (Tex. 1981). When personal property is damaged, the measure of damage is the difference in the market value of the item immediately before and after the damage. See *Thomas v. Oldham*, 895 S.W.2d 352, 359 (Tex. 1995). If market value cannot be determined, or the property is not subject to market valuation, other methods may be used, such as replacement value, actual or intrinsic value, and sometimes sentimental value.

Pre-Loss Market Values

To prove damages on a fine art loss, the pre-loss market value of the art must be established. Relevant information should be gathered, such as a description of the work of art, purchase price, photographs, condition reports, provenance (history of ownership), appraisals, and so on. It is especially important to know the actual condition of the subject work of art, as the market value

Stages of Restoration



Restorer Ella Hendriks shows pictures of the various stages of restoration of Vincent Van Gogh's 'The Bedroom' painting, rear left on easel, at the Van Gogh museum in Amsterdam, Netherlands, on Thursday Aug. 27, 2010.

Vincent van Gogh must have been horrified when he returned to his studio from hospital early in 1889 to find one of his favorite paintings damaged by moisture. He pressed newspaper to the canvas to protect it from further deterioration, rolled it up and sent it to his brother Theo in Paris.

Ella Hendriks could still see traces of newsprint when she looked at "The Bedroom" under a microscope, as she picked and scraped at earlier restorations of the canvas and removed yellowing varnish that had been brushed on 80 years ago. Hendriks has completed a painstaking six-month restoration of the masterpiece, which returned to its place on the wall of the Van Gogh Museum.

AP Photo/Peter Dejong

of works by a single artist can vary significantly depending on actual condition. If the art had been loaned to museums for exhibitions, then it would be very helpful to obtain condition reports prepared by the museum. Recent auction sales of an artist's work may be available through online services such as www.artnet.com and www.askart.com.

The market value of fine art can fluctuate significantly over relatively short periods of time. For example, the fine art market was significantly impacted by the global economic crisis that began in fall 2008. Interestingly, the demand for the work of certain artists, such as Gerhard Richter, rebounded quickly by spring 2009, and the market for his work has remained strong since. Therefore, it may be

necessary to engage an appraiser with a strong working knowledge of the market for a specific type of art or the work of a particular artist in order to determine the market value immediately before the damage occurred.

Subjectivity in Appraisal

While sales history and comparable sales are sometimes available, art valuation can be a subjective undertaking. Hiring the right appraisal expert is critical. Not all art appraisers are alike. Some are claims adjusters who have little or no experience in marketing or selling the work of a particular artist. Others are private art dealers or work at auction houses like Christie's or Sotheby's with significant expertise in a specific artist's work. Claims and subrogation professionals should thoroughly evaluate the qualifications and potential bias of prospective appraisers.

In the end, the appraisal expert needs to be highly qualified, competent, credible, and someone who has done his or her homework. The last thing you want is an appraiser who simply tells you what he or she thinks you want to hear.

Post-Loss Market Values

In addition to establishing the pre-damage market value of the art, it is also necessary to determine the post-loss market value. This is easy when the art is completely destroyed or consumed in a fire; however, in cases where conservation efforts are undertaken to remediate the damage, a determination must be made of the post-conservation market value of the art. This can be



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◀ Stephen Halbeisen

particularly challenging because the owner of the art before the loss oftentimes retains ownership after the loss and after conservation. In those cases, the loss in market value can only be estimated.

Most art appraisers estimate the post-

Water damage to a Mark Rothko oil painting requires a different response than smoke damage to a rare Ansel Adams photograph.

conservation loss of market value in terms of percentages. For example, if the work of art had a pre-loss market value of \$1 million, and the appraiser estimates the post-conservation loss of market value at 25 percent, then the provable loss of market value would be \$250,000. Given the subjective nature of this exercise, the qualifications, methodology, and credibility of the expert that appraises

the post-conservation market value of the art are paramount. If the art is actually sold after conservation is completed, then the sales price will probably be sufficient evidence of post-conservation market value.

Because of the subjective nature of art as well as the price volatility in the art market, paying attention to the details of the damages aspects of fine arts losses will pay

dividends with respect to your first-party exposure—and it will significantly improve your ability to maximize your subrogation recoveries. ■

Stephen Halbeisen is chair of Cozen O'Connor's Subrogation & Recovery Department's South Central region. He has handled cases involving fine art losses, fires and explosions, products liability claims, petrochemical losses, structural collapses, roof failures, mechanical failures, warehouse liability, public utility negligence, and construction defects. Contact him at shalbeisen@cozen.com

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