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 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 se-
lection 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 conser-
vation 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 fur-
ther harm to the artwork. In those cases,
the artwork cannot be fully restored and,
to a certain extent, will remain perma-
nently 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 dam-
gages? Works of art are considered
personal property, and the com-
mon
law rules applicable to personal prop-
erty 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 mar-
ket 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 ob-
ligated 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 prop-
erty is not subject to market valuation, other
methods may be used, such as replacement
value, actual or intrinsic value, and some-
times sentimental value.

Pre-Loss Market Values
To prove damages on a fine art loss, the
pre-loss market value of the art must be es-
blished. Relevant information should be
gathered, such as a description of the work
of art, purchase price, photographs, condi-
tion reports, provenance (history of owner-
ship), appraisals, and so on. It is especially
important to know the actual condition of
the subject work of art, as the market value
of works by a single artist can vary signifi-
cantly 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.

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 Ger-
hard Richter, rebounded quickly by spring
2009, and the market for his work has re-
mained strong since. Therefore, it may be
necessary to engage an appraiser with a
strong working knowledge of the mar-
ket for a specific type of art or the work
of a particular artist in order to deter-
mine the market value immedi-
ately before the damage occurred.

Subjectivity in Appraisal
While sales history and comparable
sales are sometimes available, art valu-
ation can be a subjective undertaking.
Hiring the right appraisal expert is criti-
cal. 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 profes-
sionals should thoroughly evaluate the
qualifications and potential bias of pro-
spective appraisers.

In the end, the appraisal expert needs
to be highly qualified, competent, cred-
ible, 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-con-
servation market value of the art. This can be

If market value cannot be determined,
or if 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.

Stephen Halbeisen

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

Most art appraisers estimate the post-

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 newspaper 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.
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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