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# Property Damage Valuation: Examination of Permitted Methods

Cost to Repair, Cost to Replace, Highest/Best Value, Role of Sentiment, Unique Property

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TUESDAY, SEPTEMBER 3, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Gary L. Wickert, Partner, **Matthiesen Wickert & Lehrer**, Hartford, Wis.

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# PERSONAL PROPERTY DAMAGE VALUATION: EXAMINATION OF PERMITTED METHODS

Cost to Repair, Cost to Replace, Highest/Best  
Value, Role of Sentiment, Unique Property

Presented By:  
Gary L. Wickert

Matthiesen, Wickert & Lehrer, S.C.

**MWL**

MATTHIESEN, WICKERT & LEHRER, S.C.  
ATTORNEYS AT LAW

# HISTORY OF PROPERTY VALUE

- **Colonial Taxation**
- **Tangible Personal Property (TPP) Tax (*ad valorem*)**
  - Property that can be moved or touched.
    - Primarily Business Equipment, Machinery, Inventory, Furniture
  - 43 states include TPP in their property tax base.
- **20<sup>th</sup> Century Tax Reform**
  - TPP Taxes Hard to Assess
  - Moving Away From TPP Taxation
  - 7 states eliminated all TPP / 6 states eliminated most TPP.
  - All states except Oklahoma exempt TPP not used for production of goods.
- **Development of Personal Property Valuation**
- **Fair Market Value (FMV) Times Tax Rate**
  - Purchase Price x Depreciation Schedule Reflecting Age and Useful Life
  - Assessment Ratio: Blanket Percentage (*e.g.*, 50%) x FMV

# UNDERSTANDING PROPERTY VALUATION TERMS

- **Fair Market Value (FMV):** Sales price a willing buyer is willing to pay to a willing seller.
- **Replacement Cost Value (RCV):** Insurance term used when paying first-party claims.
  - Cost of replacing property, with no depreciation for age, wear and tear.
- **Actual Cash Value (ACV):** Insurance term used when paying first-party claims.
  - Not Easily Defined
  - a/k/a “Actual Cost Value”
  - Cost of replacing property, less depreciation for age, wear and tear.
  - a/k/a “Depreciated Replacement Cost”
  - Not equal to Replacement Cost Value (RCV)
- **Diminution in Value (DIV): Three Types**
  - Immediate Diminished Value: Immediately After Loss
  - Inherent Diminished Value: (Residual Diminished Value) After Repairs
  - Repair-Related Diminished Value: Following Incomplete or poorly-done repairs.
- **Loss of Use: Reasonable value of the use of the property during repair.**

# EXAMPLE OF HOW ACV, DEPRECIATION, AND RCV INTERACT

- **Standard Policy Language:**

*We will pay the cost to repair or replace with similar construction and for the same use on the premises, subject to the following: until actual repair or replacement is complete, we will pay only the actual cash value at the time of the loss of the damaged property.*



# EXAMPLE OF HOW ACV, DEPRECIATION, AND RCV INTERACT

- Tree falls on 10-year-old house.
- Initial check from insurance company for ACV at time of loss.
- Once contractor hired and roof replaced, check for depreciation held back from RCV.
- $ACV = RCV - Depreciation$



# PERSONAL PROPERTY VALUATION IN THIRD-PARTY TORT LITIGATION

- **First-Party Claims / Insurance Claims**
  - Replacement Cost Value (RCV)
  - Actual Cash Value (ACV)
  - Fair Market Value (FMV)
  - Policy terms govern subject to insurance regulations/statutes.
- **Third-Party (Tort) Damages Generally**
  - **Compensatory Damages: Plaintiff put in same position as if no accident.**
    - **Replace or Repair Damaged Property**
    - **Consequential Damages: Costs of Interim Replacement (Rental), Lost Profits.**
    - **Incidental Damages: Phone Calls, Shipping, Transportation, Sales Tax, Etc.**
    - **Punitive Damages: To Punish Defendants**
  - Total Loss – Fair Market Value Prior to Loss
  - Repair Costs
  - Diminution In Value
  - Sales Tax
- **State Law Governs the Law of Damages in Tort**



# EXAMPLE: TEXAS THIRD-PARTY PROPERTY DAMAGE VALUATION

- **Totally destroyed: FMV at time of destruction.**
  - *Morrison v. Campbell*, 431 S.W.3d 611 (Tex. App.-Fort Worth 2014).
- **Not totally destroyed and *can* be economically repaired: two options.**
  - Cost of Repair and Loss of Use
    - *Gilbert Wheeler, Inc. v. Enbridge Pipelines, L.P.*, 449 S.W.3d 474 (Tex. 2014).
  - Difference in FMV before and after loss (Immediate Diminished Value)
    - *J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649 (Tex. 2016)
  - Difference in FMV before and after the loss.
- **Not totally destroyed and *cannot* be economically repaired.**
  - Damage deemed permanent if repair costs exceed FMV of property.
  - Fair Market Value Plus Loss of Use.
    - *J&D Towing, LLC, supra.*
- **Subrogation: Insurance company pays loss and pursues tortfeasor.**
  - Can recover FMV. Not amount paid by insurance company.
    - *Waples-Platter Co. v. Comm'l Stand. Ins. Co.*, 294 S.W.2d 375 (Tex. 1956).

# PERSONAL PROPERTY VALUATION

o·pin·ion

/ə'pɪnyən/

*Noun*

1. A view or judgment formed about something, not necessarily based on fact or knowledge.
2. Property valuations are like opinions; everybody's got one.



# OWNER OF PERSONAL PROPERTY AS VALUE EXPERT

- **Texas**: Owner can testify to value if based on “market value.”
  - *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012).
  - Must be “familiar” with market value of such items (loose standard for owner).
  - Cannot testify as to “intrinsic” value.
- **Kentucky**: Owner of personal property must still have “knowledge of its value” (*i.e.*, some expertise) in order to testify regarding its value.
  - *Courier-Journal & Louisville Times Co. v. Crossland*, 300 Ky. 361 (Ky. 1945).
- **Florida**: Owner qualified to testify to value of his property, but competence depends on being familiar with the property and its value.
  - *B & B Tree Serv., Inc. v. Tampa Crane & Body, Inc.*, 111 So.3d 976 (Fla. App. 2013).

# PERSONAL PROPERTY WITH NO MARKET VALUE / SERVICE VALUE

- **Service Value:** Items without a typical “market” where such items are bought and sold.
  - Utility poles, signs, school buildings, landmarks, bridges, statutes, etc.
  - Have a “Service Value” (“Use Value”)
  - Difficult to place value—before and after rule does not work.
  - Majority: Replacement cost is the value.
  - Minority: Use formula involving reproduction cost, average useful life, cost of replacement, etc. to come up with fair valuation.



# SERVICE VALUE

- ***Com., Dept. of Transp. v. Estate of Crea, 483 A.2d 996 (Pa. Cmwth. 1977)***
  - Mass. DOT sued drunk driver for causing bridge to collapse.
  - General rule (market value) doesn't work, because no "market".
  - Damage (service value) is reasonable cost of replacement by a similar structure consistent with current standards of design.
  - Didn't take into consideration depreciation.



# INTRINSIC VALUE

- The reasonable value of property to the owner in the condition the property was in when it was damaged, excluding any fanciful or sentimental consideration.
  - B & B Tree Serv., Inc. v. Tampa Crane & Body, Inc., 111 So.3d 976, 978 (Fla. App. 2013)
- Examples: *Trinkets, etchings, books, pets, family documents, household furniture, jewelry, silverware, family records, clothing, and personal effects.*
  - Not bought or sold in the marketplace.
  - Value is intrinsic to owner.
  - Sometimes confused with Sentimental Value.



# INTRINSIC VALUE

- ***Strickland v. Medlen, 397 S.W.3d 184 (Tex. 2013).***
  - Dog negligently euthanized at animal shelter.
  - Damages not allowed based on intrinsic value of dog to family.
  - Sentimental consideration sometimes included in “intrinsic value”.
  - “Human-animal” bond is undeniable, but “uncompensable”.
  - No intrinsic value derived from feelings of pet owner toward dog.
  - Replacement value of dog is appropriate measure of damage.



# INTRINSIC VALUE

- ***Lane v. Oil Delivery, Inc.*, 524 A.2d 405 (N.J. Super. 1987).**
  - Subrogation case. Defendant caused fire at insured's home.
  - When personal property/household furnishings have no market, damage is "intrinsic value" to the owner.
  - This fully compensates the injured party.
  - Even where there is second-hand market.
  - Object is to replace items with a comparable substitute.
  - This is NOT the same as replacement value.
  - Depreciation, age, wear and tear, condition, cost of replacement and cost of repair are all factors to be considered in assessing intrinsic value.

# SENTIMENTAL VALUE

- Value derived from personal or emotional association rather than its material worth.
- Examples: antiques, heirlooms, wedding memorabilia, photographs, handicrafts, and trophies.
- Jewelry accumulated over 50 years of marriage has sentimental value as well as market value.
- Many states (*e.g.*, Arizona, Georgia, Louisiana, Mississippi, Missouri, New Jersey, Wisconsin, and Texas) believe that damages should not be determined by the “sentimental or fanciful” value to the owner.
- Some states (*e.g.*, Alabama, Arizona, California, Florida, Georgia, Massachusetts, Minnesota, Mississippi, Missouri, New Mexico, New York, Ohio, Oregon, Tennessee, Texas, and others) award damages based on the property’s actual value to its owner.

# SENTIMENTAL VALUE

- *Carye v. Boca Raton Hotel*, 676 So.2d 1020 (Fla. App. 1996).
  - Hotel guest sued to recover damages for jewelry stolen from their room.
  - Jewelry had sentimental value: accumulated over 48 years of marriage.
  - In this case, property had both market value and sentimental value.
  - If there is market value, cannot recover sentimental value.



# SENTIMENTAL VALUE

- ***Bond v. A. H. Belo Corp., 602 S.W.2d 105 (Tex. App. 1980).***
  - Owner of family papers and photographs sued newspaper for losing them.
  - Reporter writing story on unwanted children lost photos/birth records.
  - Property had no market value.
  - Recovery of sentimental value allowed.
  - Feelings of owner toward property properly considered.
  - Sentimental value can be greater than actual value.



# RESIDUAL DIMINUTION IN VALUE

- **Diminution in Value (DIV): Three Types**

- Immediate Diminished Value: Immediately After Loss
- Inherent Diminished Value: (Residual Diminished Value) After Repairs
- Repair-Related Diminished Value: Following Incomplete or poorly-done repairs.

- **Automobiles**

- Difference in market value before accident and after repairs complete.
- AZ, CO, FL, GA, IL, IN, IA, KS, LA, MD, MS, MO, NJ, NM, NY, OR, SC, VA allow.
- Many states undecided or unclear.
- The 17(c) Formula
- ClaimCoach.com System
- California has no authority to allow.
  - But has Jury Instruction which does.
  - CACI-3903J (2017)
- Many states have restrictions on owner's testimony alone.

Pre-Accident Value: \$23,500

After Accident Value: \$19,000



# MATCHING REGULATIONS / COSMETIC DAMAGE / UPGRADES

- **First-Party Insurance Claims**
- **Third-Party Tort/Subrogation Claims**
- **Betterment Improvements**
  - Improvement is necessary substitute for the damaged portion of the structure.
- **Code Upgrades**
  - Majority Rule: Not recoverable in tort actions.
    - *Stenger v. Hope Natural Gas Co.*, 80 S.E.2d 889 (Ga. App. 1954).
  - Minority Rule: Cost of repair can include cost to match existing building code.
    - *Peluso v. Singer General Precision, Inc.*, 365 N.E.2d 390 (Ill. App. 1977).

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