

OneBeacon's Claim to Stolen Painting Denied by Mass. Court.

In *Apthorp v. OneBeacon Ins. Group, LLC*, 78 Mass. App. Ct. 115 (October 18, 2010), the Massachusetts Court of Appeals ruled that an insurer had no subrogation-based right of ownership in a painting recovered after having been stolen.

Facts

On November 16, 1976,¹ a portrait, among other items, was stolen from the home of Helen S. Thompson. *Id.* The portrait, painted by Angelica Kauffmann,² depicted Thompson's ancestors, John Apthorp and his two daughters, and had been recently appraised at \$25,000.³ Thompson had a homeowner's insurance policy issued by Northern Assurance Company, the predecessor of OneBeacon Insurance Group, LLC.⁴ The policy covered a loss by theft of unscheduled personal property, up to a limit of \$32,500.⁵ Thompson submitted a claim to Northern in the amount of \$65,000, which included an itemization of the stolen property, along with estimated values.⁶ The portrait was the only stolen item to have an appraisal that established value.⁷

Northern tendered the policy limit of \$32,500, and had Thompson execute a document entitled "Sworn Statement in Proof of Loss and Subrogation Agreement," dated January 17, 1977.⁸ That document contained the following relevant language:

In consideration of the payment to be made hereunder, the assured does hereby subrogate to said insurer all right, title and interest in and to the property for which claim is being made hereunder, and agrees to immediately notify said insurer in case of any recovery of

the property for which claim is being made hereunder, and will render all assistance possible in any endeavor to recover said property. Assured also agrees to turn over to said insurer, any such recovery which may be made, or reimburse said insurer in full to the extent of the payment for such property which may be recovered.⁹

In March 2007, the painting was recovered when it came to the attention of an art dealer who found it listed on the Art Loss Register.^{10,11} On June 6, 2007, OneBeacon claimed ownership of the painting by salvage.¹² Since Thompson had passed away in the interim, William O. Apthorp, executor of her estate, disputed OneBeacon's claim and sought to obtain the portrait for the estate by reimbursing OneBeacon in the amount of \$25,000, the appraised value at the time of the theft and, presumably, the maximum amount Northern paid out for the artwork.¹³ However, OneBeacon determined that, as of September 2007, the painting was now worth between \$400,000 and \$800,000.¹⁴ Naturally, the insurer refused to accept \$25,000 for the artwork and claimed full ownership under the terms of the Subrogation Agreement.¹⁵

Apthorp sued OneBeacon in the Norfolk Superior Court, seeking a declaratory judgment that he, as executor, is entitled to possession and ownership of the portrait upon payment of \$25,000 to the insurer.¹⁶ OneBeacon countersued and brought a third-party action against Thompson's heirs, seeking declaratory relief that it was entitled to possession and ownership pursuant to the Subrogation Agreement.¹⁷ There, the lower court determined that Apthorp was entitled to possession and ownership upon reimbursement to OneBeacon.¹⁸

Analysis of Court of Appeals

In affirming the ruling of the Superior Court, the Court of Appeals found that the terms of the Subrogation Agreement were not ambiguous and their plain meaning would apply.^{19 20} The agreement provided that the insured “subrogate[d] to said insurer all right, title and interest in . . . the property.”²¹ In asserting ownership of the portrait on the basis of this provision, OneBeacon was hoping that the term “subrogate” would be understood to mean “assign.”²² But the court declined to effectively broaden the definition of “subrogate,” noting that the terms “are not the functional equivalent of each other.”²³

An insurer that settles a claim acquires a right of subrogation, by operation of contract or law, to the extent of its payment to its insured, and succeeds to any right of action the insured may have against a third party for the loss.²⁴ “Subrogation” means “to confer [a] substituted right[] against [a] third part[y].”²⁵ It prevents an insured from “double dipping” by receiving payment for the loss and then seeking recovery from a liable third party.²⁶ At the same time, an insurer is precluded from receiving a windfall because it can recoup only to the extent of its payment to the insured, with any extra recovery belonging to the insured.²⁷ The court observed that if Northern wanted ownership of the recovered painting as a condition of indemnification, an assignment of title provision could have been included in the agreement. But, here, only a right of subrogation was conferred on the insurer.²⁸

Incredibly, and presumably as a last resort, OneBeacon asserted that it was entitled to recover an amount greater than \$25,000 as a matter of “‘fairness,’” notwithstanding the Subrogation Agreement that Northern itself drafted and required Thompson to sign.²⁹ In the interests of fairness, OneBeacon suggested

that the parties be deemed equal owners of the painting, and that it be allowed to seek "partition."³⁰ In rejecting the insurer's argument, the court stated that there was nothing unfair about enforcing the agreement.³¹ The court remarked that

Northern was in the business of assuming the risk of its insureds' losses; Northern had established and accepted what it considered to be an appropriate premium to assume the risk of loss of Thompson's personal property up to a limit of \$32,500; and Northern (and later OneBeacon) had the use of Thompson's premium dollars since 1975, when Thompson acquired the policy.³²

Thus, the court concluded that title to the heirloom portrait of John Apthorp and his daughters would go the subjects' descendant, William Apthorp, as executor, upon payment of \$25,000 to OneBeacon.

Some Commentary

"We are all born brave, trusting and greedy, and most of us remain greedy."

- Mignon McLaughlin

Even if you worship insurance companies and long for the day when they replace governments and rule the world, your judgment could still not be so clouded as to not see that OneBeacon's position was hopelessly untenable, and this litigation frivolous. This one was not even close. There are two possible reasons why the insurer pursued this: (1) the painting was a match for the décor in CEO Mike Miller's office or (2) it was just being greedy.

Subrogation is a well-founded, even ancient, principle, which, astoundingly, dates back to Roman law.³³ It is defined today as "the substitution of one person in the place of another with reference to a lawful claim or right."³⁴ Subrogation's primary purpose is to place the burden of loss on the responsible party.³⁵

OneBeacon knew or should have known that its only recourse was an action against the thief, which, obviously, is impossible if his or her identity is unknown, and, even with identification, probably impractical due to the difficulty of collecting on any judgment. Its actions are especially egregious given that it collected, and had use of, Thompson's premiums before the theft, and – "but wait, that's not all!" – would receive \$25,000 from her estate for the return of the painting.

Thus, OneBeacon acted greedily here.

¹ This was the date of theft stated in the Norfolk Superior Court's decision of January 12, 2009 (citation unknown). However, the Court of Appeals stated that the theft occurred in 1975. *Apthorp*, 78 Mass. App. Ct. 115. This appears to be a mistake, since the decision of the Court of Appeals also indicates that stolen artwork was appraised in 1976. *Id.* at 117.

² Born in Switzerland but reared in Voralberg/Austria, where her family originated, Angelica Kauffmann (b. Oct. 30, 1741; d. Nov. 5, 1807) was a child prodigy who became known for her history paintings. A founding member of the British Royal Academy in 1768, she received commissions from royal courts in Naples, Russia, and Austria. Wikipedia, *Angelica Kauffmann*, http://en.wikipedia.org/wiki/Angelica_Kauffmann (Dec. 5, 2010); MyStudios, *Angelica Kauffmann*, <http://mystudios.com/women/klmno/kauffmann.html> (Dec. 5, 2010).

³ *Apthorp* at 116.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 116-117 (emphasis added).

¹⁰ [The Art Loss Register](#) is a global database of missing artwork, where one may also register artwork in her collection to maximize the chances of recovery if lost or stolen.

¹¹ *Apthorp* at 117.

¹² *Id.*

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 118.

²⁰ In a footnote, the court pointed out that even if the agreement were ambiguous it would be construed against the insurer as the drafter of the boilerplate language, producing the same outcome. *Id.* n.4.

²¹ *Id.* at 118.

²² *Id.*

²³ *Id.* at 118-119.

²⁴ *Id.* at 119.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 120.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Gary L. Wickert, *The Societal Benefits of Subrogation* (2008), [http://www.mwl-law.com/CM/Resources/THE%20SOCIAL%20BENEFITS%20OF%20SUBROGATION%20\(00037583\).PDF](http://www.mwl-law.com/CM/Resources/THE%20SOCIAL%20BENEFITS%20OF%20SUBROGATION%20(00037583).PDF) (last visited Nov. 21, 2010).

³⁴ *Id.*

³⁵ *Id.*

Authored by:

Paul J. Mantell

(585) 472-9508

paulm2917@gmail.com