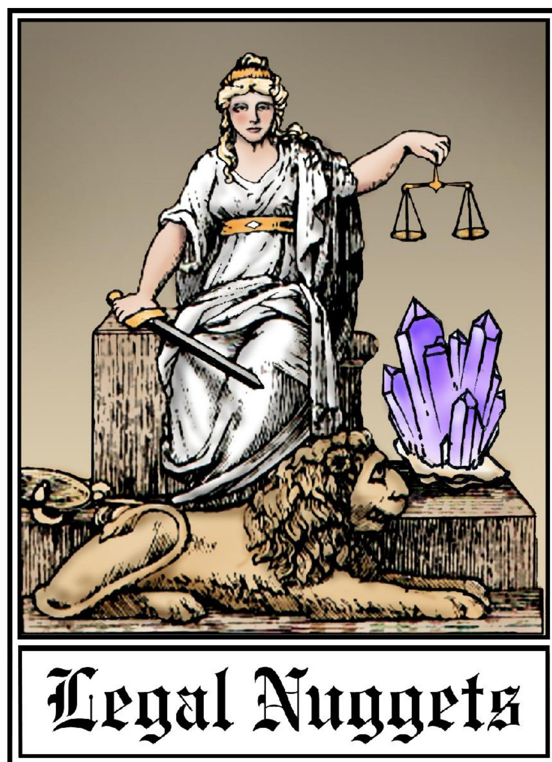

A Collection of Essays on Legal Matters Involved in Mineral Collecting

Francis M. Allegra
Judge, United States Court of Federal Claims
Adjunct Professor, Georgetown University Law Center

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Fragile Minerals and the TSA

Crocoite, scolecite, mesolite, cerussite—such specimens and other fragile delicacies are highly desired by avid mineral collectors. Yet, they strike fear in the hearts of the stoutest among us when we contemplate how to get them home intact. We have all come across a superb specimen, attractively priced, but have nonetheless refrained because there was no easy way to get it home damage-free.

What if, however, you do decide to take that specimen home with you on a plane? And what if you carefully wrap it and loosely seal it in a box, with the intent of treating it as carry-on luggage? Of course, from the moment you embark on this course, your mind is dwelling on one thought, and one thought alone—those folks you will encounter at the airport with the badges and patches that say "Transportation Security Administration" or "TSA." And, in your darkest moments, perhaps you wonder what would happen if those friendly TSA folks accidentally gouged a hole smack in the middle of your prized crocoite. It has happened to people before, and it can happen again.

Of course, in the law, as in other walks of life, avoidance of a problem is often the best course. In this regard, the TSA website (www.tsa.gov) provides some helpful advice. It states that "[i]f you are carrying valuable items . . . we recommend that you ask Security Officers to screen you and your carry-on luggage in private," adding that this process may be initiated by contacting the TSA screening supervisor. Using this procedure also probably lessens the likelihood that a TSA security officer will view your specimen as a dangerous "projectile" that cannot be taken on the plane. By the way, the TSA website also contains a detailed list of prohibited carry-on items.

Perish the thought, but what if your specimen, in fact, is damaged during the inspection process? At this point, you will discover that pursuing a monetary claim against the United States Government is not quite like pursuing one against the corner grocer. The reason is that the United States is protected from lawsuits except to the extent that the Congress consents for it to be sued. That doctrine, known in the law as "sovereign immunity," dates back to the English monarchy. Yet, despite its monarchial roots, the doctirne was viewed as so well-established by the Founding Fathers as not to be debated, even for a moment, at the Constitutional Convention.

But, all is not lost. There is, in fact, a statute that potentially waives the sovereign immunity of the United States in a case involving your negligently damaged mineral specimen. It is the Federal Torts Claims Act (found in various provisions of Title 28 of the U.S. Code), a law with an interesting history. This statute was passed in 1946, approximately a year after a B-25 "Mitchell" bomber—the type of twin-engine plane used for the Doolittle raid on Tokyo—got lost in a blinding fog and crashed into the Empire State Building, 915 feet above street level, killing and injuring a number of individuals. Responding to this disaster, Congress passed a statute generally making the United States liable "for injury or loss of property" that is "caused by the negligent or wrongful act or omission of any employee of the Government," where "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

So, what does this law mean? Under the statute, the United States is generally liable for the negligent acts of its employees to the same extent that a private person would be liable for those same acts under the law of the State in which the negligence occurred. So, if you are in the airport in Tucson, it is Arizona law that will preliminarily control whether the government is liable for negligence in gouging your crocoite.

Of course, nothing in the law, particularly when you are dealing with the United States, is that simple. For one thing, to recover under this statute, you have to file a written claim with the TSA, stating the circumstances of your loss and the exact amount you are claiming. And you must file this claim within two years of the incident. A copy of the claim form is available on the TSA website. Pay careful attention to the filing instructions, particularly the requirement that you claim a sum certain—that is, a specific dollar amount. With very limited exceptions, the figure you list on the form represents the maximum amount you can recover under the law, even if you are forced to pursue the matter in litigation. For this and other reasons, if your claim is going to be substantial, you may want to consult an attorney well-versed in the Federal Tort Claims Act to make sure that your claim is filed correctly. Mess up this preliminary step and you may later find, to your horror and chagrin, that you cannot recover at all.

The TSA has a Claims Management Office that processes these claims. The hope (and the reason why Congress established the claim procedure) is that this agency will either grant your claim or negotiate a reasonable settlement. If, however, TSA denies your claim or does not decide your claim within six months, then you have the right to file suit against the United States in the U.S. District Court for the district in which you live. If you get to this point, you should definitely consider hiring an attorney, as the United States will be defended in that lawsuit by attorneys from the U.S. Department of Justice that specialize in handling tort cases.

There are a variety of other statutory twists and turns that might affect your ability to recover here. For one thing, it is possible that the Justice Department will argue that the TSA's actions are covered by a statutory exception to the Federal Tort Claims Act, perhaps the one that exempts from coverage claims arising from the detention of goods by a law-enforcement officer. However, a "Dear Traveler" message posted on the TSA website from the Director of the TSA's Claims Management Office appears to admit that the agency is responsible if loss or damage to your property is directly caused by the negligence of a TSA employee. (The lawyers among you might want to read Kosak v. United States, 465 U.S. 848 (1984), in which the Supreme Court held that the U.S. Customs Service could be liable for damaging artworks.) Remember also that your recovery may be affected by nuances in the law of the state in which the negligence occurred (in our example above, Arizona). Finally, recognize that the Federal Tort Claims Act does not allow for the recovery of certain types of damages, among them punitive damages and pre-judgment interest on the amount of your loss. So do not expect a bonanza at the government's expense.

The bottom line is that Congress has created a potential legal path for you to recover damages against the United States if, despite your best efforts to avoid the problem, the TSA folks convert your cabinet specimen into hundreds of micromounts. Happy flying.

NOTE: ***This column is for educational purposes only and is not legal advice, or a substitute for such advice. Readers who have questions on this topic should consult with a qualified lawyer.***

The Tax Man Cometh

In 1900, when J. P. Morgan, at George Kunz's behest, purchased the Bement collection and promptly donated it to the American Museum of Natural History, he likely was unconcerned about the amount of the income tax deduction generated by his contribution. That was because the modern income tax was not passed until after the Sixteenth Amendment to the Constitution was ratified in 1913.

Since 1917, every version of the income tax code has included a section authorizing a deduction for contributions or gifts to entities organized and operated exclusively for religious, charitable, scientific, literary or educational purposes. Currently, that provision is found in section 170 of the Internal Revenue Code. If you contribute property, the amount of your deduction under this section is "generally" equal to the "fair market value" of the property.

Now, if you ever hear a lawyer, let alone a ***tax*** lawyer, utter the word "generally," take note, as that is a sure fire indication that there is ***at least*** one exception to the general rule lurking. In the case of section 170 of the Code, there are more than a few. For those donating minerals, one of the more important ones is found in section 170(e), which essentially caps the amount of the deduction in the case of property which is not "capital gain property." Under this rule, if a mineral specimen is inventory in a trade or business, the amount of the charitable deduction is set at the cost incurred in acquiring the specimen. The same is true if the specimen is not inventory in a trade or business, but has been held for a year or less before the time of the donation. So, if a specimen is not used in inventory in a trade or business and has appreciated, you must hold it for more than year before you donate it in order to deduct the full appreciated fair market value. Alas, this rule does not work both ways; if the fair market value of the specimen decreases from your cost, it is that diminished value at the time of the donation, and not the cost of purchase, that sets the amount of the deduction.

This begs the question: what is "fair market value?" Under IRS regulations, that value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."[1] (A slightly different formulation applies if the donated property was held as inventory). IRS Publication 561, entitled "Determining the

Value of Donated Property" (available at www.irs.gov), indicates that "[t]he cost of the property to you . . . may be the best indication of its [fair market value.]" It adds that "because conditions in the market change, the cost or selling price of property may have less weight if the property was not bought or sold reasonably close to the date of the contribution." The law thus anticipates that as time passes, it is more likely that the value of the property will differ from its acquisition price.

Publication 561 provides additional guidance for valuing "hobby collections," including "natural history items." It cautions taxpayers not to rely too much on published prices, noting that "a dealer may sell an item for much less than is shown on a price list, particularly after the item has remained unsold for a long time." (Shocking news, no doubt). Other helpful hints on how to value minerals may be drawn, by analogy, from the guide's discussion of valuing jewelry. As to such items, the IRS encourages donors to get appraisals that consider the "coloring, weight ... brilliance and flaws" in the specimen. The guide notes that while "sentimental personal value" has no effect on fair market value, "if the jewelry was owned by a famous person, its value might increase." In other words, provenance matters, as, undoubtedly, do such traditional indicia of mineral value as the size, associations and locality of the find.

So, in auditing returns, does the IRS actually focus on this valuation issue? Who knows. But, rest assured, the IRS's audit-selection formulae are more sensitive to ***large*** deductions than ***small*** ones. Evidence that this issue has periodically arisen in audits may be found in court cases involving the value of contributed minerals and gems. These cases provide us with additional guidance on how to value mineral specimens in calculating a charitable deduction.

One of them, *Chiu v. Commissioner of Internal Revenue,* 84 T.C. 722 (1985), involved an all-star cast from the mineral world, with key testimony being provided by none other than Paul Desautels, fresh off his 25-year tour as the distinguished Curator of Gems and Minerals at the Smithsonian Institution. Desautels, in fact, was still the Curator when the taxpayers in question donated a variety of specimens to the Smithsonian, among them, a sinhalite, a cat's-eye rubellite tourmaline, a couple of euclase crystals, several cerussite specimens, some wulfenite specimens and a few anglesite crystals.

The taxpayers claimed that they had acquired these specimens at significant discounts and that their values as of the time of the donation were much higher. Their claim was supported by two appraisers, as well as testimony from Desautels. As quoted in the court's opinion, Desautels testified that the mineral market was "chaotic" and that establishing actual sale prices was complicated by the fact that selling "fine mineral specimens is a very secretive business" in which "[d]ealers don't tell you" the final sales price. He added that he had never been able to wheedle "a discount greater than 30 percent from the asking price, even at a time when the dealer was under pressure to sell," noting that the "normal discount" he received was "10 percent from the asking price." These last comments actually served to doom the taxpayers, who were arguing that they had acquired their specimens at discounts of 75 to 90 percent. The court rejected the higher values placed on the specimens by Desautels and the other appraisers, choosing instead to set that value at what the taxpayers had paid.

Now, times have changed, but the moral of this story still rings true: courts tend to give more credit to the price fetched on the recent purchase of a donated mineral than on a subsequent appraisal. So, if you intend to argue that you bought your mineral at a super discount price and are now donating it at its "true" value, or that the specimen being donated has exploded in value since its purchase ("yes, the mine really did close"), be prepared to bring in heavy artillery in the form of appraisals and appraisers. Indeed, the IRS publication mentioned above warns that appraisals should carefully document any "unusual circumstances" associated with relatively short-term swings in value.

A word to the wise about appraisals and appraisers. The degree to which you must document the "fair market value" of your specimen for tax purposes hinges on the amount of the deduction claimed. Generally, if the amount claimed for an item or a group of similar items of donated property is under $5,000, an appraisal is helpful, but not required. If it is $5,000 or more, then you must get a qualified appraisal of your specimens made by a qualified appraiser and retain it for your records. And, if your deduction exceeds $500,000, then you must attach that appraisal to your return. For more information on this see IRS Publication 526, "Charitable Contributions," also available at www.irs.gov.

IRS regulations[2] shed light on what is a "qualified" appraisal and who is a "qualified" appraiser. They indicate that where an appraisal is required, it must be performed not more than 60 days before the date of contribution. Care must be taken in setting the appraisal fee; that charge cannot be what the IRS calls a "prohibited appraisal fee." According to the IRS, a "prohibited appraisal fee" is one in which some part of the fee is based on a percentage of the appraised value of the property or the amount of a deduction allowed by the IRS. (By the way, an appraisal fee, even if acceptable, cannot be deducted as a charitable contribution, but may qualify as a "miscellaneous deduction" subject to the 2 percent cap applicable to such deductions). To be a "qualified appraiser" one must meet a number of requirements in the regulations, principal among which is having verifiable education and experience in valuing the sort of property being appraised. Importantly, an appraiser generally cannot be involved in the transaction in which the donor acquired the property being appraised. (For more information see the segment on "Appraisals" in IRS Publication 561).

Tax provisions often are complex and section 170 is no exception. Those with particular issues should consult a tax professional—always a good idea given what Will Rogers once said about filling out tax returns: "Even when you make one out on the level you don't know, when it's through, if you are a Crook or a Martyr."

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[1]26 C.F.R. §1.170A-1.

[2]26 C.F.R. §1.170A-13

Collectors, Investors and Dealers

During a trip to Berlin in 1891, Mark Twain was mistaken several times for Theodor Mommsen, the eminent German historian and archeologist. Reputedly, Twain became embarrassed when, as he entered a beer hall, the assembly jumped to their feet and pounded their mugs in a toast, only later to find that he was not Mommsen, the true object of their affection. This caused Twain to comment in his diary: "Been taken for Mommsen twice. We have the same hair, but on examination it was found the brains were different."

We mineral afficionados are sometimes prone to misidentifications, particularly when it comes to identifying ourselves as a collector, an investor or a dealer. In these times of expensive rocks there is, perhaps, more tendency than ever to blur those categories. Some collectors fancy themselves as dealers, at least if it means getting into the wholesale ballrooms at Tucson. Yet, other folks who regularly sell minerals, sometimes even at shows, shrink from the notion of being called dealers. And everyone would like to be an investor—at least if that means buying low and selling high. But, lurking behind these seemingly innocent labels are tax ramifications—and, for the unwary, potentially adverse ones.

The income tax law distinguishes between collectors, investors and dealers in a variety of ways. A key provision is section 183 of the Internal Revenue Code, enacted by Congress in 1969 to deal with so-called "hobby losses"—primarily, but not exclusively, those incurred by "weekend" farmers and horse breeders. This provision substantially limits most deductions relating to "an activity not engaged in for profit"—that is, an activity relating neither to an investment nor to a trade or business. Owing to this "hobby loss" section, mineral collectors may deduct their expenses or losses only up to the amount of gross income derived from the collection activities and, even then, subject to other significant limitations in the Code (*e.g.*, to be deductible, miscellaneous deductions must exceed two percent of the taxpayer's adjusted gross income). As a result, the wide majority of collectors can neither deduct the cost of creating or maintaining their collection, nor claim any losses associated with the sale of their minerals. The Code, however, offers collectors one financial ray of hope: they may receive favorable capital gains treatment on the income produced from the sale of their minerals, provided the minerals have been held for a minimum qualifying period.

Unlike collectors, investors may deduct certain costs as expenses incurred in the production of income, and may do so even if those expenses exceed their income from selling minerals. Like collectors, investors also receive favorable capital gains treatment on income produced from the sale of minerals held for investment. Moreover, the favorable tax treatment afforded to "like-kind" exchanges in which taxpayers can swap one specimen for another, potentially tax-free, applies to investors but not collectors.

Dealers too may benefit from this like-kind exchange provision. They may also deduct their expenses as trade or business expenses. But, unlike collectors and investors, they are precluded from receiving capital gains treatment. Dealers, however, enjoy one potentially significant tax advantage unavailable to the other groups: they can not only deduct losses, but may carry net operating losses back and forward to offset income in other years. (Of course, most of them would prefer not having more losses than they can deduct in a single year!)

There are, then, potential advantages and disadvantages to each tax status. Having weighed these pros and cons, many commentators believe that investors receive the most favorable tax treatment— deductible expenses, like-kind exchanges and capital gains treatment. Be that as it may, good tax planning may allow you to maximize your tax savings, while bad tax planning can leave you in a lurch. Indeed, no tax planning might leave you with the worst of two worlds. For example, failing to take deductions to which you are fully entitled in earlier years, only to find in later years, after those deductions can no longer be taken, that the IRS has saddled you with the loss of capital gains treatment.

So, how do we tell the difference between a collector, an investor and a dealer? In its usual helpful way, the tax law answers this question with two more questions.

First, is the activity engaged in for profit? The IRS often resolves this issue by relying on a list of factors, many taken from opinions in cases involving art owners. These factors include: (1) the manner in which the taxpayer carries on the activity—with the taxpayer more likely to have a profit motive if he uses financial projections, has accounting records, or a budgets to control expenses; (2) the expertise of the taxpayer or his advisors—with taxpayers pursuing a profit likely to develop more expertise; (3) the time and effort expended by the taxpayer in carrying on the activity—with spending a great deal of time and effort a sign of a profit motive; (4) the expectation that assets used in the activity may appreciate in value—with that expectation really being at the core of a profit motive; (5) the taxpayer's history of income or losses with respect to the activity or similar activities—with long-term profitability being indicative of an intent to realize a profit; (6) the overall financial status of the taxpayer—with the existence of other large sources of income tending to suggest that the taxpayer is pursuing a hobby; and (7) whether the activity has elements of personal pleasure or recreation—with more pleasure meaning less profit motive.[1]

Now, before the last of these factors causes you to shudder, take heart, for the relevant IRS regulation hastens to add that: "[T]he fact that the taxpayer derives personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit if the activity is in fact engaged in for profit as evidenced by other factors whether or not listed." Note too that section 183(d) of the Code creates a presumption that an activity is engaged in for profit if income, in the form of a net profit, is realized from that activity over a certain number of years. These rules, however, are a bit complicated and beyond the scope of this brief column.

If the taxpayer lacks a profit motive, our inquiry is at an end; he is a collector, subject to the limitations of section 183 described above. But, if that individual passes the profit motive test, we reach the second of our queries: is he or she engaged in a trade or business? Here, we encounter yet another facts-and-circumstances test, distilled from decades of court decisions (many involving whether gambling is a trade or business). Among the factors relevant here are:

[1] *See* Treas. Reg. § 1.183-2(b).

(1) Whether the taxpayer is involved in the profit-producing activity with continuity and regularity; (2) whether the taxpayer conducts frequent or substantial sales; (3) whether the taxpayer holds himself out to others as engaged in the selling of goods and services; (4) whether profit is expected to be produced not from the long-term appreciation of the asset, but from buying the item at a lower than retail market price and selling it at a market price; and (5) whether the taxpayer maintains books and records that are consistent with conducting a business (*e.g.*, ones that reflect the carrying of an inventory). If the answer to all these questions is "yes," the taxpayer is likely in a trade or business. Yet, in practice, the standard for determining trade or business status is more like that once famously penned by Justice Potter Stewart in describing obscenity—"I know it when I see it." If it looks like a trade or business, in other words, it probably is.

If we apply the profit motive and trade or business tests in tandem, we get the following three definitions:

(1) If you lack a profit motive, you are a ***collector***.

(2) If you have a profit motive, but are not in a trade or business, you are an ***investor***.

(3) If you have a profit motive and are in a trade or business, you are a ***dealer***.

Sound simple? Let's put these twin tests to work on a hypothetical case: Assume that Mr. Primorsky Nikolai occasionally travels to Europe to buy large Dalnegorsk collections. He retains the best specimens for himself, and then resells the rest, in a lot, to a friendly dealer. Sometimes, he makes a profit on these deals, but his financial goal is to come out even, that is, to sell the collection (minus the culled specimens) for about the price he bought it. Mr. Nikolai does not hold himself out as a mineral dealer. He sometimes runs ads that read: "Collector buys very fine Dalnegorsk collections. Top prices paid." He has no current intentions of selling his world-class Dalnegorsk collection. Indeed, while he periodically buys individual specimens directly from dealers, he rarely sells any of his own, even though most of them have greatly appreciated in value.

So what is Mr. Nikolai? A collector? An investor? Perhaps a dealer? Applying the factors above, we can surmise that he is most likely a collector. He appears to be motivated primarily by personal pleasure and does not appear to have a dominant profit motive—at least one that is reflected in his dealings. Because he does not have a profit motive, we need not look at the second test posed above— whether he is in a trade or business. But, looking at all the factors listed above, you can see how his tax status might be different if we modified the hypothetical situation a bit. What if, for example, Mr. Nikolai plans to sell his collection to fund his retirement, and has made financial and budget projections on that basis, seeking advice periodically from experts on the value of Dalnegorsk minerals? What if he keeps a detailed inventory of his collection and, to track the appreciation of his specimens, logs the results of comparable sales or auctions on the internet? What if he has no other significant source of income and, every few months, sells off several duplicate specimens that have particularly appreciated to realize some spending money? With a few tweaks of our hypothetical situation, then, we can improve the case for classifying Mr. Nikolai as an investor.

The astute among you (more likely, the self-interested) are probably asking by now: can a single taxpayer be a collector as to some minerals and an investor or dealer as to

others? The answer is a resounding—maybe. The limitation in section 183 applies to "an" activity. In defining the quoted phrase, the IRS regulations[2] state that "where the taxpayer is engaged in several undertakings, each of these may be a separate activity, or several undertakings may constitute one activity." They further advise that "[g]enerally, the most significant facts and circumstances in making this determination are the degree of organizational and economic interrelationship of various undertakings, the business purpose which is (or might be) served by carrying on the various undertakings separately or together in a trade or business or in an investment setting, and the similarity of various undertakings."

Finally, the regulations make clear that while the Commissioner generally accepts a taxpayer's characterization of several undertakings as being a single activity or separate activities, that characterization will be rejected if it is "artificial" and "cannot be reasonably supported under the facts and circumstances of the case." The cases in this area—many of which involve farmers who held some land for cultivation and other land for investment—suggest that, at a minimum, if you are going to hold some specimens for investment and others in a collection or inventory, your recordkeeping should plainly reflect that difference. And those differences should also be reflected on your tax returns, which should report income and deductions, from year to year, that are consistent with your dual tax status.

Yes, there are limits to tax planning. Many of the basic facts that reflect who we are and what we do cannot easily be altered. Nonetheless, the moral of the story is that you should be aware of your tax status (or desired tax status) and plan and act accordingly, particularly, in avoiding activities that might cloud your status and, especially, in maintaining appropriate books and records. So, if you are an investor or collector, you might want to consider whether getting a full-fledged business license (and a business card to match) really are worth increasing the odds that the IRS will treat you as a dealer. Better yet, if you are going to expend significant dollars on mineral specimens or accumulate a collection that has become quite valuable, take some time to sit down with a tax professional and develop a long-term plan. Depending on your age, that plan might be dominated by estate tax considerations. Having that plan is going to be particularly critical if you want to convince the IRS (or, heaven forbid, a judge) that you are holding some specimens in a collection and others to produce income.

So, the next time someone at the Tucson Show starts a friendly conversation by asking you whether you are a collector or dealer, think twice (and maybe ask to see credentials!). Better yet, if you are serious about your minerals, take a few moments before you go to your next show to do a little tax planning. If you don't, you might some day encounter the IRS revenue agent who once said: "The trick is to stop thinking of it as '***your***' money."

"My Word is My Bond"

[2] Treas. Reg. § 1.183-1(d)(1)

"A verbal contract isn't worth the paper it's written on." So said Samuel Goldwyn, the film mogul from the 1920s and 1930s. Alas, poor Sam spoke from experience, as he had been forced out by his partners before they founded a new studio that ironically bore his name—you know it as Metro-***Goldwyn***-Mayer or MGM.

Now, you might think that with this bit of scandalous history and hundreds of millions of dollars at issue, oral contracts in Hollywood would be rarer than blue-capped tourmalines—and you would be wrong! Owing to the fast-paced and creative nature of the moviemaking industry, artists, studios and financiers often still rely on handshake deals. And, they are not alone. To this day, it is common in New York City for diamond merchants to conclude an agreement with a handshake and the formal words *mazel u'bracha* ("luck and blessings"). Likewise, a recent study found that more than half the farm leasing contracts in Nebraska and South Dakota were still unwritten. Oral agreements still prevail on many stock exchanges, including the London Stock Exchange, whose motto, *dictum meum pactum,* is quoted (albeit in English) as the title of this installment. And, of course, oral agreements and mutual understandings are extremely common in the world of mineral collecting and mineral dealing.

So, this might persuade you to think that the law is very tolerant of oral contracts—and again you would be wrong! (My fault, of course). Because there are many thorny evidentiary problems associated with enforcing oral contracts, legislatures and judges show a strong preference for written contracts. These preferences ordinarily are reflected in state law, for it is that law, rather than federal law, which controls most contract disputes. These preferences arise both in statutes and in state "common law"—the latter constituting the body of legal customs and traditions derived from past judicial decisions.

So what are some of these legal preferences for written contracts? Some take the form of so-called "Statutes of Frauds." The first such statute was passed by the British Parliament way back in 1677. In modern form, these statutes commonly require that contracts, which cannot by their terms be performed within a year, be in writing and signed in order to be enforceable. The U.S. Uniform Commercial Code—a set of sample provisions drafted by legal experts that often are used by state legislatures as models for new laws—contains a Statute of Frauds provision for the sale of goods, requiring that all contracts for the sale of goods in excess of $500 be accompanied by a signed document as evidence of the sale to be enforced. Some state legislatures (including Arizona's) have relaxed this rule somewhat, particularly in situations in which the goods purchased are immediately transferred.[1] Nonetheless, potential bargainers are well-advised to be aware of the Statute of Frauds in the state in which they plan to transact business, particularly if they anticipate a long-term deal.

Next, we have "parol evidence rules." These rules take two forms—some come from statutes, while others derive solely from the common law. Under these rules, a written document takes precedence over any oral agreements entered into prior to the adoption of the writing and renders the oral agreements unenforceable. This rule can cause problems for the unwary, particularly when one contracting party thinks that a subsequent written agreement merely supplements a prior oral agreement, and the other party thinks that the written agreement totally replaces that earlier contract.

We are not done. State law also tends to favor written contracts in terms of the amount of time given a party to file suit for a breach of a contract—an issue controlled by what are known as statutes of limitations. In many states, the prescribed limitations periods are longer for written contracts than oral ones. Under California law, for example, the statute of limitations for filing a breach of contract action is four years for a written contract, but only two years for an oral one. Some states, moreover, limit the types of judicial remedies that are available for a breach of contract depending upon whether the contract is written or oral. For example, some states permit a court to order the breaching party to perform a contract only if it is in writing; the party suing upon a breach of an oral contract is limited to damages. This distinction might be critical if what you want, in your breach of contract action, is the specimen you paid for (which has substantially increased in value since the purchase), rather than your money back.

With the legal deck stacked so heavily in favor of written contracts, why are "handshake deals" still so prevalent in certain quarters, even in high-priced deals? There are several reasons. First, most business deals are relatively short and simple. The typical retail sale of a mineral, for example, involves a quick exchange of the specimen for cash and thus is not impacted by laws like the Statute of Frauds. That sort of basic transaction also can trigger consumer protection laws that provide additional safeguards to the buyer, including several implied warranties (more on that in a later column). Second, in many transactions, the benefits associated with having a written contract are simply outweighed by the costs of having such an agreement prepared—costs framed either in terms of the expense associated with having an agreement drafted or of the opportunities lost while that drafting process occurs. In practical terms, it probably makes little sense to pay $1,000 or more to develop even the simplest of written contracts unless the financial exposure in the deal is substantial.

Care must also be taken in drafting those written contracts. This is not the time for "lunch hour law" (in law, you almost always get what you pay for). The law books, indeed, are brimming with cases in which poorly drafted agreements created problems that might have been avoided had the parties proceeded with a handshake.

Yet, these factors do not explain why some parties continue to use oral contracts for very large deals—those involving hundreds of thousands, if not millions of dollars. As it turns out, the use of these oral contracts often is promoted by the availability of effective non-legal enforcement mechanisms within relatively small and close-knit communities—communities in which a loss of reputation, occasioned by a breach of contract, means the certain death of a business. But, even in such communities, it is not always easy to tell who is in the right and who is in the wrong. That is why it is common in some industries for trade associations or other similar bodies to assist in resolving disputes among parties. Those alternative arbitration or resolution mechanisms, if well-administered and fair, have the potential for reducing transaction costs for everyone involved. With the advent of very highly priced "trophy rocks," a few mineral dealers have argued that such an association should be established in the mineral world. But, as yet, this is not a reality.

So where does this leave us? Without accounting for every idiosyncratic aspect of a given state's laws, there is at least significant indication that the wide majority of individual mineral sales, particularly those that involve no extended terms or complicated

financial arrangements, need not be accompanied by a formal written contract. Under most state laws, a simple receipt will suffice. Beyond that, there is no easy answer. Certainly, parties contemplating a large deal ought to have some basic knowledge of the law, as there may be some circumstances in which an oral contract is simply unenforceable. Beyond this, the parties might want to conduct a cost-benefit analysis to determine whether it makes sense to have a written agreement prepared. Large dollar amounts and special financing or marketing arrangements, particularly those that extend over time, ought to tip the scale more in favor of having a written agreement. At the least, the presence of such features suggests that the oral agreement ought to be evidenced *somehow*—a check stub, a list of specimens, or even a sentence or two on a napkin is better than nothing. (Remember, in court, it is not what you know, but what you can prove.)

Even in the largest deals, however, you might encounter that proud soul who will react indignantly to any request for a written agreement, saying, in so many words: "Why? Don't you trust me?" And, in most situations, particularly where professional reputations are at stake, perhaps it is fine to extend a hand of trust and forego the written document. But, before you feel too guilty about insisting on something in writing, keep in mind a couple of last thoughts.

First, remember what Ralph Waldo Emerson once wrote: "All sensible people are selfish, and nature is tugging at every contract to make the terms of it fair." A student of human nature, Emerson apparently understood that perceptions of the fairness of a contract often shift over time—and with those shifting views often come misunderstandings as to what was originally agreed. To paraphrase Emerson, it is one thing to have our selfish human nature "tugging" at the clauses of a written contract, and quite another to have that happen with only the fuzzy recollections of an oral contract. (It never ceases to amaze me how recollections of the same conversation can so differ when people get into court.)

Second, before extending your hand, picture in your mind one of those cell phone commercials—you know, the ones in which friends and family are surrounded by a crowd of folks in white hard hats and red jumpsuits. Imagine that the crowd standing behind the person with whom you are about to deal represents his creditors and business partners. Because, in the end, it might not be the smiling person who is extending his hand to you, but one of the folks in that crowd (sans the red jumpsuit) who you will be facing when you try to explain why that flashy Kongsberg silver, about to be sold as collateral for a loan, actually belongs to you under an oral agreement. As Sam Goldwyn probably figured out, a friendly handshake sometimes is nothing more than an invitation to a round of arm-wrestling later in the courts.

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[1] *See* Arizona Rev. Stat. 44-101.4.

Specimen Defamation

“A lie can travel halfway around the world,” Mark Twain once wrote, “while the truth is putting on its shoes.” Anyone who has spent much time roaming about a major mineral show knows this. It is not unusual to have some rumor making the rounds: “Have you seen those Chinese silvers – they are molded and bent by little kids in Tianjin.” “He’s got a bunch of specimens marked as smithsonite from the Kelly Mine, but everyone knows they are hemimorphites from Wenshan.” “That azurite most certainly is not from Bisbee.”

Sometimes, the rumors are true. Other times, they are not. Oftentimes, the rumor is obviously part of a whispering campaign directed at the seller, perhaps with the intent of besmirching his business reputation. And with minerals fetching high prices, such rumors can be harmful, both personally and financially. So harmful, indeed, that what we are calling a “rumor” may be more accurately described, under the law, as “defamation”—also known, in various state laws, as calumny, vilification, slander (for spoken words), libel (for written words), or even product disparagement.

So what’s an injured party to do? There’s always that Roman maxim, *In ius voco spurious* (“I speak the law to the illegitimate”). You probably know it as: “Sue the b___tard!” But, before we rush to the conclusion that every “rumor” is an excuse for a lawsuit, let’s cover a few basics, beginning with the elements of the so-called defamation torts (a “tort” is a civil wrong, other than a breach of contract, for which the law provides a remedy, usually in the form of damages).

State law controls the definition of these torts and that means there are some local variations. But, generally speaking, these torts have the following features:

(1) The comment must be of an injurious character.
(2) It must be false (“Truth is an absolute defense”).
(3) It must be communicated to a third party in circumstances where it is reasonably foreseeable that it would be relied upon as true.
(4) The publication of the comment must result in a financial loss.
(5) Statements of opinion are generally not actionable.

At this point, the laws of the various states diverge. Most formulations of these torts require the defendant to have *wrongful intent.* But, in some instances, that person must know that the comment was false or act with reckless disregard of its truth or falsity, whereas in others, mere negligence is sufficient. Generally, the law requires a greater showing of culpability (*e.g.*, that the defendant knew the comment was false) where the impact of the comment is financially limited, for example, where the comment is directed at a particular specimen; and a lesser showing where the potential harm is broader, as where the comment is directed at an entire business. Indeed, in some states, to prevail on a claim of product disparagement, a plaintiff must show that the statement was made with malice—a specific intent to harm. Substantial state variation also occurs in terms of proof of damages. Many states require that a plaintiff show that his or her damages were the natural and immediate consequence of the disparaging statement, a tough standard to meet. On the other hand, some states presume the existence of a basic level of damages if the statement impugns the integrity of the entire business.

Although there may have been such cases in the past, research has revealed no published opinions involving defamation and mineral specimens. The casebooks, however, are replete with decisions involving other collectibles, particularly art work, and especially cases involving auction houses, appraisers and critics. Importantly, these cases—among them *Hahn v. Duveen*, a famous dispute over the authenticity of an alleged DaVinci painting—draw distinctions between statements of fact and of opinion. As mentioned above (item 5), statements of opinion are generally not actionable, and some cases may invoke the First Amendment. The distinction between fact and opinion may be relevant when the comment made is that someone "thinks" a mineral is fake or misrepresented. But, take care, for at least some state courts have held that an opinion that implies that the speaker is privy to undisclosed facts (a so-called "mixed opinion") may still be actionable.

More recent cases add a novel twist: the possible application of federal trademark law, also known as the Lanham Act. The Act includes a provision that prohibits any use of a description or representation in commercial advertising or promotion that "misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods." Damages have been assessed under this provision in cases in which published statements wrongly accused a work of being inauthentic or were viewed as impugning the integrity of a collection or collector. While the keen observer may have noted that this statute appears to be geared toward advertising, the world of the Internet likely has caused that distinction to be a bit fuzzier than it was before.

Legal niceties aside, there are some practical aspects that one should consider when deciding whether or not to sue (or even to threaten to sue). Consider three famous libel cases:

(1) *Marquis of Queensberry v. Oscar Wilde* (1895). Wilde, the Irish playwright, brought a libel suit against the Marquis (of boxing rules fame) because the latter had publicly claimed that Wilde was a "ponce and a sodomite." During the trial, Wilde's carnal exploits were thoroughly explored. Newspapers in the United States and England reported on these lurid details of the testimony, creating an international sensation. The Marquis not only won the suit, but, based on the revelations at trial, Wilde was subsequently convicted on criminal charges and sentenced to two years at hard labor.

(2) *Whistler v. Ruskin* (1878). Oxford poet John Ruskin (who was also a famous mineral collector) wrote a review about a painting by American artist, James McNeil Whistler, in which Ruskin stated: "I never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face." Whistler sued Ruskin for 1,000 pounds. The jury found against Ruskin—but awarded Whistler a mere farthing (¼ of a penny). Soon after the award, Whistler was forced to declare bankruptcy, causing one historian to observe: "it would have been much wiser on Mr. Whistler's part to feign indifference."

(2) *Collier v. Postum* (1907). Charles Post claimed that eating his company's Grape Nuts breakfast cereal would avoid "the necessity of an operation for appendicitis."

Robert Collier, publisher of Collier's magazine, called this "potentially deadly lying." Post responded with an advertising blitz aimed at Collier's. Collier's sued Post for libel and was awarded $50,000, at that time, the largest verdict ever returned in New York City. However, the judgment—which *The New York Times* had characterized as an "important victory over the forces of fraud"—was later reversed on appeal for violation of a procedural rule and, after being remanded to the trial court, the case languished and eventually was dismissed.

Each of these cases represents a mini-documentary on what can go wrong with a lawsuit.

Because truth is always a defense in defamation-type cases, anyone thinking of suing ought to consider (as poor Oscar Wilde failed to do) the prospect of having intimate details of one's dealings revealed in court. While there are limitations on how far a court will go, the standard employed in conducting "discovery" (the pretrial process of obtaining documents, admissions and testimony from an opponent) allows the opponent to probe not only for facts relevant to a case, but to obtain any documents or testimony that might lead to such relevant facts. Consequently, if there is any doubt as to the truth of the rumor or anything embarrassing (or worse) that might be revealed during discovery, a potential plaintiff should think twice before suing.

Furthermore, while anyone who has been unfairly impugned will naturally thirst for vindication, one seeking to sue should always conduct a basic cost/benefit analysis first. Sometimes, in trying to settle a case, I will bring a baseball bat to a meeting with the parties. I tell them that litigation is like getting hit in the head with that bat—for both the loser ***and*** the winner. A good attorney may be able to estimate your damages based upon verdict surveys, and any attorney ought to be able to give you a ballpark estimate of the costs of litigation. Generally, it would be a good thing if the former was larger than the latter—and considerably so, to account for the fact that recoveries tend to be overestimated and costs underestimated. Fail to ask about those numbers and you might find yourself like poor Whistler.

And then there are those procedural hurdles, like the one that apparently tripped up Mr. Collier. The problem, generally, is not a "technicality"; most lawyers worth their salt do not make those types of mistakes. That said, in court, there are rules that must be complied with. Among these is a detailed set of evidence rules that govern what is admissible in court. These rules are the prism through which you must view the potential evidence in your case. And if you are relying on a lot of hearsay (e.g. a statement from a third party introduced to prove the truth of the matter asserted) or other weak evidence, you may find your path to recovery blocked.

This all suggests that a person contemplating suing someone over a negative comment may want to consider other alternatives first. Perhaps an old-fashioned, face-to-face conversation; or perhaps the mediation of such disputes could be another task for a future mineral dealers' trade association. At the least, you might want to consider the old Chinese proverb: "Slander cannot destroy an honest man; when the flood recedes the rock is there." While this saying probably did not come from a mineral dealer, in the

mineral world, as in other pursuits, true quality and professionalism tend to shine out and, over time, burn away the fog of even the most pernicious whispering campaign.

[1] 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929).
[2] 15 U.S.C. § 1125(a).
[3] Ruskin's mineral collection, also known as the Guild of St. George Collection, was acquired during his European travels. Parts of his collection are still displayed at the Museum in Sheffield, England.
See http://www.museums-sheffield.org.uk/coresite/html/ruskinc.asp.

Warranties

Nary a mineral collector is unfamiliar with Washington Roebling. The public identifies him with the Brooklyn Bridge, as the one who supervised its construction. Mineral collectors, however, are more apt to know Roebling for something else – the phenomenal mineral collection that he assembled and that eventually passed to the Smithsonian Institution.

How many of you, though, have heard of George Parker and William McCloundy? Famous mineral collectors? No. Vaunted mineral dealers? Nope. They were con men, who, in the early 1900s, made their living selling New York City's landmarks to unwary immigrants. And their favorite "inventory" item was – Roebling's own Brooklyn Bridge, which they "sold," on average, twice a week. New York's finest often became aware that Parker or McCloundy (who was also known as "I.O.U. O'Brien") had struck again when some unsuspecting soul set up a barrier on the bridge to collect tolls. Both Parker and McCloundy eventually took a trip over another bridge – one over the Hudson – to Sing Sing, where they spent much of their remaining days. In criminal court, they were convicted of fraud. But, civilly speaking, these tricksters violated a number of contractual warranties when they sold something that they did not own.

When you and I buy a mineral, we make certain assumptions, and pretty fundamental ones – that the dealer has the right to sell us that mineral specimen, and that the specimen is accurately described in terms of its location, provenance, and repair status. For centuries, the law has given assumptions like these legal standing, in the form of something called warranties.

So what are warranties? Let's start with some basic definitions. A warranty is a promise made by one party in a transaction to the other that certain facts or conditions are true. These promises can be either express or implied. Express warranties are made in writing or verbally – they are explicit. Implied warranties, by contrast, are presumed to exist under the law, even if they are never discussed by the parties. They arise by operation of the law, based upon the parties' unstated expectations – like the assumption that a dealer has a right to sell a specimen. A breach of a warranty – whether it is express or implied – can give rise to a suit for damages that is ordinarily filed in state court.

The Uniform Commercial Code – commonly known as the UCC – describes these warranties in great detail. The UCC is a set of model laws drafted by commercial law experts that establishes the "rules of the road" for the sale of goods. Every state has adopted the UCC (albeit with some slight variations) [1]. Under the UCC's sweeping definitions, minerals qualify as "goods," mineral dealers are "sellers" or "merchants," and mineral purchasers are "buyers." The UCC is important for at least two reasons. First, it aids buyers, sellers and, where necessary, courts, in deciding whether particular written or oral statements give rise to express warranties. Second, it creates a set of implied warranties that apply in most sales transactions, including those involving minerals.

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[1] For a copy of the UCC see http://www.law.cornell.edu/ucc/1; for a table showing how the States have implemented the UCC, see http://www.law.cornell.edu/uniform/ucc.html.

Under the UCC, "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." The UCC emphasizes that "it is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty," but it cautions that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

Cases involving precious artwork provide indication as to how these rules might apply to minerals. These cases suggest that it may be difficult to apply these rules to the sale of a mineral because a dealer's statement that a specimen comes from a particular location or is unrepaired often is viewed as nothing more than an educated opinion, unless the dealer knows the relevant facts first-hand. Several cases have dealt with whether an express warranty arose when a dealer made a representation regarding the authenticity of an art object – that a painting was a Picasso, for example. In these cases, the purchaser later found out that the object was a fake and sued the dealer to rescind the transaction and recover the purchase price. Sometimes, courts have declined to hold that art catalogs listing a painting as being the work of a particular artist gave rise to an express warranty, instead treating the catalog listing as a mere opinion. In other instances, though, courts have held that similar representations created warranties. What distinguishes these cases? Well, in the latter group, the courts found that a reasonable investigation would have revealed the fakery and held that the dealer's failure to substantiate the provenance would allow for a rescission of the sale with a refund of the purchase price (plus interest). Of course, all these cases arose because the dealer, when first approached, refused to take the artwork back – and one would hope that a reputable mineral dealer would not behave in this fashion.

So, let's say a dealer has a label indicating that a particular amazonite/smoky quartz combination comes from a particular mine in Colorado and is unrepaired. If the dealer is the miner, there is little doubt that the law would find that the label gives rise to an

express warranty to which the specimen must conform. If the dealer is not the miner or perhaps someone who bought the specimen at the mine, resolution of whether the label gives rise to an express warranty may depend on whether a reasonable investigation would reveal the true location of the specimen or its repair status.

At least one of the implied warranties recognized by the UCC is important in mineral transactions. UCC section 2-312 indicates that in every sale, there is an implied warranty that "the title conveyed shall be good and its transfer rightful" and that "the goods shall be delivered free from any security interests or other lien . . . of which the buyer at the time of the contracting has no knowledge." Often, this implied warranty of title comes up when the goods sold are later claimed by a third party or are seized by law enforcement officers as stolen property. Notably, a number of state courts have held that this implied warranty is breached – and the purchaser may sue the seller – if substantial doubts arise as to the purchaser's title. As one commentator remarked about the sale of a painting, "the buyer did not purchase a lawsuit, he purchased a painting."

So, let's say the same dealer as above sells that same amazonite/smoky quartz cluster and that, thereafter, a third party claims ownership. UCC section 2-312 gives the purchaser the right to bring the dealer into the dispute – he or she cannot stand aside and say, in effect, to the purchaser – "that's your problem." Whether the purchaser can proceed against the dealer to rescind the transaction depends upon how the relevant state has interpreted the UCC, but there is little doubt that if the purchaser ultimately must make amends to the true owner, he or she may proceed against the dealer for breach of warranty.

The UCC gives rise to other implied warranties that could be relevant in some mineral transactions. UCC section 2-314, for example, states that, unless modified by the parties, "a warranty that goods shall be merchantable, is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." And UCC section 2-315 provides that if a seller has reason to know the buyer intends to use the goods for a "particular purpose" and that the buyer is relying upon the seller's skill or judgment to furnish suitable goods for that purpose, then an implied warranty that the goods shall be fit for such purpose arises.

But, be careful before jumping to conclusions about these warranties. For example, some courts have held that the implied warranty of merchantability in section 2-314 is not violated where a forgery is sold because the ordinary purpose to which artwork is put is to be displayed for its aesthetic appeal – and a forgery suffices for this purpose. One can imagine this same rationale being applied to certain mineral specimens (*e.g.*, display specimens). Other courts have held that the implied warranty under section 2-315 only applies where the "particular purpose" expressed is "peculiar" and not the ordinary purpose for which goods in question are used. (I will leave to your imagination what is a "peculiar" purpose for buying a mineral specimen.)

Legally speaking, the warranties created by the UCC have, for the most part, rendered that old Latin maxim, *caveat emptor* ("buyer beware"), obsolete. But, more practically, no one wants to buy a lawsuit instead of a mineral specimen. Moreover, the existence of these warranties is not an invitation to file a lawsuit. These duties and corresponding rights have been created not with the goal of producing litigation, but with the

expectation that, unlike Messrs. Parker or McCloundy, parties will conform their conduct with the law. Good business practices and a desire to preserve their reputations, of course, lead most dealers to do the right thing, even without the threat of a lawsuit.

Now, if the story of Parker and McCloundy sounds familiar, it may be because you once saw the 1937 movie, “Every Day’s a Holiday.” In that film, the character Peaches O’Day sells the Brooklyn Bridge to a gullible fellow, who receives a bill of sale from her stating “One Bridge, in good condition.” And who played the curvaceous Peaches? The indomitable Mae West – perhaps one of many roles (on and off the stage) she had in mind when she uttered her famous line, “[i]t ain’t sin if you crack a few laws now and then, just so long as you don’t break any.”

Estate Planning for Your Collection

“You can’t take it with you.” “You can’t . . .” Jerking awake on your favorite couch, you realize it is well past midnight and you have been “watching” an old black-and-white film. You roll back the DVR and see Lionel Barrymore, playing some grandfatherly figure, telling an annoyed and youthful Jimmy Stewart—“You can’t take it with you, Mr. Kirby. So what good is it? As near as I can see, the only thing you can take with you is the love of your friends.” At that moment, you lift your eyes a bit and see, nattily displayed on the shelves above your set, your treasured mineral collection, and you wonder: “you can’t take it with you . . . so, what good is it?”

Sooner or later, every collector must contemplate the fate of his or her collection. For some, the solution will be a donation to a museum. For many—particularly those for whom their collection has become not just a treasured possession, but treasure ($$$)—the inclination is to sell off those specimens, to spare one’s heirs the task of having to liquidate what, for them, may be a “bunch of pretty rocks.” But, does this really make sense (for US residents), given the current state of the law?

To be sure, the law in this area is sort of like the weather: if you don’t like it, wait a few minutes and it will change. But, in fact, unique opportunities exist in the estate planning arena for 2012, options that many mineral collectors ought to consider.

Under Federal law, the estate tax and gift tax are linked. The calculation of those taxes is somewhat similar to that of the Federal income tax. The law first describes what is taxed, with the primary focus being on the transfer of property, including money. From the value of that transferred property, the law allows for exemptions, deductions and credits. The gift and estate taxes are integrated to prevent someone from escaping the latter tax by giving away all his property. To be sure, history tells us (and we will see what Congress does) that very few people have to pay these taxes. (Of course, very few people also have several hundred thousand dollars of fluorite specimens lying around.)

So why is 2012 a special year for these taxes? Prior to 2011, you could give away $1 million over a lifetime (as well as much smaller annual gifts) without triggering the gift tax. But, for 2012—and, as far as we know, never again—that gift exemption is

$5,120,000. For a married couple, the exemption is doubled. So, *for the remainder of 2012*, a couple can give away cash or assets using a lifetime exemption of **$10,240,000**!

For some individuals, this increased lifetime exemption offers a unique opportunity to give away all or a significant portion of their collection to their heirs without paying either a gift tax or an estate tax. But, there are other points, including income tax issues, to think about. Consider the following example:

"Galena" Sam McQuirk is 75 years old and has been seriously collecting minerals since he first went to the Tucson show in 1955. Over the years, he has invested about $200,000 in his collection, which now has a market value of $4 million. Though the collection is Sam's pride and joy, he is a little concerned that his children may not fully appreciate its value; when Sam recently showed his eldest son, George, a spectacular crystallized silver from Kongsberg, George wondered aloud how much it would be worth melted down. Sam, of course, cringed.

Sam recently visited his attorney and was startled to learn that his collection could add $2 million or more to the estate tax bill that will be triggered when he and his wife, Sally, both pass away. His attorney pointed out that the more the collection appreciates between now and when Sam and Sally die, the greater that estate tax bill could be. Aware of the current gift exemption, Sam's attorney suggests that he give away some or all of his collection to his family, and thereby likely avoid a hefty estate tax bill. Sam, though, remains concerned that his children may not appreciate the collection and will sell off the pieces at a bargain discount to the first *sarcoramphus papa** who comes through the door. Sam, moreover, would like to continue to enjoy his collection, even if he no longer owns it, but his attorney informs him that he cannot make a "gift" of the collection and retain possession of it too.

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*Vulture.

Hoping for a solution, Sam goes to his accountant and is now even more confused. His accountant points out that under the Federal income tax law, if his minerals remain part of his estate and are passed to Sally, they will receive a free "step-up" in basis. By way of an example, the accountant points out that a Tsumeb azurite that Sam purchased for $200 is now worth $40,000. If Sam sold the specimen for that price, he would be liable for income tax on the difference between the $40,000 sales price and the $200 "basis." If, however, Sam died tomorrow and willed the specimen to Sally, his wife not only would avoid the estate tax (an individual is generally not subject to that tax on what he or she receives from a spouse) but also would avoid the income tax too because the specimen's basis would be "stepped up" to its value at the time of Sam's death. Under this scenario, if Sally sold the specimen, she would be liable for income tax only on the difference between the sales price and a stepped-up $40,000 basis. If Sam willed the minerals to his children, they would have to pay the estate tax, but would also get the stepped-up bases to be used should they later sell the specimens. On the other hand, if Sally receives the minerals from Sam's estate, does not sell them herself and wills them

to their children, no "step-up" will have occurred, leaving the possibility that a hefty estate tax will be owed.

The accountant points out one more very important detail: if Sam follows his attorney's advice and, taking advantage of the gift tax exemption described above, gives the minerals to his children, they will not get a step-up in basis either. Under the law, his children can receive the minerals without triggering the gift tax, to be sure, but they will have to pay the full freight, when it comes to the income tax, should they later sell the minerals.

Now, if this example makes you a little dizzy or uncomfortable, that's probably good. In fact, there are no "easy answers" when it comes to deciding whether to retain a mineral collection or take advantage of this year's enhanced gifting exemption. Making this decision requires careful analysis from both an income and estate/gift tax perspective. You may want to get some advice on which course will produce the best overall result for you—and do so now.

But let's not overlook Sam's biggest concerns regarding the fate of his collection: that it will be squandered. Let's presume that Sam's collection is not worth millions of dollars, but is still among the most valuable assets he has, and that he wants to continue to enjoy the collection until he dies and then pass it along to his wife or children, particularly now that he understands the income tax benefits of having his wife or children (rather than him) sell the minerals with a stepped-up basis.

To accomplish these goals, Sam might want to create a Limited Liability Company (LLC) to which he can convey his collection in exchange for units of interest (like shares). Under the LLC's Operating Agreement, Sam can serve as the initial manager of that LLC and, in that capacity, make all the day-to-day decisions regarding his collection. If Sam wants to start giving his children an interest in the collection, he can do so easily by signing over units to them. (Once he starts doing this, however, Sam will need to check back with his tax professional regarding where the minerals will be housed, as that could prove important for estate and gift tax purposes). Or Sam can hold the LLC units and pass the units, rather than the collection itself, to his heirs. In either scenario, the Operating Agreement, which will remain binding after he dies, can limit or condition the ability of the children to sell their units to strangers. It can also limit the ability of the unit holders to sell the minerals at all—perhaps requiring that holders of 75 percent or more of the units agree before any part of the collection is sold. The agreement can also appoint a specific individual to take Sam's place as the manager, if he dies or becomes disabled—a person (not a *sarcoramphus papa*) who Sam particularly trusts and who is knowledgeable about minerals. The point is that by using a LLC, Sam can both pass the minerals along to his heirs and make sure that they truly enjoy the benefits associated with his collection.

By the way, various of the planning devices discussed above also apply to the LLC. For example, Sam can give the units of the LLC away and at least potentially take advantage of the gift tax exemption (assuming he is willing to move the minerals to a location that he does not own or control). He can also hold the units and, when he dies, pass them to his heirs at a stepped-up basis (reflecting the death value of the assets, *i.e.*,

the minerals) held by the LLC. (Sam might also considering using a trust—but that topic is beyond the scope of this article.)

True, "you can't take it with you." (And as a pundit observed to one curmudgeonly collector, "and where you going, the sulfides would melt anyhow!") But, you can make sure that your family and friends enjoy the fruits of your passion and efforts. It just takes a little planning (and *soon*, if you want to take advantage of that special 2012 exemption.