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Afekciona vrednost stvari i osiguranje imovine

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Apstrakt

Određivanje visine naknade štete prema vrednosti koju je stvar imala za oštećenog, ukoliko je oštećena ili uništena umišljajnim krivičnim delom, predstavlja jedno od ključnih odstupanja od opšteg pravila o objektivnom shvatanju građansko-pravne krivice u našem deliktnom pravu. Iako uživa dugu tradiciju, njegovo tumačenje i primena stvara niz dilema u pravnoj teoriji i praksi domaćih sudova. Među njima, ključno je pitanje da li je reč o specifičnom osnovu za naknadu nematerijalne štete ili o afekcionoj vrednosti oštećene ili uništene stvari, kao načinu odmeravanja visine materijalne štete koji u sebi nosi subjektivnu konotaciju. Ovom problemu je u fragmentima posvećeno samo nekoliko radova u našoj teoriji odštetnog prava, dok do sada ovo pitanje nije posmatrano u kontekstu osiguranja imovine, odnosno potrebe da se stvari naročitog značaja za oštećenog, koje mogu, ali i ne moraju imati veliku tržišnu vrednost, i dodatno osiguraju. Upravo su to razlozi zbog kojih se u ovom radu ispituje spremnost tržišta osiguranja da odgovori potrebama specifičnih zahteva korisnika, kada je u pitanju osiguranje od krađe i razbojništva vrednih i retkih stvari kulturno-istorijskog značaja, kolekcionarskih primeraka, nakita i dragocenosti, ali i stvari za koje su vlasnici posebno emotivno vezani, kao kućni ljubimac, lična prepiska, pisma, priznanja za različita postignuća ili porodične fotografije.

Ključne reči: afekciona vrednost, naknada štete, sticanje od nevlasnika, osiguranje imovine

1. UVOD

Jedno od osnovnih načela savremenog srpskog odštetnog prava jeste princip integralne ili potpune naknade pretrpljene štete. Prema njemu oštećeni ima pravo na naknadu imovinske štete u iznosu potrebnom da se njegova materijalna situacija dovede u ono stanje u kojem bi inače bila da nije došlo do štetne radnje ili propuštanja (Zakon o obligacionim odnosima, u daljem tekstu: ZOO, 1978, čl. 190). Samim tim, oštećenom pripada pravo, kako na naknadu stvarne štete, tako i pravo na izmaklu dobit, bez obzira na stepen štetnikove krivice[1], kada se radi o subjektivnoj odgovornosti, dok isto važi i kada se odgovornost zasniva na stvorenom, odnosno održavanom riziku (Antić, 2011, 469–470). Ipak, od ovog opšteg pravila se u određenim situacijama može odstupiti, pa sud može dosuditi sniženu naknadu zbog slabijeg materijalnog stanja odgovornog lica, ako šteta nije prouzrokovana ni namerno, ni krajnjom nepažnjom (ZOO, 1978, čl. 191, st. 1), u slučaju kada je štetnik radio nešto korisno za oštećenog, vodeći računa brižljivosti koju pokazuje u sopstvenim poslovima (ZOO, 1978, čl. 191, st. 2), kao i slučaju podeljene odgovornosti (ZOO, 1978, čl. 192, st. 1).

S druge strane, postoji i situacija u kojoj je moguće da sud dosudi naknadu većeg obima od one koja oštećeniku pripada, prema pravilima o integralnoj naknadi štete, u slučaju kada je stvar uništena ili oštećena umišljajnim krivičnim delom, o kojem se rešava u krivičnom postupku, što ujedno predstavlja i prejudicijalno pitanje u parnici. U tom slučaju se odmeravanje naknada štete vrši prema vrednosti koju je uništena ili oštećena stvar imala za oštećenika, što je inače princip koji uživa dugu istoriju u domaćem pravu (ZOO, 1978, čl. 189, st. 4; Karanikić Mirić, 2011, 68). Ujedno se radi i o jednom od ključnih odstupanja[2] od opšteg pravila

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[1] Šteta može biti prouzrokovana umišljano, odnosno dolozno (*dolus*), potom kao posledica nepažnje (culpa) koja može biti gruba ili krajnja (*culpa lata*), odnosno obična nepažnja (culpa levis). U skladu sa tradicijom rimskog prava, ponekad se pri gradaciji nepažnje navodi i najlakša – (*culpa levissima*) koja u ugovornom pravu ima značaj kada se radi o besteretnim ugovorima ili pri utvrđivanju visine naknade štete ukoliko ju je štetnik prouzrokovao radeći nešto korisno za oštećenog, vodeći računa brižljivosti koju pokazuje u sopstvenim poslovima. Tada sud može dosuditi manji iznos naknade, u odnosu na pretrpljenu štetu.

[2] Ostali slučajevi odstupanja predstavljaju: učešće krivice trećeg lica i samog oštećenog, te se odgovornost deli između

o objektivnom shvatanju građansko-pravne krivice u našem deliktnom pravu (Salma, 2008, 93). Ovo je i jedina odredba ZOO u kojoj se pominje termin umišljaj. Pravilo čl. 189, st. 4 ZOO tiče se odmeravanja naknade štete, a ne uslova za zasnivanje građansko-pravne odgovornosti (Karanikić Mirić, 2011, 68). Neka pitanja vezana za primenu ovog pravila i dalje su sporna u pravnoj teoriji, kao i praksi domaćih sudova, među kojima i da li je reč o posebnom osnovu za naknadu nematerijalne štete ili o afekcionoj vrednosti oštećene, odnosno uništene stvari (*pretium affectionis*), kao vidu odmeravanja visine naknade materijalne štete koji u sebi nosi subjektivnu konotaciju.

Ovom problemu je u fragmentima posvećeno samo nekoliko radova u našoj teoriji odštetnog prava, dok u kontekstu osiguranja imovine on do sada nije posmatran, odnosno potrebe da se stvari naročitog značaja za oštećenog i dodatno osiguraju. Upravo su to razlozi zbog kojih se u radu ispituje spremnost tržišta osiguranja da odgovori potrebama specifičnih zahteva korisnika, kada je u pitanju osiguranje od krađe i razbojništva vrednih i retkih stvari kulturno istorijskog značaja, kolekcionarskih primeraka, ali i stvari koje ne moraju imati značajnu tržišnu vrednosti no za koje su vlasnici posebno emotivno vezani kućni ljubimci, lična prepiska, pisma, priznanja za različita postignuća ili porodične fotografije.

2. PRAVNA UPORIŠTA I RAZLOZI ZA ODMERAVANJE NAKANADE ŠTETE PREMA VREDNOSTI KOJU JE STVAR IMALA ZA OŠTEĆENOG

Odmeravanje naknada štete prema vrednosti koju je uništena ili oštećena stvar imala za oštećenog znači neku vrstu (re)definisanja uslova odgovornosti za štetu (Radulović, 2020, 340). Odredba člana 189, stav 4 ZOO ređe se tumači kao osnov za naknadu nematerijalne štete[3], dok se mnogo češće uzima kao uporište za odmeravanje materijalne štete prema vrednosti koju je stvar imala za samog štetnika, odnosno njenu afekcionu vrednost. Naša teorija prava uglavnom prihvata drugo shvatanje, čemu se priklonila i sudska praksa (Radulović, 2020, 340). Pravilom iz čl. 189, st. 4 regulisana je naknada materijalne štete koja podrazumeva običnu štetu i izmaklu korist, što afekciona vrednost po svojoj prirodi svakako nije, te se često kritikuje i sama pozicija ove odredbe. Isto pravilo postoji i u hrvatskom (Zakon o obveznim odnosima Hrvatske, čl. 1089, st. 4), crnogorskom i Zakonu u obligacionim odnosima Federacije BIH i Republike Srpske (u sva tri zakona: čl. 196, st. 4).

Prema nekim autorima, procena subjektivne vrednosti uništene ili oštećene stvari podrazumeva da ona, ili čini ekonomsku celinu sa drugim stvarima koje pripadaju oštećenom, ili činjenicu da je oštećeni emotivno vezan za nju. Kada je reč o naknadi materijalne štete, primena subjektivnog merila bi bila opravdana samo kada je uništenjem ili oštećenjem jedne stvari poremećena ekonomska celina stvari čiji je ona sastavni deo, pa je time naneta šteta celokupnoj imovini oštećenog (Blagojević, Krulj, 1983, 706). Budući da stvari od posebne važnosti za oštećenog vrlo često nisu deo nikakve posebne uže ekonomske celine, osim deo same njegove imovine, po nama je ovo stanovište većim delom neprihvatljivo. Prema istim autorima, u ostalim slučajevima subjektivna procena vrednosti materijalne stvari uzima se kao poseban vid naknade nematerijalne štete, što uglavnom i teorija, a i sudska praksa odbacuju. Tako je u jednoj sudskoj odluci konstatovano da „gubitak materijalne stvari, pa i umetničkog dela ne predstavlja po ZOO priznat osnov za naknadu nematerijalne štete prouzrokovan duševnim patnjama." Ovo iz razloga što se taj vid štete može dosuditi samo u slučaju povrede života i tela, ugleda, časti, slobode ili prava ličnosti, odnosno smrti bliskog lica ili pretrpljenog straha (Rešenje Vrhovnog suda Srbije, Rev. I 2749/2004 od 25. 11. 2004. godine).[4] Slično ovome, okružni sud u Valjevu

štetnika, trećeg lica i oštećenog srazmerno udelu krivice trećeg lica odnosno, oštećenog. Potom, tu spada i slučaj obaveznog osiguranja od odgovornosti za štete nanete u saobraćaju kada regresno pravo osiguravajućeg društva prema štetniku, osiguraniku, zavisi od toga da li je saobraćajni udes prouzrokovan namernom ili nehatnom krivicom. Ukoliko je udes izazvan namerno, ili u stanju nesposobnosti za rasuđivanje, koje se pravno izjednačuje sa umišljajem nastalim pod uticajem sredstava koji smanjuju ili u potpunosti isključuje svest i pažnju (actiones liberae in causa), osiguravajuće društvo, nakon isplate sume osiguranja oštećenom, može da zahteva povraćaj isplaćene sume osiguranja od štetnika – osiguranika.

[3] U pogledu određivanja visine afekcione naknade ne postoji nikakva granica. Prema nekim autorima ona ima i izgled neimovinske štete, ograničenja u pogledu visine naknade određuju se prema opštim pravilima za određivanje visine neimovinske štete (Salma, 2004, 605). Profesor Radišić pominje ambivalentne oblike šteta koje pripadaju sivoj zoni između tipično materijalnih i nematerijalnih šteta, nazivajući ih tzv. subjektivnim-ekonomskim štetama u koje, između ostalih, ubraja i oštećenje ili uništenje porodične slike ili rukopisa naučnog dela (Radišić, 13, 1998).

[4] U konkretnom slučaju, primenom odredbe člana 200 ZOO tužilji je dosuđena i nematerijalna šteta prouzrokovana njenim duševnim patnjama zbog gubitka – krađe vredne skulpture „P." ZOO je izuzetno predviđena mogućnost i većeg dosuđenja materijalne štete od stvarne vrednosti uništene stvari. To je izričito propisano odredbom čl. 189, st. 4 ZOO, ali samo u slučaju kada je stvar uništena ili oštećena umišljajnim krivičnim delom štetnika. U konkretnom slučaju taj uslov nije ispunjen, jer gubitak skulpture „P" nije nastao krivičnim delom tužene, već

je jednom prilikom potvrdio prvostepenu odluku u kojoj je pravilno primenjeno materijalno pravo i odbijen tužbeni zahtev za naknadu nematerijalne štete zbog povrede prava ličnosti, odnosno pretrpljenih duševnih bolova zbog požarom uništenih umetničkih slika, knjiga i skulptura (Presuda Okružnog suda u Valjevu, Gž. 1119/2005 od 21. 7. 2005. godine).[5] Zbog svega navedenog, konstatovali bismo da odredbe ZOO ovde pružaju materijalno-pravni osnov za odmeravanje visine materijalne štete, prema vrednosti koju je stvar imala za samog oštećenog, što svakako predstavlja vrstu subjektivnog odnosa koji bismo tumačili na drugačiji način od gore pomenutih.

Generalno, određivanje visine naknade štete prema vrednosti koju je ona imala za oštećenog, polazeći od toga da je stvar oštećena ili uništena krivičnim delom izvršenim sa umišljajem, kao najtežim stepenom krivice, predstavlja slučaj u kojem do izražaja dolazi distributivna pravda (Perović, Stojanović, 1980, 564). Ona podrazumeva drugačiji izraz univerzalnog načela obligacionog prava, kakva je jednaka vrednosti uzajamnih davanja, kojim se u ovom slučaju ne uspostavlja odnos u robnoj razmeni, odnosno davanju stvari iste vrste, količine i kvaliteta, sa u svemu istim takvim stvarima, nego isključivo određuje položaj ljudi i regulisanje društvenih odnosa prema svojstvima koji oni poseduju (Perović, Stojanović, 1980, 158). Tu se misli na socijalno poreklo, imovinsko stanje, stepen obrazovanja. Konkretno, u slučaju prouzrokovanja štete umišljajnim krivičnim delom za uspostavljanje ravnoteže ključne su zasluge odgovornog lica. Ovde zapravo leži potreba za prevazilaženjem koncepcije koja počiva na potpunom razdvajanju represivne sfere krivično-pravne i reparacione sfere građansko-pravne zaštite, koja je danas posebno izražena (Nikolić, 1994, 159-160). Time dolazi do približavanja kaznenih i građansko-pravnih sankcija. (Nikolić, 1994, 159-160). Pitanje vezanosti suda pravnosnažnom krivičnom presudom nije sporno, dok svaka rasprava o ovlašćenju parničnog suda da odlučuje o postojanju krivičnog dela, kao prethodnom pitanju, neće biti predmet dubljih analiza jer prevazilazi potrebe i okvire ovog rada.

U teoriji se uslov u vidu postojanja umišljajnog krivičnog dela obično pravda dvostrukim potrebama: kažnjavanje počinioca i od strane društva i od strane žrtve. Kako se generalno smatra, bilo kakav gubitak lakše bi se podneo ukoliko oštećeni zna da je do njega došlo samo na osnovu „čistog delikta", a ne umišljajnog krivičnog dela, što je sa našeg stanovišta neprihvatljivo. Ovo potvrđuju i pojedine sudske odluke donete pre stupanja na snagu ZOO.[6] Uslov za odmeravanje štete prema vrednosti koju je stvar imala za oštećenog nije nužno podrazumevao postojanje umišljajnog krivičnog dela, već je bila dovoljna namera, pa čak i krajnja nepažnja, što se čini kao daleko prihvatljivije rešenje. Time se afirmišu prava i interesi oštećenog, kada je u pitanju posebna emotivna veza prema pojedinim stvarima, naročito kada se radi o kućnim ljubimcima, i drugim predmetima često šireg umetničkog i kulturno-istorijskog značaja, koji su vlasnicima posebno važni. Ovakve potrebe potvrđuje i rešenje Švajcarskog zakona o obligacionim odnosima, prema kojem pravo na naknadu afekcione vrednosti nije uslovljeno postojanjem umišljajnog krivičnog dela[7], pa ga je tako moguće ostvariti kada na primer, životinju pregazi auto, dok visina naknade zavisi od slobodne ocene suda i okolnosti konkretnog slučaja. Pri tome, sudovi ovakav slučaj nisu tretirali kao osnov za naknadu nematerijalne štete, dok za naknadu materijalne štete prema afekcionoj vrednosti nisu zahtevali dokazivanje teške povrede ličnih prava, nego je ovaj slučaj bio osnov za uvođenje novog *sui generis* instituta (Milenković, 2015, 539).

Shvatanje o afekcionoj vrednosti stvari kao osnovu za naknadu materijalne štete u našem pravu podržavaju i odredbe kojom se reguliše stvarno-pravna materija, odnosno sticanje svojine od nevlasnika (Zakon o osnovama svojinsko-pravnih odnosa, u daljem tekstu:

trećeg lica. Stoga se uvećana naknada adekvatna vrednosti koju je ta skulptura imala za tužilju može dosuditi samo na teret lica koje je skulpturu ukralo, ali ne i na teret tužene.

[5] U ovoj presudi se, između ostalog, konstatuje da ZOO u odredbi čl. 200, st. 1 govori o pravu na naknadu štete za pretrpljene duševne bolove zbog umanjenja životne aktivnosti, naruženosti, povrede ugleda, časti, slobode i prava ličnosti i smrti bliskog lica, tako da naknada štete za duševne bolove zbog uništenih ili oštećenih određenih predmeta koje imaju posebnu vrednost za oštećenog, kao što su umetničke slike, privatne fotografije i drugi predmeti nije predviđena kao poseban vid nematerijalne štete. Pri tome je nesumnjivo da se u konkretnom slučaju ne radi ni o kakvoj povredi prava ličnosti, kako to pravilno nalazi i prvostepeni sud. Neosnovano je insistiranje u žalbi tužilaca na široj primeni odredbe čl. 189, st. 4 ZOO, u konkretnom slučaju, odnosno da se tužiocima može dosuditi predmetna šteta i ako do štete nije došlo izvršenjem krivičnog dela, obzirom da su uništene odnosno oštećene stvari imale posebnu vrednost za tužioca, jer žalba nema u vidu da odredba čl. 189 ZOO, govori o naknadi materijalne štete, tako da su tužioci mogli da ističu činjenicu da su za njih od posebnog značaja oštećene umetničke slike i skulpture samo u postupku za naknadu materijalne štete, pri čemu se iz spisa vidi da su u ovom delu tužioci tužbu povukli.

[6] „Naknada štete u visini vanredne vrednosti (afekcione vrednosti) koju je stvar imala za oštećenog može se dosuditi samo ako je šteta učinjena namerno ili krajnjom nepažnjom. Ova krivica se ne pretpostavlja, nego se mora dokazati" – Rešenje Vrhovnog suda Vojvodine, Rev. 456/63 od 20. 9. 1963. godine, Zbirka sudskih odluka /1963/: knjiga VIII, sveska 3, odluka br. 333, navedeno prema: Karanikić Mirić, 2011, 68.

[7] Švajcarski Zakon o obligacijama, čl. 43, st. 1 bis.

ZOSPO, čl. 31, st. 2). Savesno lice može postati vlasnik stvari iako istu nije pribavilo od lica koje je imalo pravo svojine na toj stvari, čime se odstupa od ključnog načela rimskog prava koje isključuje sticanje prava svojine od nevlasnika.[8] Samim tim apsolutno pravo sticaoca je relativizirano pravom ranijeg vlasnika da traži povraćaj pokretne stvari po prometnoj vrednosti.[9] Time se ne dira u pravo sticaoca da zahteva naknadu štete od prenosioca, onda kada se utvrdi da stvar ima poseban značaj za ranijeg vlasnika, što predstavlja sinonim za njenu afekcionu vrednost. Ovakvo rešenje pomaže ranijem vlasniku da povrati stvar koja mu je vrednija od novca, pa makar se ona otkupila i po znatno višoj ceni od prvobitne (Stojanović, Petrović, 1991, 158). U zemljama u našem okruženju isto rešenje sadrži Zakon o svojinsko-pravnim odnosima Crne Gore (čl. 61, stav 1).

Sticanje prava svojine od nevlasnika različito je regulisano u uporednom pravu, te ga recimo ne poznaju pravni sistemi Danske, Norveške, Portugalije, Južne Amerike, izuzev Argentine u kojoj je savesno sticanje dopušteno za kupoprodaje na sajmovima i pijacama, kao i za kupovinu od trgovaca koji takvim stvarima profesionalno trguju (Stojanović, Petrović, 1991, 152). Danas, najveći broj zemalja prihvata srednje rešenje između neograničene vindikacije i neograničenog priznanja mogućnosti savesnog sticanja. U nemačkom pravu štiti se savesno sticanje na pokretnim stvarima koje nisu izašle iz državine vlasnika protivno njegovoj volji (nemački Građanski zakonik, čl. 932–935),[10] što je kao rešenje prihvaćeno i austrijskom (čl. 367), a u skladu sa njim i našim srpskim Građanskim zakonikom iz 1844. godine (čl. 221), kao i grčkom (čl. 1036 i 1038). Sličan pristup postoji i u zemljama romanskog pravnog kruga u kojima je ukinuta derivacija za pokretne stvari, izuzev ako je stvar izašla iz vlasnikove državine bez njegove volje, dakle ako je ukradena, ako ju je izgubio, te kasniji držalac ne stiče svojinu i vlasnik je može reivindicirati u roku od tri godine (Code civil, čl. 2279) (Stojanović, Petrović, 1991, 152). U *commom law* sistemu polazi se od maksime *nemo dat quod non habet* (ne možeš dati ono što nemaš), pa se dopuštaju samo određeni slučajevi savesnog siticanja (Stojanović, Petrović, 1991, 154). Za razliku od kontinentalnog prava, u engleskom i američkom pravu napravljena je funkcionalno razlikovanje između uslova za savesno sticanje u građanskom, odnosno trgovačkom prometu (Stojanović, Petrović, 1991, 154).

Uslov sadržan u ZOSPO, koji podrazumeva da raniji vlasnik može da traži povraćaj pokretne stvari po prometnoj vrednosti samo ukoliko se utvrdi da ona za njega ima poseban značaj, kritikuje se zbog činjenice da ovo lice savesnom sticaocu ima obavezu da nakadi stvar po tržišnoj vrednosti, koja je uvek manja ili veća od one koju je nevlasniku dao sticalac (Volar, 2015, 45). U slučaju da je prometna vrednost manja, savesnom sticaocu je prouzrokovana šteta, dok bi u suprotnom slučaju došlo do neosnovanog bogaćenja (Volar, 2015, 45). Sam pravni standard „posebni značaj" ostaje predmet tumačenja i prema većini autora pod njim se smatraju kućni ljubimci, kao i porodični nakit, slike i druga umetnička dela, nagrade, priznanja, porodične fotografije, lična prepiska, pisma i slično. Sudu ostaje da u konkretnom slučaju utvrdi da li poseban značaj i postoji. Ovde se nesumnjivo radi o specifičnom individualnom odnosu ranijeg vlasnika prema stvari koja mora biti individualno određena. U praksi se može javiti i situacija kada sa obe strane, dakle i za savesnog sticaoca i ranijeg vlasnika, stvar ima poseban značaj (Volar, 2015, 45). Postavlja se pitanje da li će sud tada i to morati da uzme u obzir. Ipak, ovakve situacije bi podrazumevale ličnopravni odnos prema istoj individualno određenoj pokretnoj stvari, što je teže zamislivo, naročito ukoliko se uzmu u obzir ordenje, priznanja, lična pisma ili slike. U Prednacrtu građanskog zakonika uslovi za sticanje stvari od nevlasnika regulisani su članom 1628 i poklapaju se sa onima iz ZOSPO, s tim da je posebnim članom[11] regulisano pravo otkupa stvari koja ima poseban značaj za ranijeg sopstvenika od savesnog pribavioca, takođe u roku od godinu dana.

Svakako, činjenica je da afekciona vrednost stvari prevazilazi njenu *prometnu, redovnu ili običnu vrednost* (*pretium comune*). Ipak, treba je istovremeno jasno razlikovati od *cene zbog posebnih okolnosti*, usled kojih stvar ima veću vrednost od prometne, kao određen lek potreban teškom bolesniku ili životinja izdresirana za posebne radnje, odnosno od *neprocenjive vrednosti stvari* (*res inaestimabiles*) koja se ne može odrediti nikakvim upoređivanjem sa drugim stvarima u prometu, jer je izgubila i svoju upotrebnu, ali i prometnu vrednost.

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[8] Prema čl. 31 ZOSPO savesno lice stiče pravo svojine na pokretnu stvar koju je pribavilo uz naknadu od nevlasnika koji u okviru svoje delatnosti stavlja u promet takve stvari, od nevlasnika kome je vlasnik predao stvar u državinu na osnovu pravnog posla koji nije osnov za pribavljanje prava svojine, kao i na javnoj prodaji.

Raniji vlasnik može od savesnog sticaoca zahtevati da mu stvar vrati uz naknadu po prometnoj ceni, ukoliko ta stvar ima za njega poseban značaj.

[9] Ovaj zahtev se ne može istaći nakon proteka godinu dana od sticanja prava svojine na tu stvar.

[10] Posebna pravila važe za novac ili hartije od vrednosti na donosioca, ili stvari stečene na javnoj prodaji.

[11] Prednacrt Građanskog Zakonika Republike Srbije, verzija od 28. 5. 2019. godine, čl. 1632, https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html posećeno 24. 1.2024.

3. ZA KOJE STVARI SE NAJČEŠĆE UTVRĐUJE AFEKCIONA VREDNOST I KOLIKO JE UOBIČAJENO NJIHOVO POSEBNO OSIGURANJE?

Kada je u pitanju odnos između tržišne i afekcione vrednosti stvari dešava se da je stvar cenovno potpuno beznačajna, ali sa subjektivnog stanovišta imaoca ima ogromnu važnost, kao lične fotografije, prepiska ili priznanja za različita postignuća. Takođe, moguće je i da stvar istovremeno ima i veliku prometnu vrednost, ali i veliki značaj za vlasnika, kada su u pitanju vredan porodičan nakit, umetnička dela ili druge dragocenosti, posebno ukoliko su u pitanju kolekcionarski primerci.

Krađe umetničkih dela iz privatnih kolekcija predstavljaju unosan posao organizovanih kriminalnih bandi, posebno u Francuskoj, Nemačkoj, Poljskoj i Rusiji. Prema nekim istraživanjima, oko 43 posto umetničkih dela nestane upravo iz privatnih kolekcija, oko 14 iz galerija, a ostatak iz crkava i muzeja.[12] Bez obzira na ove podatke, u jednoj analizi koju je objavila međunarodna grupa za osiguranje „Hiskoks" (*Hiscox*),[13] sa sedištem na Bermudama, specijalizovana upravo za osiguranje umetničkih dela, nakita i satova, svaki drugi kolekcionar umetničkih dela nema nikakav ili ima paket osiguranja nedovoljan da pokriće krađe ovih predmeta. Prema procenama američkog FBI od krađe umetničkih dela prouzrokuje se godišnja šteta od osam milijardi dolara, dok je ona prema istoričarima umetnosti manja, i iznosi oko šest milijardi. Ipak, to znači da se u svetu svakog dana ukradu umetnička dela u vrednosti od oko 16,4 miliona dolara.[14]

Priznanja, medalje i pehari za sportiste imaju izuzetno posebnu vrednost i značaj. Bez obzira na to, često su i predmet pljački. Tako je recimo, Amerikanki Tristan Gal ukradena zlatna medalja osvojena na zimskim olimpijskim igrama 2002. godine u skeletonu,[15] zajedno sa burmom i drugim vrednim stvarima prilikom provale u njen stan 2011. godine, a plivaču Džošu Devisu čak četiri medalje iz automobila 2009. godine. Slično, Rastiju Smitu, brzom klizaču, je prilikom pljačke stana njegove majke ukraden čitav sef u kojem su se nalazile dve bronzane medalje osvojene na Olimpijskim igrama 2002. i 2006. godine (Rao, 2014). I kod nas su poznati slični slučajevi, pa su tako Živoradu Miciću, čuvenom srpskom biciklisti i nekadašnjem olimpijcu Kraljevine Jugoslavije, prilikom pljačke imovine lopovi ukrali čak 1000 medalja, pehara i plaketa, kao i majice koje je nosio tokom sportske karijere. Kako je naš sportista jednom prilikom istakao, same medalje nemaju gotovo nikakvu nominalnu vrednost i za njihovo osvajanje je dobio mnogo više novca. Onome ko ih je ukrao pretapanjem neće doneti ništa, a našem sportisti, kako je istakao, vrede „kao ceo život" (Živanović, 2015).

Društvo za osiguranje „Liberti Mutal" je u saradnji sa Američkim olimpijskim komitetom osiguralo sve medalje olimpijaca SAD osvojene na zimskim olimpijskim i paraolimpijskim igrama u Sočiju 2014. i Rio De Žaneiru 2016. godine od gubitka u iznosu od 5000 dolara. Time su pokriveni svi eventualni troškovi izrade replike i same isporuke. Osiguranje pokriva i pomoć sportistima u složenom postupku naručivanja i izrade zamenskih medalja. Izrada replike košta između 500 i 1200 dolara, sve u zavisnosti od količine upotrebljenih plemenitih metala i trenutnih cena zlata, srebra i bronze na tržištu. Pojedini sportisti su ipak, dodatno osigurali svoje medalje. Neki su, pak, kako bi se oslobodili svih briga, donirali svoja odličja. Medalje umetničkih klizačica Kristi Jamaguči i Tare Lipinski izložene su u Svetskom muzeju umetničkog klizanja, odnosno kući slavnih u Kolorado Springsu. Uz to je Lipinski svoju zlatnu medalju osvojenu 1998. godine na zimskim olimpijskim igrama u Naganu osigurala na milion dolara.

Na listi stvari za koje se nesumnjivo utvrđuje afekciona su kućni ljubimci – najčešće psi ili mačke, koji ukoliko se radi o mešancima, imaju malu tržišnu vrednost. Bez obzira što oni danas, kroz sve šire prihvatanje biocentrične etike, uživaju specifičan pravni subjektivitet, u slučaju povreda i smrti vlasničke životinje uzima se da one i dalje predstavljaju puki objekt prava. Oštećeni ima pravo na naknadu materijalne štete koja obuhvata prometnu vrednost, koja svakako zavisi od vrste životinje, zdravstvenog stanja, starosti, pola, dresure, a naravno i od pedigrea koji drastično povećava cenu (Milenković, 2015, 528). Pravo na naknadu štete,

[12] Iako zvuči neverovatno, avgusta meseca 1911. godine iz Luvra ukradena je, a nakon dve godine i pronađena Mona Liza, dok se na spisku najvećih pljački u istoriji pominju krađe iz muzeja Kunsthol u Roterdamu i iz muzeja Izabel Stevart Garner 1990. godine kada je ukradeno ukupno 13 dela Rembranta, Vermera, Dege i Monea. Iz jedne ciriške galerije su 2008. godine ukradena dela Pola Sezana „Dečak u crvenom prsluku", koja je 2012. godine pronađena u Beogradu, potom Vinsenta Van Goga „Grana kestena u cvatu" i Moneove „Bulke kod Veteja" pronađene nakon desetak dana u Švajcarskoj, kao kasnije i slika „Grof Lepik i njegove ćerke", Edgara Dege za koje je odgovorna kriminalna grupa „Pink Panter." Rembrantova „Oluja na Galijskom jezeru" iz 1633. godine vodi se već preko tri decenije kao nestala, kao i Vermerov „Koncert", što ujedno predstavlja najveću pljačku umetničkih dela zajedno sa još 11 drugih dela u istoriji SAD 1990. godine.

[13] Krađa umetnina je unosan posao, https://www.b92.net/kultura/vesti.php?nav_category=270&yyyy=2012&mm=04&dd=12&nav_id=599980, 20. 1. 2024.

[14] Ibid.

[15] Skeleton je zimski sport u kojem je cilj preći zaleđenu stazu na propisanim sankama u što kraćem vremenu.

obuhvata i troškove lečenja, koji često mogu da budu višestruko veći od same prometne vrednosti životinje. Noveliranjem Nemačkog građanskog zakonika 2002. godine vlasniku povređene životinje priznato je pravo na naknadu troškova i onda kada oni višestruko prevazilaze njenu tržišnu vrednost, dok su sudovi dosuđivali ovakve naknade još i pre uvođenja novina (Milenković, 2015, 529). Slična situacija je i u Austriji, SAD, a u Švajcarskoj se ova praksa odnosi isključivo na kućne ljubimce (Milenković, 2015, 528). U našem pravu, osnov za naknadu štete na ime troškova lečenja, čak i onda kada oni prevazilaze tržišnu vrednost životinje, nalazimo u članu 190 ZOO koji predviđa pravo na naknadu imovinske štete u iznosu koji je potreban da se oštećenikova materijalna situacija dovede u ono stanje u kojem bi inače bila da nije bilo štetne radnje, odnosno propuštanja. Naknada izgubljene zarade ima smisla kada se radi o stoci, živini ili profesionalnom odgoju životinja, ili recimo kod terapeutskih pasa ili životinja koji su bili akteri u filmovima, serijama ili reklamnim kampanjama.

Kada se uzme u obzir poseban odnos ljubavi i pažnje između vlasnika i životinje, integralna naknada štete, svakako je nedovoljna da kompenzuje svu bol i patnju u slučaju njene povrede ili gubitka. Ipak, za naknadu afekcione vrednosti, kućni ljubimac bi, prema našem ZOO, morao biti povređen ili usmrćen umišljajnim krivičnim delom. Pod pretpostavkom da je utvrđena ova okolnost, u narednom koraku je potrebno da vlasnik dokaže i postojanje posebne vezanosti za svog ljubimca. O eventualnoj osobitoj naklonosti prema drugim stvarima možda i ima prostora raspravljati, ali kada su u pitanju kućni ljubimci (ne i ostale domaće životinje), to nužno proizlazi iz statusa koji im je priznat. Pre svega u međunarodnom pravu, dok se na osnovu Zakona o dobrobiti životinja (član 5, stav 26) kućni ljubimci smatraju životinjama sa druženje, što nesumljivo potvrđuje postojanje osobitog prijateljstva (Radulović, 2020, 346). Sa druge strane, ove okolnosti podržavaju i prethodno iznet stav da bi naknadu afekcione vrednosti trebalo priznati u slučaju štete nanete namerom, odnosno krajnjom nepažnjom, uz određene zakonodavne reforme.

Iako je mogućnost osiguranja kućnih ljubimaca uvedena početkom 20. veka, prva ovakva polisa prodata je u Americi tek 1982. godine. Pripadala je jednom od najpoznatijih pasa na svetu – čuvenoj Lesi. U toj zemlji do 1997. godine postojala je samo jedno društvo za osiguranje koje je nudilo ovakve proizvode na tržištu. Danas je mnogim osiguravačima to isključiva delatnost,[16] pa je prema podacima iz 2021. godine u ovoj zemlji bilo osiguranih 16% pasa, dok je deceniju pre toga, 2011. godine to bilo skromnih 5,7% (Verteramo Chiu, Li, Lhermie, Cazer, 2021, 1). Prema podacima Američke asocijacije za osiguranje kućnih ljubimaca, u proseku godišnji troškovi za osiguranje pasa iznose 584 dolara za pse, odnosno 343 za mačke (Schlichter, 2022). Kada se uzme u obzir da oko 80% vlasnika koristi veterinarske usluge najmanje jednom u toku godine, sa izdacima od 253 dolara po psu, samo za lečenje, u šta ne ulazi još u proseku 138 dolara za preventivnu godišnju zdravstvenu zaštitu, procenat osiguranih kućnih ljubimaca u ovoj zemlji bi mogao biti mnogo veći (Gajinov, 2023, 15).

4. AFEKCIONA VREDNOST U KONTEKSTU OSIGURANJA STVARI U DOMAĆINSTVU

Osiguranje imovine obuhvata osiguranje pokretnih i nepokretnih stvari i imovinskih interesa, sa ciljem obeštećenja, uz generalno pravilo da korisnik osiguranja iz njega ne može dobiti veću naknadu od stvarno pretrpljene štete. Visina naknade koja se isplaćuje osiguraniku zavisi od vrednosti osigurane imovine, odnosno stvari, visine prouzrokovane štete kao i opredeljene sume osiguranja (Miladinović, 2020, 210). Kada govorimo o osiguranju imovine, kao najčešćoj vrste neživotnih osiguranja, važno je osvrnuti se na pitanje obuhvata rizika pojedinih paketa, kao i vrste stvari obuhvaćenih polisom. Klasični paketi osiguranja domaćinstva, iako imaju svoju primenu i adekvatnost, često ne odgovaraju osiguranicima kada su u pitanju poseban način i širina pokrića (Jovanović, 2018, 42).

Budući da nam težište interesovanja ostaje isključivo na stvarima koje za vlasnika imaju poseban značaj, treba naglasiti da standardni paketi osiguranja u domaćinstva pokrivaju najčešće i rizike od provalne krađe, razbojništva, odnosno vandalizma. Takođe, pokrivena je štetu na svim stvarima koja se u trenutku izvršenja pomenutih krivičnih dela nađe u kući, odnosno stanu. U tu skupinu ulaze i domaće životinje, ali ne i kućni ljubimci, za koje se moraju zaključiti posebne polise osiguranja. Među ostalim stvarima koje se mogu naći u kući, odnosno stanu, sreću se i one koje imaju veliku tržišnu vrednost i poseban značaj za vlasnika, kao kolekcionarski primerci, stvari velike umetničke i istorijske vrednosti, što svakako ne mogu da pokriju standardne polise osiguranja.

Kada su u pitanju vredne stvari, često se unapred određuju limiti, recimo za nakit ili umetnički predmete ograničenja se obično kreću od 1000 do 5000 dolara,

[16] Neke od njih su: 24 PetWatch Pet insurance, AKC Pet Healthcare, ASPCA Health-Care, Embrace Pet Health Isurance, Pets Best Pet Insurance, Petplan Pet Insurance, PurinaCare Pet Health Insurance, Trupanion Pet Insurance, Veterinary Pet Insurance.

za krzno, satove, poludrago kamenje na 1500 dolara, zlatno posuđe, ili ono od srebra i kalaja na 2500 dolara (Caton, 2023). Na tržištu Velike Britanije moguće je dobiti osiguranje i u slučaju kada se nakit preuzme radi njegove upotrebe, ali najviše do 30 dana od dana uzimanja iz sefa (Jovanović, 2018, 46). Američko društvo za osiguranje „Katon" (*Caton Hosey insurance*) se sa svojim specifičnim polisama trudi da odgovori specifičnim zahtevima korisnika, uz mogućnost da se za pojedine vredne predmete naknadi šteta u visini tržišne vrednosti neposredno pre krađe ili gubitka, a ne prema vrednosti u trenutku zaključenja polise, uz relativno fleksibilne uslove procene. Ponekad može doći i do povećanja vrednosti dragocenosti i umetničkih predmeta, te će osiguranik biti podosiguran. Prema uslovima osiguranja pojedinih britanskih osiguravača, ovakav problem se rešava na način da osiguranik ima pravo da opciono ugovori proširenje pokrića (Jovanović, 2018, 46). Ukoliko je nastala potpuna šteta, osiguravači naknađuju punu tržišnu vrednost, ali ograničavaju svoju obavezu na maksimalno 150% ugovorene sume osiguranja (Jovanović, 2018, 45, prema: AIG Europe Limited, 2018, 11). Takođe, kada su u pitanju ovakve polise, uvek je važno posedovati adekvatnu dokumentaciju radi što tačnijih procena. Uz to, postoji i opcija niže premije, ukoliko se dragocenosti čuvaju u trezoru banke ili sefu. Iz američke osiguravajuće kuće *AIG* (*American International Group*) se konstatuje da je zaprepašćujuće koliko vlasnika najprestižnije brendirane odeće u SAD nije osiguralo sadržaj svojih ormara, čija vrednost se kreće od nekoliko stotina hiljada, pa sve do milion dolara (Đurić, 2022). Najčešći razlog je, tvrde, to što većina i ne zna da ovaj deo njihove svojine nije pokriven standardnim polisama imovinskog osiguranja, niti ugovorima koji se odnose na umetničke i druge kolekcije. Pod ovom imovinom se misli na odeću i obuću koju su kreirale i ručno proizvele priznate modne kuće za konkretnog pojedinca ili u ograničenim serijama, kada je reč o pratećim predmetima poput tašni, rukavica, kaiševa (Đurić, 2022). To podrazumeva i poseban značaj za same vlasnike ovakvih odevnih predmeta.

Na osnovu sprovedenog istraživanja, primećujemo da ni jedna naša osiguravajuća kompanije nema specijalizovane pakete koji bi pružili osiguranje umetničkim delima i dragocenostima velike vrednosti. Oni su kao stvari uključeni u standardne pakete osiguranja stvari u domaćinstva, ali bi tada obuhvat pokrića morao biti daleko veći. Svakako, da su razlozi za ovakvu situaciju u svetu osiguranja materijalne prirode. Na našem tržištu je broj kolekcionara i vlasnika ovakvih stvari zanemarljiv. Sa druge strane, postoji i drugi problema vezani za stvari realno male tržišne vrednosti, koje sa subjektivnog stanovišta imaju ogromnu vrednost, za koje sami opšti principi osiguranja ne pokazuju gotovo nikakav senzibilitet, ni u svetu, a ni kod nas. Upravo su ovo razlozi zbog kojih tržište osiguranja mora da se postepeno prilagođava individualnim zahtevima korisnika nudeći nove, nestandardne pakete usluga. Sam obuhvat rizika u vidu krađe, razbojništva, odnosno vandalizma, kada govorimo o ovim stvarima, nije doveden u pitanje.

5. ZAKLJUČAK

Odmeravanje naknada štete prema vrednosti koju je uništena ili oštećena stvar ima za oštećenika znači neku vrstu (re)definisanja uslova odgovornosti za štetu. Ponekad je tržišna vrednost takvih stvari potpuno beznačajna, ali sa subjektivnog stanovišta imaoca ogromna u slučaju nestanka kućnog ljubimca, porodičnih fotografija, rukopisa, nagrada ili priznanja. Sa druge strane, dešava se i da stvar istovremeno ima i veliku prometnu vrednost, ali i značaj za vlasnika kada je u pitanju vredan porodičan nakit, umetnička dela ili druge dragocenosti. Važeća rešenja našeg ZOO, odnosno nužno postojanje umišljajno izvršenog krivičnog dela radi sticanja prava naknadu štete prema afekcionoj vrednosti stvari nailazi na kritiku. Zaštita interesa oštećenog, ali i širih društvenih interesa, nameću potrebu reforme našeg zakonodavstva. Samim tim, potpuno podržavamo rešenje prema kojem bi kao uslov bila dovoljna namera, pa čak i krajnja nepažnja, budući da se radi posebnoj emotivnoj vezi prema pojedinim stvarima, naročito kada se radi o kućnim ljubimci i drugim umetničkim stvarima, često velikog kulturno-istorijskog značaja. Ovome u prilog idu i sudske odluke donete pre stupanja na snagu ZOO.

Istraživanje pokazuje da svaki drugi kolekcionar umetničkih dela nema nikakav ili ima paket osiguranja nedovoljan da pokrije krađu ovih predmeta, da se retki sportisti odlučuju da osiguraju svoja odličija, kao i da je mali broj vlasnika kućnih ljubimaca koji za njih imaju posebne polise. Za stvari realno male tržišne vrednosti, koje sa subjektivnog stanovišta vlasniku mnogo znače kao uspomene, porodične fotografije ili lična prepiska, opšti principi osiguranja ne pokazuju gotovo nikakav senzibilitet, ni u svetu, ni kod nas.

Opšti zaključak je da tržište osiguranja u svetu tek nasumično prepoznaje zahteve klijenata da zaštite svoje vredne umetničke kolekcije, nakit i ostale dragocenosti posebnim polisama. Sa rastom bogatstva i moći, raste i interesovanje za pojedine hobije i kolekcionarstvo, pa time i interes za finansijskim obezbeđenjem stečenih vrednosti. Budući da ovakve pojave nisu u dovoljnoj meri prisutne kod nas, usled nižeg nivoa ekonomskog razvoja, i ponuda paketa osiguranja sasvim opravdano

ne doživljava nikakve posebne promene. Time se tržište i dalje svodi na klasične pakete osiguranja stvari u domaćinstvu, do određenog limita, koji u svom standardnom obliku uglavnom obuhvataju i rizike od krađe i razbojništva.

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Affective value of things and property insurance

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Abstract

Determining the amount of compensation according to the value that this subject has for the damaged party, if it was damaged or destroyed by an intentional criminal act is based on 189(4) of the Law on Obligations. This represents one of the key exceptions from the general rule based on the objective understanding the civil culpability in our tort law. Although it enjoys a long tradition, its interpretation and application creates a series of dilemmas in the legal doctrine and practice of domestic courts. Among them, the key question is whether it is about a special base for measuring compensation for non-patrimonial damage or it is basis for special *pretium affectionis* as a way of measuring the amount of compensation for patrimonial damage, which carries a subjective connotation. Only a few scientific works in our doctrine of tort law have been devoted to this issue in fragments. Moreover, these problems have not been observed in the context of property insurance yet. Thus, the author tries to examine the ability of insurance the market to meet the needs of special user requests, when it comes the need to insure from theft and robbery not only valuable and rare things that has cultural and historical importance and collectibles, but also subjects to which the owners are particularly emotionally attached such as pet, personal correspondence, letters, and awards for various achievements or family photos.

Key words: *pretium affectionis*, damage compensation, purchase from non-owner, property insurance

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1. INTRODUCTION

One of the basic principles of contemporary Serbian compensation law is the principle of integral or complete compensation for the damage suffered. According to it, the injured party has the right to compensation for property damage in the amount necessary to bring their financial situation to the state in which it would otherwise have been had the harmful act or omission not occurred (*Law on Obligations* or *Law on Contracts and Torts*, hereinafter: LOO, 1978, Art. 190). Therefore, the injured party has the right to compensation for actual damage, as well as the right to lost profit, regardless of the degree of fault of the injured party, when it comes to subjective responsibility, while the same applies when the responsibility is based on the created or maintained risk (Antić, 2011, 469–470). However, this general rule can be deviated from in certain situations, so the court can award a reduced compensation due to the weaker financial condition of the responsible person, if the damage was not caused either intentionally or by gross negligence (LOO, 1978, Article 191, Paragraph 1), in the case when the harmed person did something useful for the injured party, taking into account the care he shows in his own affairs (LOO, 1978, Art. 191, Paragraph 2), as well as in the case of shared responsibility (LOO, 1978, Art. 192, Paragraph 1).

On the other hand, there is also a situation in which it is possible for the court to award compensation of a larger scope than that which the injured party is entitled to, according to the rules on integral compensation of damages, in the case when the thing was destroyed or damaged by an intentional criminal act, which is decided in criminal proceedings, which also represents a prejudicial question in litigation. In that case, compensation is calculated according to the value that the destroyed or damaged thing had for the injured party, which is a principle that enjoys a long history in domestic law (LOO, 1978, Art. 189, Paragraph 4; Karanikić Mirić, 2011, 68). It is also one

of the key deviations from the general rule on the objective understanding of civil-law guilt in our tort law (Salma, 2008, 93). This is the only provision of the LOO in which the term imagination is mentioned. The rule of Article 189, par. 4 of the LOO concerns the assessment of damages, not the conditions for establishing civil liability (Karanikić Mirić, 2011, 68). Some issues related to the application of this rule are still disputed in legal theory, as well as in the practice of domestic courts, among which is whether it is a special basis for compensation for non-patrimonial damage or the affective value of the damaged or destroyed thing *(pretium affectionis)*, as in the form of measuring the amount of compensation for patrimonial damage, which carries a subjective connotation.

Only a few works in our theory of compensation law have been devoted to this problem in fragments, while in the context of property insurance it has not been observed so far, that is, the need to additionally insure things of particular importance to the injured party. These are the reasons why the paper examines the readiness of the insurance market to respond to the needs of specific user requests, when it comes to insurance against theft and robbery of valuable and rare things of cultural and historical importance, collectibles, but also things that do not necessarily have a significant market value, but to which the owners are especially emotionally attached, like pets, personal correspondence, letters, recognitions for various achievements or family photos.

2. LEGAL FOUNDATIONS AND REASONS FOR MEASURING DAMAGE COMPENSATION ACCORDING TO THE VALUE THAT THE THING HAD FOR THE DAMAGED PERSON

Measuring damages according to the value that the destroyed or damaged thing had for the injured party means a kind of (re)definition of the conditions of responsibility for damage (Radulović, 2020, 340). The provision of Article 189, paragraph 4 of the LOO is less often interpreted as a basis for compensation for non-patrimonial damage[1], while it is much more often taken as a basis for measuring patrimonial damage according to the value that the thing had for the harmed person, that is, its affective value. Our theory of law generally accepts the second understanding, to which judicial practice has also favoured (Radulović, 2020, 340). According to the rule from the Article 189, Paragraph 4, compensation for patrimonial damage is regulated, which includes ordinary damage and lost benefit, which affective value by its nature is certainly not, and the very position of this provision is often criticised. The same rule exists in the Croatian law (Croatian Obligations Act, Art. 1089, Paragraph 4), Montenegrin law and the Law on Obligations of the Federation of Bosnia-Herzegovina and Republika Srpska (in all three laws: Art. 196, Paragraph 4).

According to some authors, the assessment of the subjective value of a destroyed or damaged thing implies that it either forms an economic unit with other things belonging to the injured party, or the fact that the injured party is emotionally attached to it. When it comes to compensation for patrimonial damage, the application of a subjective criterion would be justified only when the destruction or damage of one item disrupted the economic whole of which it is an integral part, thus causing damage to the entire property of the injured party (Blagojević, Krulj, 1983, 706). Since things of particular importance to the injured party are very often not part of any specific narrower economic entity, except part of their property itself, in our opinion this point of view is largely unacceptable. According to the same authors, in other cases, the subjective assessment of the value of material things is taken as a special type of non-patrimonial damage compensation, which is generally rejected by both theory and judicial practice. Thus, in one court decision, it was stated that "the loss of a material thing, including a work of art, is not a recognised basis for compensation for non-patrimonial damage caused by mental suffering under the LOO." This is due to the fact that this type of damage can be awarded only in case of injury to life and body, reputation, honour, freedom or personal rights, i.e. death of a close person or suffered fear (Decision of the Supreme Court of Serbia, Rev. I 2749/2004 of 25th November 2004)[2]. Similar to this, the district court

[1] There is no limit in determining the amount of affection compensation. According to some authors, it also has the appearance of non-property damage, limitations regarding the amount of compensation are determined according to the general rules for determining the amount of non-property damage (Salma, 2004, 605). Professor Radišić mentions ambivalent forms of damages that belong to the grey zone between typically material and non-patrimonial damages, calling them the so-called subjective-economic damages which include, among others, the damage or destruction of a family picture or the manuscript of a scientific work (Radišić, 13, 1998).

[2] In the specific case, by applying the provisions of Article 200 of the LOO, the plaintiff was also awarded non-patrimonial damages caused by her mental suffering due to the loss - the theft of the valuable sculpture "P." The LOO is exceptionally designed for the possibility of awarding patrimonial damage greater than the actual value of the destroyed thing. This is expressly prescribed by the provisions of Article 189, Paragraph 4 of the LOO, but only in the case when the thing is destroyed

in Valjevo once confirmed a first-instance decision in which substantive law was correctly applied and rejected a claim for compensation for non-patrimonial damages due to the violation of personal rights, i.e. suffered mental pain due to the destruction of art paintings, books and sculptures by fire (Judgment of the District Court in Valjevo, Gž. 1119/2005 of July 21, 2005).[3] Due to all of the above, we would state that the provisions of the LOO here provide a material-legal basis for measuring the amount of patrimonial damage, according to the value that the thing had for the injured party, which certainly represents a type of subjective relationship that we would interpret in a different way than the ones mentioned above.

In general, determining the amount of compensation according to the value it had for the injured party, starting from the fact that the thing was damaged or destroyed by a criminal act committed with intent, as the most serious degree of guilt, represents a case in which distributive justice comes to the fore (Perović, Stojanović, 1980, 564). It implies a different expression of the universal principle of obligation law, which is equal to the value of mutual gifts, which in this case does not establish a relationship in commodity exchange, i.e. the giving of things of the same kind, quantity and quality, with all the same such things, but exclusively determines the position of people and regulation of social relations according to the properties they possess (Perović, Stojanović, 1980, 158). This refers to social origin, property status and level of education. In particular, in the case of causing damage by an intentional criminal act, the merits of the responsible person are crucial for establishing the balance. Here actually lies the need to overcome the concept that rests on the complete separation of the repressive sphere of criminal law and the reparative sphere of civil law protection, which is particularly pronounced today (Nikolić, 1994, 159-160). This leads to convergence of criminal and civil sanctions (Nikolić, 1994, 159-160). The question of the court being bound by a final criminal judgment is not disputed, while any discussion about the authority of the civil court to decide on the existence of a criminal offense, as a previous question, will not be the subject of deeper analysis because it exceeds the needs and scope of this paper.

In theory, the condition in the form of the existence of an intentional criminal offense is usually justified by twofold needs: punishment of the perpetrator both by society and by the victim. As it is generally considered, any loss would be easier to bear if the injured party knows that it was caused only on the basis of "pure delict", and not intentional criminal act, which is unacceptable from our point of view. This is also confirmed by certain court decisions made before the LOO entered into force.[4] The condition for assessing the damage according to the value that the thing had for the injured party did not necessarily imply the existence of an intentional criminal act, but it was sufficient that there was intent, and even extreme negligence, which seems to be a far more acceptable solution. This affirms the rights and interests of the injured party, when it comes to a special emotional connection to certain things, especially when it comes to pets and objects of often wider artistic and cultural-historical importance, which are particularly important to the owners. Such needs are also confirmed by the decision of the Swiss Law on Obligations, according to which the right to compensation of emotional value is not conditioned by the existence of an intentional criminal act[5], so it is possible to realise it when, for example, an animal is run

or damaged by the intentional criminal act of the perpetrator. In the specific case, that condition was not met, because the loss of the sculpture "P." was not caused by the criminal act of the defendant, but by a third party. Therefore, the increased compensation of the adequate value that the sculpture had for the plaintiff can be awarded only at the expense of the person who stole the sculpture, but not at the expense of the defendant.

[3] In this judgment, it is stated, among other things, that the LOO in the provisions of Article 200, Paragraph 1 talks about the right to compensation for mental pain suffered due to reduction of life activity, humiliation, damage to reputation, honour, freedom and personal rights and death of a close person, so compensation for mental pain due to destroyed or damaged certain objects that have a special value for of the injured party, such as artistic paintings, private photographs and other objects, is not provided as a special type of non-patrimonial damage. There is no doubt that in this particular case there is no violation of personal rights, as the first-instance court correctly found. The insistence in the plaintiffs' appeal on a wider application of the provisions of Article 189, Paragraph 4 of the LOO, in the specific case, i.e. that the plaintiffs can be awarded the damage in question even if the damage was not caused by the commission of a criminal offense, given that the destroyed or damaged things had a special value for the plaintiff, because the appeal does not take into account that the provision of Article 189 of the LOO, talks about compensation for patrimonial damage, so the plaintiffs could emphasise the fact that for them the damaged artistic paintings and sculptures are of special importance only in the procedure for compensation for patrimonial damage, while the file shows that in this part the plaintiffs filed the lawsuit withdrew.

[4] "Compensation for damage in the amount of the extraordinary value (affective value) that the thing had for the injured party can be awarded only if the damage was done intentionally or through gross negligence. This guilt is not assumed, but must be proven" - Decision of the Supreme Court of Vojvodina, Rev. 456/63 of 20 September 1963, Collection of court decisions /1963/: book VIII, volume 3, decision no. 333, cited according to: Karanikić Mirić, 2011, 68.

[5] Swiss Law on Obligations, Art. 43, paragraph 1 bis.

over by a car, while the amount of the compensation depends on the free assessment of the court and the circumstances of the specific case. At the same time, the courts did not treat this case as a basis for compensation for non-patrimonial damage, while for compensation for patrimonial damage according to affective value, they did not require proof of a serious violation of personal rights, but this case was the basis for the introduction of a new *sui generis* institute (Milenković, 2015, 539).

The understanding of the affective value of things as a basis for compensation for patrimonial damage in our law is supported by the provisions that regulate the real-legal matter, i.e. the acquisition of property from non-owners (Law on the Basics of Property-Legal Relations, hereinafter: LOBPLR, Art. 31, Paragraph 2). A conscientious person can become the owner of a thing even though they did not acquire it from a person who had the right of ownership of that thing, thereby deviating from the key principle of Roman law that excludes the acquisition of the right of ownership from a non-owner.[6] Therefore, the absolute right of the acquirer is relativised by the right of the previous owner to request the return of the movable property at market value.[7] This does not affect the right of the acquirer to demand compensation for damages from the transferor, when it is established that the thing has a special significance for the previous owner, which is a synonym for its affective value. This solution helps the former owner to recover the thing that is more valuable to them than money, even if it was purchased at a significantly higher price than the original (Stojanović, Petrović, 1991, 158). In the countries around us, the same solution is contained in the Law on Property-Legal Relations of Montenegro (Article 61, Paragraph 1).

The acquisition of property rights from non-owners is regulated differently in comparative law, and for example it is not recognized by the legal systems of Denmark, Norway, Portugal, South America, with the exception of Argentina, where *bona fide* acquisition is allowed for sales at fairs and markets, as well as for purchases from merchants who they trade such things professionally (Stojanović, Petrović, 1991, 152). Today, the majority of countries accept a middle solution between unlimited vindication and unlimited recognition of the possibility of conscientious acquisition. In German law, the *bona fide* acquisition of movable property that has not left the owner's state against his will is protected (German Civil Code, Art. 932-935)[8], which is also accepted as a solution in Austria (Art. 367), and in accordance with it and our Serbian Civil Code from 1844 (Art. 221), as well as Greek (Art. 1036 and 1038). A similar approach also exists in the countries of the Romance legal circle, where the derivation for movable property has been abolished, unless the thing left the owner's state without his will, that is, if it was stolen, if they lost it, then the subsequent holder does not acquire ownership and the owner can reclaim it within three years (Code civil, Art. 2279) (Stojanović, Petrović, 1991, 152). The *common law* system is based on the maxim *nemo dat quod non habet* (you cannot give what you do not have), so only certain cases of conscientious objection are allowed (Stojanović, Petrović, 1991, 154). Unlike continental law, in English and American law a functional distinction is made between the conditions for *bona fide* acquisition in civil and commercial transactions (Stojanović, Petrović, 1991, 154).

The condition contained in LOBPLR, which implies that the previous owner can request the return of the movable object at market value only if it is determined that it has special significance for them, is criticized due to the fact that this person has the obligation to pay the object at market value to the conscientious acquirer, which is always smaller or larger than the one given to the non-owner by the acquirer (Volar, 2015, 45). In the event that the turnover value is lower, damage has been caused to the conscientious acquirer, while in the opposite case there would be unjust enrichment (Volar, 2015, 45). The legal standard of "special importance" itself remains subject to interpretation and according to most authors it includes pets, as well as family jewelry, paintings and other works of art, awards, recognitions, family photos, personal correspondence, letters and the like. It remains for the court to determine in a specific case whether special significance exists. This is undoubtedly a specific individual relationship of the previous owner towards the thing, which must be individually determined. In practice, a situation may arise when the matter has special significance on both sides, i.e. for the conscientious acquirer and the previous owner (Volar, 2015, 45). The question arises

[6] According to Article 31 of the LOBPLR, a conscientious person acquires the right of ownership to a movable thing that they acquired for a fee from a non-owner who puts such things on the market as part of their activity, from a non-owner to whom the owner handed over the thing to the state on the basis of a legal transaction that is not a basis for acquiring the right of ownership, as and on public sale. The previous owner can demand from the bona fide acquirer to return the thing to them with compensation at the market price, if that thing is of special importance to them.

[7] This request cannot be made after one year has passed since the acquisition of ownership rights to the item.

[8] Special rules apply to money or bearer securities, or things acquired at public sale.

whether the court will then have to take that into account. Nevertheless, such situations would imply a personal legal relationship to the same individually determined movable thing, which is more difficult to imagine, especially if decorations, recognitions, personal letters or pictures are taken into account. In the Draft Civil Code, the conditions for acquiring things from non-owners are regulated by Article 1628 and coincide with those from LOBPLR, with the fact that a separate article[9] regulates the right to purchase things that have special significance for the previous owner from a conscientious acquirer, also within a year.

Certainly, it is a fact that the affective value of a thing exceeds its traffic, regular or ordinary value *(pretium commune)*. However, at the same time, it should be clearly distinguished from the price due to special circumstances, due to which the thing has a higher value than the market value, such as a certain drug needed by a seriously ill person or an animal trained for special actions, that is, from the inestimable value of a thing *(res inaestimabiles)* which cannot be determined by any by comparing it with other things in circulation, because it has lost both its use and circulation value.

3. FOR WHICH ITEMS IS THE AFFECTIONAL VALUE DETERMINED MOST OFTEN AND HOW COMMON IS THEIR SPECIAL INSURANCE?

When it comes to the relationship between the market value and affective value of things, it happens that the thing is completely insignificant in terms of price, but from the subjective point of view of the owner, it has enormous importance, like personal photos, correspondence or acknowledgments for various achievements. Also, it is possible that the thing has a high market value at the same time, but also a great importance for the owner, when it comes to valuable family jewellery, works of art or other valuables, especially if they are collector's items.

The theft of works of art from private collections is a lucrative business for organised crime gangs, especially in France, Germany, Poland and Russia. According to some research, about 43 percent of works of art disappear from private collections, about 14 from galleries, and the rest from churches and museums[10]. Regardless of this data, in an analysis published by "Hiscox", the international insurance group based in Bermuda[11], which specialises in the insurance of works of art, jewellery and watches, every second art collector has no insurance package or insufficient to cover the theft of these items. According to estimates by the American FBI, the theft of works of art causes annual damage of eight billion dollars, while according to art historians, it is less, and amounts to about six billion. However, this means that around $16.4 million worth of art is stolen worldwide every day[12].

Acknowledgments, medals and trophies for athletes have an extremely special value and significance. Regardless, they are often the subject of robberies. For example, the gold medal won at the 2002 Winter Olympic Games in skeleton was stolen from the American athlete Tristan Gale, along with her wedding ring and other valuables during a burglary in her apartment in 2011, and swimmer Josh Davis had even four medals stolen from his car in 2009. Similarly, Rusty Smith, a speed skater, had his entire safe containing two bronze medals won at the 2002 and 2006 Olympic Games stolen during a robbery at his mother's apartment (Rao, 2014). Similar cases are known in our country, so for example, Živorad Micić, a famous Serbian cyclist and former Olympian of the Kingdom of Yugoslavia, during the robbery of his property, thieves stole as many as 1000 medals, cups and plaques, as well as the T-shirts he wore during his sports career. As our athlete once pointed out, the medals themselves have almost no nominal value and he received much more money for winning them. The one who stole them by melting them will not bring anything, and to our athlete, as he pointed out, they are worth "like a whole life" (Živanović, 2015).

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[9] Preliminary draft of the Civil Code of the Republic of Serbia, version dated May 28, 2019, Art. 1632, https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html, visited 24th of January 2024.

[10] Although it sounds incredible, the Mona Lisa was stolen from the Louvre in August 1911, and two years later it was found, while the list of the biggest robberies in history includes the thefts from the Kunsthall museum in Rotterdam and from the Isabel Stewart Garner museum in 1990, when a total of 13 works by Rembrandt, Vermeer, Degas and Monet. In 2008, Paul Cézanne's "Boy in a Red Waistcoat" was stolen from a Zurich gallery, which was found in Belgrade in 2012, then Vincent Van Gogh's "Chestnut Branch in Bloom" and Monet's "Poppy Field near Vétheuil" were found ten days later in Switzerland, as well as the painting "Count Lepic and his daughters", by Édgar Degas, for which the criminal group "Pink Panther" is responsible. Rembrandt's "The Storm on the Sea of Galilee" from 1633 has been missing for over three decades, as well as Vermeer's "Concert", which is also the largest theft of works of art along with 11 other works in US history in 1990.

[11] "Art theft is a lucrative business", original: "Krađa umetnina je unosan posao", https://www.b92.net/kultura/vesti.php?nav_category=270&yyyy=2012&mm=04&dd=12&nav_id=599980, visited 20th January 2024.

[12] Ibid.

The “Liberty Mutual” insurance company in cooperation with the American Olympic Committee insured all the medals of the USA Olympians won at the Winter Olympic and Paralympic Games in Sochi 2014 and Rio de Janeiro 2016 against loss in the amount of 5000 dollars. This covers all possible costs of making the replica and the actual delivery. The insurance also covers assistance to athletes in the complex process of ordering and making replacement medals. Making a replica costs between $500 and $1,200, all depending on the amount of precious metals used and current market prices for gold, silver, and bronze. However, some athletes additionally secured their medals. Some, on the other hand, in order to get rid of all worries, donated their medals. The medals of figure skaters Christy Yamaguchi and Tara Lipinski are on display at the World Museum of Figure Skating, i.e. the Hall of Fame in Colorado Springs. In addition, Lipinski insured her gold medal won in 1998 at the Winter Olympic Games in Nagano for one million dollars.

On the list of things that are undoubtedly determined to be affectionate about are pets - most often dogs or cats, which, if they are mixed breeds, have little market value. Regardless of the fact that today, through the wider acceptance of biocentric ethics, they enjoy specific legal subjectivity, in the case of injury and death of the owner’s animal, it is considered that they still represent a mere object of law. The injured party has the right to compensation for patrimonial damage that includes the market value, which certainly depends on the type of animal, health condition, age, sex, training, and of course also on the pedigree, which drastically increases the price (Milenković, 2015, 528). The right to compensation for damages also includes treatment costs, which can often be many times higher than the market value of the animal itself. By amending the German Civil Code in 2002, the owner of an injured animal was granted the right to compensation for expenses even when they exceed its market value many times over, while the courts awarded such compensation even before the introduction of the additions to the act (Milenković, 2015, 529). The situation is similar in Austria and the USA, and in Switzerland this practice applies exclusively to pets (Milenković, 2015, 528). In our law, the basis for compensation for treatment costs, even when they exceed the market value of the animal, is found in Article 190 of the LOO, which provides for the right to compensation for property damage in the amount needed to bring the injured party’s financial situation to the state in which it would otherwise have been if there had been no harmful action, i.e. omission. Compensation for lost earnings makes sense when dealing with livestock, poultry or professional animal breeding, or for example with therapy dogs or animals that have been actors in films, series or advertising campaigns.

When taking into account the special relationship of love and care between the owner and the animal, the integral compensation of damages is certainly insufficient to compensate for all the pain and suffering in the event of its injury or loss. However, according to our LOO, the pet would have to be injured or killed by an intentional criminal act in order to compensate for the affective value. Assuming that this circumstance has been established, in the next step it is necessary for the owner to prove the existence of a special attachment to his pet. There may be room to discuss a possible special affection towards other things, but when it comes to pets (not other domestic animals), this necessarily results from the status that is recognised for them. First of all, in international law, while based on the Animal Welfare Act (Article 5, paragraph 26), pets are considered companion animals, which undoubtedly confirms the existence of a special friendship (Radulović, 2020, 346). On the other hand, these circumstances also support the previously stated position that compensation for affective value should be recognised in the case of damage caused with intent, that is, gross negligence, with certain legislative reforms.

Although the possibility of pet insurance was introduced at the beginning of the 20th century, the first such policy was sold in America only in 1982. It belonged to one of the most famous dogs in the world - the famous Lassie. In that country, until 1997, there was only one insurance company[13] that offered such products on the market. Today, it is the exclusive activity of many insurers, so according to data from 2021, 16% of dogs were insured in this country, while a decade before, in 2011, it was a modest 5.7% (Verteramo, Chiu, Li, Lhermie, Cazer, 2021, 1). According to the American Pet Insurance Association, the average annual cost of dog insurance is $584 for dogs and $343 for cats (Schlichter, 2022). When you consider that about 80% of owners use veterinary services at least once a year, with expenses of $253 per dog, just for treatment, not including an average of $138 for annual preventive health care, the percentage of insured pets in this country it could be much higher (Gajinov, 2023, 15).

[13] Some of them include: 24 PetWatch Pet insurance, AKC Pet Healthcare, ASPCA Health-Care, Embrace Pet Health Isurance, Pets Best Pet Insurance, Petplan Pet Insurance, PurinaCare Pet Health Insurance, Trupanion Pet Insurance, Veterinary Pet Insurance.

4. AFFECTIVE VALUE IN THE CONTEXT OF THE INSURANCE OF THE HOUSEHOLD THINGS

Property insurance includes the insurance of movable and immovable things and property interests, with the aim of compensation, with the general rule that the beneficiary of the insurance cannot receive more compensation from it than the actual damage suffered. The amount of compensation paid to the insured depends on the value of the insured property, i.e. things, the amount of damage caused, as well as the determined sum of insurance (Miladinović, 2020, 210). When we talk about property insurance, as the most common type of non-life insurance, it is important to refer to the issue of risk coverage of individual packages, as well as the types of things covered by the policy. Classic household insurance packages, although they have their application and adequacy, often do not suit the insured when it comes to the special method and breadth of coverage (Jovanović, 2018, 42).

Since our focus of interest remains exclusively on things that are of particular importance to the owner, it should be emphasised that standard household insurance packages cover the most common risks of burglary, robbery, or vandalism. Also, damage to all things found in the house or apartment at the time of the aforementioned criminal acts is covered. This group also includes domestic animals, but not pets, for which special insurance policies must be concluded. Among the other things that can be found in the house, i.e. the apartment, there are also those that have a high market value and special importance for the owner, such as collectibles, things of great artistic and historical value, which certainly cannot be covered by standard insurance policies.

When it comes to valuables, limits are often set in advance, say for jewellery or art pieces, the limits usually range from $1,000 to $5,000, for furs, watches, semi-precious stones at $1,500, goldware, or silverware and tinware at $2,500 (Caton, 2023). In the UK market, it is possible to get insurance in the event that the jewellery is taken for its use, but for a maximum of 30 days from the day it was taken from the safe (Jovanović, 2018, 46). The American insurance company "Caton" (Caton Hosey Insurance) with its specific policies tries to respond to the specific requirements of users, with the possibility of compensating damages for certain valuable items in the amount of the market value immediately before the theft or loss, and not according to the value at the moment of conclusion of the policy, with relatively flexible assessment conditions. Sometimes there may be an increase in the value of valuables and works of art, and the insured will be underinsured. According to the insurance conditions of certain British insurers, this problem is solved in such a way that the insured has the right to optionally contract an extension of coverage (Jovanović, 2018, 46). If total damage has occurred, insurers compensate the full market value, but limit their liability to a maximum of 150% of the contracted insurance sum (Jovanović, 2018, 45, according to: AIG Europe Limited, 2018, 11) Also, when it comes to such policies, it is always important to have adequate documentation for accurate assessments. In addition, there is also the option of a lower premium, if valuables are kept in a bank vault or safe. The American insurance company AIG (American International Group) states that it is surprising how many owners of the most prestigious branded clothing in the USA did not insure the contents of their closets, the value of which ranges from several hundred thousand to a million dollars (Đurić, 2022). The most common reason, they claim, is that most do not know that this part of their property is not covered neither by standard property insurance policies nor by contracts related to art and other collections. This property refers to clothing and footwear created and hand-made by recognised fashion houses for a specific individual or in limited series, when it comes to accompanying items such as handbags, gloves, belts (Đurić, 2022). This implies their special importance for the owners of such clothing.

Based on the research conducted, we note that none of our insurance companies have specialised packages that would provide insurance for works of art and high value valuables. As things, they are included in standard household insurance packages, but then the coverage would have to be much higher. Certainly, the reasons for this situation in the world of insurance are of a material nature. In our market, the number of collectors and owners of such things is negligible. On the other hand, there are other problems related to things of really small market value, which from a subjective point of view have enormous value, for which the general principles of insurance show almost no sensitivity, neither in the world, nor in our country. These are the reasons why the insurance market must gradually adapt to the individual requirements of users by offering new, non-standard service packages. The very inclusion of risks in the form of theft, robbery, or vandalism, when we talk about these things, is not questioned.

5. CONCLUSION

Measuring damages according to the value that the destroyed or damaged thing has for the injured party means a kind of (re)definition of the conditions of liability for damage. Sometimes the market value of such things is completely insignificant, but from the subjective point of view of the owner, it is huge in the case of the disappearance of a pet, family photos, manuscripts, awards or recognition. On the other hand, it also happens that the thing has a high market value at the same time, but also importance for the owner when it comes to valuable family jewellery, works of art or other valuables. The valid decisions of our LOO, that is, the necessary existence of an intentionally committed criminal act in order to obtain the right to compensation for damages according to the affective value of things, is being criticised. Protection of the interests of the injured party, as well as broader social interests, imposes the need to reform our legislation. Therefore, we fully support the solution according to which the condition would be sufficient intention, and even extreme carelessness, since it is about a special emotional connection to certain things, especially when it comes to pets and other artistic things, often of great cultural and historical importance. This is also supported by court decisions made before the LOO entered into force.

Research shows that one in two art collectors has no or insufficient insurance coverage to cover the theft of these items, that few athletes choose to insure their items, and that few pet owners have special policies for them. For things of really small market value, which mean a lot to the owner from a subjective point of view, such as memories, family photos or personal correspondence, the general principles of insurance show almost no sensibility, neither in the world, nor in our country.

The general conclusion is that the insurance market in the world only randomly recognises the requests of clients to protect their valuable art collections, jewellery and other valuables with special policies. With the growth of wealth and power, the interest in certain hobbies and collecting grows, and thus the interest in financial security of acquired values. Since such phenomena are not sufficiently present in our country, due to the lower level of economic development, the offer of insurance packages quite justifiably does not experience any special changes. Thus, the market is still reduced to classic insurance packages for household items, up to a certain limit, which in their standard form mostly include the risks of theft and robbery.

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