# Entrusting Or Conveying Your Jewelry Or Fine Art – Let The Consignor (And Its Insurer) Beware

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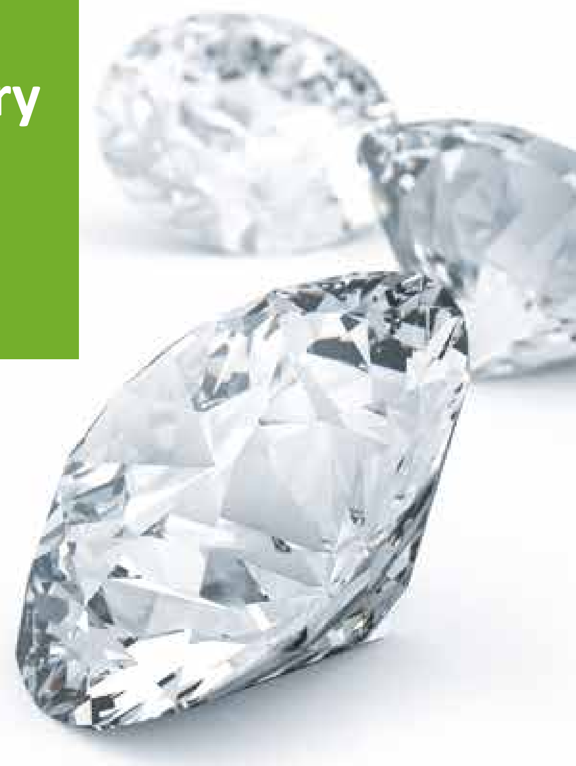

**The jewelers block and fine art insurance market has the distinction of insuring objects which are not only some of the most valuable items of property in the world, but are also the ones which are more easily capable of being lost, moved, concealed or sold than, let's say, a skyscraper or a wind turbine. The job of insuring jewelry and fine art is also not made easier by the fact that dealers in both markets can sometimes regard insurance more as part of the transaction than a risk management issue. While there are registries for stolen art, there is also no centralized or uniformly required database where one can publish and establish title to one's property and guarantee provenance (nor is it necessarily clear that dealers or owners who are accustomed to operating privately and discreetly, with little oversight, would utilize such a database anyway).**

Therefore, the age-old conundrum is how can Insurers best protect their Insureds (and themselves) from claims that arise due to the very nature of the business that their Insureds engage in – consigning and loaning out valuable property on little more than trust or minimal paperwork. In the Jeweler's Block market in the United States, more so than in the Fine Arts market, protection has traditionally been sought through proposal forms, warranties, limits on showcases and displays, limits on travel coverage and security surveys. But no proposal form, policy warning or survey is foolproof. Losses will happen and claims will be made.

Because Insurers have little control over their Insureds' consignment and loan practices, there has been a noticeable attempt to shift responsibility onto (and rollback coverage from) the entrusting party, your insured, where the entrustee's dishonest act has caused a loss, unless the jewelry or fine art has been deposited in a bank, stored in a hotel safe or warehouse, given to the insured's salesman or shipped with a carrier. Typical policy wording excludes coverage for "Misappropriation, secretion, conversion, infidelity or any dishonest act on the part of the assured or other party of interest, his or their employees or agents or others to whom property may be entrusted (carriers for hire excepted)." [1] The battle lines are often drawn over whether there was a "voluntary" entrustment, as opposed to an outright theft which would be an "all risks" direct physical loss, and the deciding factor is often the state of mind of your insureds rather than the one who deprived them of possession of the property.

Thus, in one Florida case the Court was confronted with a situation where an emerald was delivered or entrusted to a third-party who made off with the stone. [2] At issue was whether the emerald had been "delivered or entrusted" to the third-party. The Court held that one had to look at the intent or the state of mind of the person who was turning the item over and, in that case, there was no doubt that there was a voluntary delivery which comprised an entrustment to the thief. As such, the insurer's denial of coverage was upheld. An earlier case in New York had arrived at a similar conclusion. [3] The Court focused on the intent of the owner of the jewelry rather than the motive of the one who eventually obtained possession. Accordingly, although the insured owner was deceived, the Court found that the merchandise had been entrusted and fell within the exclusion. In another New York Federal case, [4] the insured had mistakenly delivered precious stones to an individual who he had wrongly identified. That individual had then disposed of the stones. The Court found that despite the erroneous delivery, the facts of this case fell squarely within the exclusion. To the Court, the delivery occurred to an individual who then converted the items dishonestly. Thus, coverage was denied.

The fact that the entrusted party is a faceless entity, such as a warehouse, is irrelevant. So long as in the insured's state of mind, it had surrendered, delivered or transferred possession of its goods "with confidence that the property would be used for the purpose intended....temporary storage," the exclusion will be enforced, regardless of claims that a warehouse's actions in selling all of the insured's goods to settle a debt amounted to a theft. [5] Even an art gallery that pleads guilty to thefts of artwork will qualify as "anyone" in an exclusion for "any fraudulent, dishonest or criminal acts by....(b) anyone entrusted with the covered property." [6]

However, questions of fact can bedevil such cases, particularly where it is not clear to whom your insured intended to deliver the property. In one New York case [7] the Court was called upon to examine whether the exclusion relating to the dishonesty of an employee would apply where the insured had shipped loose diamonds to a consignee, which were then stolen by the consignee's employee. The Court held that, on the stipulated facts, it was unclear whether the jewels had been entrusted to the thief. A similar finding was also made in a New York case [8] where mere suspicion that a courier might have stolen the jewelry or been involved in its loss was not sufficient as the record before the Court did not allow a conclusion that the loss was definitely due to dishonesty. In another New York case, [9] the insured had delivered merchandise on memorandum to a retail jewelry store. It was subsequently stolen with the assistance of an employee of the person to whom the good had been delivered. At trial, the jury had determined that the owner of the retail store had not delivered or entrusted the memorandum jewelry to his employee. This was despite the fact that the employee had received both the combination of the safe and the keys of the store. The Court upheld the jury's decision, expressly rejecting the argument of the insurer that the release of the combination and the delivery of the keys amounted to an entrustment to the employee of the jewelry contained in the store's safe.

Another way Insurers seek to control their insureds' potential consignment of jewelry or fine art is through "personal conveyance" clauses that require close supervision or monitoring of the items, sometimes even requiring that works be controlled "by hand" or "carried," and penalizing insureds who fail to exercise such strict supervision, even where the loss was not their fault but that of their agents or consignees.

For example, where a chauffeur was hired to drive the insured to a wedding and back, the insured left jewelry in an attaché case in the trunk and the chauffeur, after dropping off the insured at the wedding, left the jewelry unattended while having dinner elsewhere, it was held this loss was not covered per a baggage warranty that excluded "all losses from baggage unless in the hands of or under the personal supervision of the assured or a member of his family." [10]

In another case, a federal court in New York addressed a loss where an insured's salesman sat with a bag containing the insured's jewelry on top of an empty chair in a restaurant as he had dinner with his family, and only left the bag by accident at the end of the meal, which was subsequently stolen after he had left the restaurant. The Court held that while the phrase "close personal custody and control" was ambiguous, the loss was still not covered because "under any reasonable interpretation…[the salesman] relinquished 'close personal custody and control' at least when he walked out of the diner door" and that a true owner cannot maintain 'close personal custody and control' over mislaid property. [11]

Most recently, in a New York case our firm recently concluded for the Lloyd's and London Markets, the appellate court affirmed the trial court's decision granting summary judgment to the Insurers in a dispute involving a scheduled $2.5 million personal jewelry collection policy. [12] This policy had a $750,000 Sub-Limit, which applied to items not located in or removed from the insured's named bank safe deposit box in the policy. However, the Sub-Limit contained an exclusion that barred coverage unless the items are: "(i) being worn or (ii) being carried by hand under the personal supervision of the insured or (iii) deposited in a bank or locked safe, unless the insured is staying at an hotel or motel when such items are kept in the principal safe of the hotel or motel."

The Insured delivered two of the jewelry items to a dealer in order to be inspected by a potential buyer. Although she was wearing these items when she drove to the dealer, she removed them before he arrived at her car and then handed them in a bag to the dealer. The Insured had no control over the dealer's use of the items and there was no agreement, verbal or written, as to when the dealer would have to return the items or the price the items would be sold at. Subsequently, the dealer allegedly did not return the items. The Insured filed a complaint with the police, which was voided on the ground that this was a civil dispute. The Insured filed an insurance claim, but Insurers denied the claim on the basis of the exclusions to the Sub-Limit. A lawsuit ensued. The trial court held that the exclusion in the Sub-Limit applied, the loss was not covered and Insurers were entitled to summary judgment. The court's reasoning meshed with Insurers': the Insured was not wearing the items at the time of the loss, ceased to carry the items when she gave them to the dealer, and did not personally supervise the dealer when he was carrying the items. The appellate court agreed.

Clearly, what constitutes an 'entrustment' or a 'personal conveyance' is often in the eye of the beholder. That 'beholder' becomes a court if there is a coverage dispute between the Insurer and the Insured after a loss. As is self-evident, lodging coverage disputes in court does not guarantee results and raises the risks and costs for both the Insurer and the Insured. This has spurred an increase in commercially reasonable settlements, mediation and arbitration. It is possible that coverage disputes will be avoided or least mitigated in the future by the growth of "title" insurance for artwork, tagging jewelry with identification, defining terms in policies and obtaining a better understanding of an insured's expectations during the underwriting process. However, until these processes become more common and formalized, insurers in the jeweler's block and fine art markets will probably continue to require jurisdiction based interpretation of the 'entrustment' exclusion and 'personal conveyance' condition in their policies of insurance.

1. The Camera Mart, Inc. v. Lumbermens Mutual Casualty Company, 58 Misc. 2d 448, 449 (Civil Ct. NY Cty. 1968).
2. David R. Balogh, Inc. v. Pennsylvania Millers Mutual Fire Ins. Co., 307 F. 2d 894 (5th Cir. 1962).
3. Abrams v. Great American Insurance Co., 269 N.Y. 90 (1935).
4. M.H. Lipiner & Son, Inc. v. Hanover Insurance Co., 869 F. 2d 685 (2d Cir. 1989).
5. Cougar Sport, Inc. v. Hartford Insurance Company of the Midwest, 190 Misc. 2d 91 (Sup. Ct. NY Cty. 2000), affd., 288 A.D. 2d 85 (1st Dept. 2001).
6. AXA Art Insurance Corp. v. Renaissance Art Investors, LLC, 32 Misc. 2d 1223(A), (Sup. Ct. NY Cty. 2011), affd., 102 A.D. 3d 604 (1st Dept. 2013).
7. Facet Industries, Inc. v. Wright, 62 N.Y. 2d 769 (1984).
8. Chase Rand Corp. v. Central Insurance Co., 63 F. Supp. 626 (S.D.N.Y. 1945).
9. Glick v. Excess Insurance Co., 14 N.Y. 2d 635 (1964).
10. Zimring et. al v. English and American Ins. Co., 91 A.D. 2d 889 (1st Dept. 1983).
11. Saritejdiam, Inc. v. Excess Insurance Co. et. al, 971 F. 2d 910 (2d Cir. 1992).
12. Marbury v. Chaucer Syndicates et. al, (Sup. Ct. Westchester Cty., Index No.: 59532/11), affd., 140 A.D. 3d 1033 (2d Dept. 2016).