

Fine Art Losses – “Canvas” the Subrogation Landscape

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If a fire or flood destroys a high-net-worth client's fine art collection, an insurer who pays out a claim related to the loss has an incentive to pursue subrogation. This article explores some of the issues an insurer should “canvas” before pursuing subrogation for these types of claims.

Damage to fine art can occur in a number of ways. For instance, fine art may be damaged in a natural disaster – such as a flood or a wildfire. Artwork may also be accidentally damaged because of a transportation-related incident physically damaging the art. In addition, artwork may suffer fire or smoke damage from a fire within a building. Another possibility is that the artwork suffers damage because of renovations either to the insured's home or a neighboring property. For example, a renovation contractor may damage artwork due to vibrations or leaking water. A construction worker, moreover, may turn with a tool in his hand, or trip and fall, damaging the artwork.

One of the first things an insurer should do – during the adjustment of the claim – is determine when the loss occurred, i.e., before the loss or as a result of the loss. To make this determination, the adjuster should consider bringing in a fine art expert. If an insurer pays for a loss that occurred *before* the incident at issue, it may be deemed a volunteer.

Consider a claim based on a fire where the insured claims that a painting suffered by soot or smoke damage. An expert can determine a timeline with respect to whether the painting was damaged by soot resulting from a fire or, pre-loss, due to layers of nicotine that may be found in the smoker's home.

Once the adjuster determines that the loss was caused by the fire, the adjuster should consider whether there is any subrogation potential associated with the claim. In this example, a possible target may be a construction contractor or electrician that caused the fire. However, as each of these possible targets may have a contract that involves the anti-subrogation rule and/or a waiver of subrogation clause, the adjuster should contact a subrogation attorney to determine the merits of pursuing potential targets.

Another situation where the adjuster may want to involve a subrogation attorney is where the target is a transportation carrier and the contract or bill-of-lading for that carrier contains a limitation of liability clause. A knowledgeable subrogation attorney can help the insurer analyze the strength of any limitation of liability clauses in the relevant jurisdiction.

In addition, an insurer should consider involving a subrogation attorney is because damages may be difficult to prove. Some jurisdictions state that, for personal property, the insurer can only recover the diminution in value associated with the artwork. However, if the painting is unique (i.e., has no market value) or market value is difficult to determine, an attorney may be able to argue that the insurer can recover a different measure of damages. For instance, the attorney might be able to convince a court that damage should be allowed to make the insured (i.e., the subrogating insurer) whole and that the court should consider the fine art's replacement value, intrinsic and/or sentimental value.

An attorney may also be able to argue that any damage done to the artwork can be treated only so far without risking or causing further damage to the artwork. A subrogation attorney may be able to convince the court and/or the target that because the artwork cannot be fully restored it still remains damaged, and the insurer should be able to recover for that loss as well.

While an adjuster is generally concerned with valuing damaged artwork properly to reimburse the insured, an adjuster addressing fine art losses should be equally concerned – from the outset – with a claim’s subrogation potential. Below is a partial checklist for adjusting/subrogating fine art losses:

1. Is the item scheduled on the policy and, if so, what value was used?
2. Did the loss occur as a result of the incident, or did the damage occur before the incident?
3. Is the artwork on loan and, if so, is there a Loan Agreement in place?
 - a. If yes, does the Loan Agreement address insurance?
4. Can the piece be repaired or is it a total loss?
 - a. If the artwork can be repaired, what will be the cost?
5. Are there any potential subrogation targets the insurer can recover the loss from (for example, the shipper/packer; the entity causing the flood or fire; or the warehouse where the art was stored)?
 - a. Did you secure all the applicable contracts, including bills of lading?
6. Are there any contractual barriers to recovery (such as an agreement to secure insurance; a limitation of liability clause; an exculpatory clause; a waiver of subrogation)?
 - a. If yes, can the insurer argue that the contractual barriers are unenforceable or should not bar recovery in this instance?
7. Assuming the insurer can repair the artwork, will the repair cost fully restore the art to its pre-incident value, or will the artwork be diminished in value?
 - a. If the artwork will still have a diminished value after restoration and/or if its value is less because of the stigma associated with repaired art, is this value recoverable?
8. Will the cost to repair/conservate the item plus diminution in market value exceed the value of the artwork?
 - a. If yes, in order to make the insured whole, can you recover this amount in the jurisdiction where the incident occurred?

In summary, if you receive a claim involving fine art, one of the first things you should think about is whether there is any subrogation potential associated with the loss. Pursuing subrogation allows insurers to consider not only what happened, but why it happened. Because storage and other contracts are generally complex and include insurance and/or limitation of liability provisions, adjusters and in-house subrogation professionals should consider involving an experienced subrogation attorney at the outset of the claim. An attorney can help an insurer identify subrogation targets and can also provide support related to damages.

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