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The Stealth Claim

Written by John Draneas

Legal Files" has written many times about the concept of diminished value — where even a perfectly repaired car is still worth less than it was before the damage occurred.

This month, I'm enlisting the help of Mike Shoemaker, a Houston-based attorney who conducts a national practice representing car and aircraft owners when their vehicles have been damaged in crashes and casualties. Shoemaker will give us a new spin on this subject.

But first, a little refresher on diminished value.

What is diminished value?

Let's say you are looking at two identical Porsche 911 GT3 RS cars (same year, model, color and options), both offered for sale at $250,000. They both look and drive great, but you discover that one of them had been moderately damaged — but perfectly repaired so that it was just as good a vehicle as the other Porsche that had never been damaged.

Which one would you buy?

Almost everyone would buy the undamaged Porsche, for various reasons:

How do we know that the damaged Porsche was perfectly repaired and will stand the test of time? Will the buyer care when you decide to sell it?

Ten times out of 10, the buyer will choose the undamaged car — it's the same money, so why take any chances? Buy the one that has never been damaged for $250,000.

Or you can offer less for the one that was damaged. Pay $200,000 and take your chances. After all, it was repaired so well that you can't tell. It drives the same, and five or 10 years from now, no one may care very much.

The $50,000 differential illustrates the diminished value of the moderately damaged and perfectly repaired Porsche.

Although the two cars are essentially the same to the casual observer, and they both drive the same, one is worth $50,000 less than the other. This is the economic theory and reality of diminished value.

Is this logical?

From a practical perspective, one of these vehicles is just as good as the other. So why won't people buy the damaged and repaired car for the same price as the undamaged one?

The reason must not reside in the vehicles themselves, because equally pristine cars would not result in favoritism. The answer must, and indeed does, lie apart from the physical vehicles themselves.

The value of any object rests not in the object itself, but in the minds of the sellers and buyers. Remember when '57 Chevy Bel Airs were worth $100,000? It was only a few years back. Today, good luck getting anywhere near that amount for the same car.

Cars do go in and out of fashion, and their values change because the market is willing to pay more or less for the same car. You could make the argument that changing demographics and such trigger the change, but that's really a stretch.

The truth is that the market simply reflects people's preferences at any point in time. Is that logical? The answer is it doesn't have to be.

To establish market value for anything, all that has to happen is for a willing buyer and seller to arrive at a sales price. The motivations may be — and often are — entirely illogical. But because logic or the lack thereof doesn't affect the validity of the sales price, it doesn't affect the market value of the vehicle.

The market perceives the damaged-and-repaired car as being worth less. That perception makes it worth less. That perception may be illogical, but it doesn't matter. All that matters is that the marketperceives that the 911 is worth $50,000 less after its damage and repair. The $50,000 loss is real, and it is recoverable as part of your damage claim.

A new twist

So let's say you're out on a dark and stormy night, driving your Ferrari 458 Speciale back from the Keels & Wheels Concours d'Elegance at the Lakewood Yacht Club in Seabrook, TX.

Suddenly, from out of nowhere, a pickup sideswipes you. You're not hurt, but there's more than a little damage to your car. You exchange information including insurance. You expect the other driver's insurance to pay for the damages.

You're going to find out that it's not that simple.

After your vehicle is towed to an authorized Ferrari repair facility, the repair manager tells you that repairs will cost $60,000. The repair manager is a pretty savvy guy, and he tells you that isn't the whole story — you have two other losses. He refers you to an attorney who handles motor vehicle property-damage issues.

The attorney explains that you have three claims as a result of the accident:

- The cost of the repair of your Ferrari.
- The diminished value of your Ferrari after the repair.
- Compensation for the loss of use of your vehicle.

Loss of use

The attorney asks you whether you will need to rent another car while your Ferrari is repaired. You respond, "Don't worry about that. I only drive the Ferrari once in a while, and I have other cars available for daily use. I don't need a rental car."

The attorney says, "Good. That means you will have a clean claim for loss of use."

You ask, "What's loss of use?"

The attorney explains that loss of use claims are "stealth claims" because most car owners and attorneys don't know they exist.

The law compensates an owner for the loss of use of a vehicle, even if the owner doesn't rent another car. The amount of the claim is determined by multiplying the number of days that an owner loses use of a vehicle by the rental value of the vehicle.

Best of all, insurance policies routinely cover loss of use as part of the coverage for property damage.

Think about it. Ferraris often take 150 to 180 days to repair, mostly due to how long it takes to get parts from Italy.

In your case, a car in the same class as your Ferrari rents for about $1,000 per day. If your Ferrari is out of commission for 150 days, that's a $150,000 loss-of-use claim. That dwarfs the repair and diminished-value claims.

Too good to be true?

This sure sounds like a "too good to be true" situation. If your Ferrari had not been damaged, you would have driven it, what, maybe 10 days out of those 150 days? To a reasonable person, that would make it no more than a $10,000 loss.

Oddly enough, the Supreme Court of Texas, for example, has not seen it that way. The Texas Court has held that loss-of-use damages are recoverable for the full time you are unable to use your car — even if you would not have actually driven it during that time.

So with a straight face, you can make a $150,000 loss-of-use claim in this example. That's a far larger claim than the $60,000 repair claim — as well as the diminished-value claim of a similar amount.

Wait, it goes further

Let's go another step. Say that your Ferrari was totally destroyed and the insurance company just writes you a check for the full value of the Ferrari. Do you still have a loss-of-use claim?

Traditionally, no.

But that all changed in 2016, when the Texas Supreme Court held that an owner could be compensated for the loss of use of personal property that had been totally destroyed. The court held that loss-of-use damages could be recovered for the time reasonably needed to replace the property.

The stealth claim for loss of use just got stealthier.

We all know that you can't just walk into the nearest dealer and buy another vehicle just like your totaled Ferrari. It takes time to search the market to find one that looks good, have it inspected, transported to you, etc.

Say that all of that, quite reasonably, takes 90 days. That leaves you with a $90,000 loss-of-use claim (90 days x $1,000/day rental value).

A useful twist

Loss of use can be a powerful claim when your collector car is damaged and needs significant repairs.

Given the high rental value of our cars, loss of use may be the largest claim we have. Granted, it may be difficult to stand firm and demand the value of every single day that you can't drive a car you wouldn't have driven very much anyway.

However, the presence of the loss-of-use claim will certainly give you negotiation leverage on the damage and diminished-value claims, leading to an overall fair result. ♦

JOHN DRANEAS is an attorney in Oregon. He can be reached through www.draneaslaw.com. MICHAEL "MIKE" N. SHOEMAKER is an attorney in Houston, TX. He can be reached throughwww.MikesLawPractice.com. Their comments are general in nature and are not intended to substitute for consultation with an attorney.