

# Litigators of the Week: After a 74-Day Trial, Shook Fends Off Claims From Artist's Heirs Against UMB Bank

By Ross Todd

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Lawyers for the heirs of Thomas Hart Benton—an artist at the forefront of the Regionalist movement—were seeking hundreds of millions of dollars from UMB Bank at trial last year. They claimed the bank mismanaged the family trust Benton and his wife set up to benefit his children and grandchildren and lost more than 100 of his works.

But after a bench trial conducted over 74 days last year, Circuit Judge Mark Styles Jr. in Kansas City, Missouri, awarded just \$35,000 for five works unaccounted for by the bank.

“UMB was tasked by Benton to help grow and establish his legacy as a world renowned artist after his death,” wrote Styles in the judgment handed down last week. “The evidence established UMB accomplished Benton’s wishes and desires.”

Our Litigators of the Week are UMB’s defense team led by **Todd Ruskamp, Patrick Kenney** and **Russell Shankland** of **Shook, Hardy & Bacon**.

**Lit Daily: Who was your client and what was at stake here?**

Pat Kenney: Our client was UMB Bank, N.A. At stake in the lawsuit was the work of numerous UMB



Courtesy photos

**(l-r) Todd Ruskamp, Patrick Kenney, and Russell Shankland of Shook, Hardy & Bacon.**

employees over 40-plus years in administering the trust created by the great American artist Thomas Hart Benton and his wife Rita Benton. Tom and Rita Benton established the trust for the benefit of their children and grandchildren, the plaintiffs. Plaintiffs alleged that UMB mismanaged the trust in three areas: (1) sale and management of the fine art held in the trust; (2) exploitation of copyrights for Benton’s artworks; and, (3) investment of the non-art assets held in the trust.

In 1979, when the trust was established, the trust held over 3,000 original works of fine art.

The collection included several hundred paintings, including many of Benton's most significant works. The collection also included hundreds of works-on-paper (watercolors and drawings), thousands of lithographs, and a small collection of works by Benton's students and friends. In addition to the fine art, the trust held archival materials from the Bentons and real estate in three states.

At trial, the plaintiffs sought in excess of \$500 million in damages. Plaintiffs also asked the court to invalidate hundreds of sales of art from the trust or award damages equivalent to the current fair market value for the pieces sold. Finally, plaintiffs requested appreciation and "make whole" or "plus up" damages to cover changes in value over time and to reimburse any tax consequences from any judgment entered by the court.

The court's judgment awarded plaintiffs \$35,000 and no other relief.

#### **How did this matter come to you and the firm?**

Todd Ruskamp: UMB contacted us based on our prior work in significant trust and fiduciary litigation matters for various financial services and trust companies.

**74 trial days. A 14,000-plus page trial transcript. 67 witnesses. About 3,700 exhibits. Why was this trial so complex?**

Kenney: The court's judgment explained the complexity inherent in this case. As the court notes, the disputes covered a time span of over four decades of trust administration by UMB. The court also notes that this was, in essence, four lawsuits in one case: (1) a lawsuit over fine art sales and practices; (2) a trust administration and accounting lawsuit; (3) a lawsuit regarding the monetization of alleged copyrights; and, (4) claims related to the trust's marketable securities portfolio. In each of these areas, the claims were complex, but the court gave the parties the trial time necessary to present the relevant evidence. The fine art portion

of the case illustrates the complexity of the claims and defenses. Claims at issue implicated specialized areas in fine art including inventory and curation practices, sales practices, appraisal practices and standards, promotion of the art and the artist, and alleged conflicts of interest in connection with particular art sales.

**What were your key themes and how did you try to drive them home throughout the trial?**

Russell Shankland: Our trial presentation urged that, throughout the more than 40 years that UMB administered the trust, UMB followed the then-existing and evolving customs and norms of a reasonable corporate trustee. This evidence defeated the plaintiffs' attempt to use their experts to second-guess decades-old trust management based on supposed "best practices" from today. Retired and former UMB employees testified about why and how they made certain decisions. UMB experts, who had spent long careers in the trust industry, put UMB's conduct into perspective, describing how they had experienced technology advancing and practices changing. The court's judgment reflects that it embraced the importance of context, circumstances and facts, which were central to UMB's themes.

**Benton's grandson, Anthony Gude, who is also an artist, was the only plaintiff to attend trial. Judge Styles' decision gives a lot of credence to his testimony, but also points out that it was quite helpful to the defense case. What points were you able to make through his testimony?**

Ruskamp: The more our team scoured the records (hand-written notes, letters, old account statements, etc.) from various parties, the more it became clear that the actual facts contradicted the material allegations made in the petition and the assumptions made by plaintiffs' experts. Mr. Gude was often part of those communications and he confirmed important facts about his knowledge

of and involvement in UMB's management of the Benton art portfolio and other trust assets. As reflected in the judgment, the timing, context and substance of UMB's service as trustee was important and Mr. Gude's testimony helped the court to analyze the actual evidence rather than the conclusory allegations made in the pleadings.

**Did you know you were going to be able to make those points going into Gude's testimony? Was that the plan all along? Or were there some elements of improvisation in how you approached him?**

Ruskamp: You always hope a cross-exam will go as planned, but it seldom does. Mr. Gude's direct examination included denials of knowledge of or involvement in UMB's management in response to broad, open-ended questions. The cross-exam focused first on confirming the specifics of undeniable facts that called into question the direct exam testimony and established that the details mattered. Over a more extended cross-exam, we were able to improvise a bit on issues where Mr. Gude's testimony was helpful to the court and favorable to UMB's defense. Not surprisingly, our team's preparation was the key to an effective examination.

According to court filings, one of the plaintiffs, Benton's granddaughter, Daria Lyman, reached out to you by email in April to request that she be removed as a plaintiff. "I was forced to be a plaintiff by my mother who was the corrupt leader of a demonic commune as I tried to imply during my deposition," she wrote. "Now that she has passed I feel I must shed light on the truth. I wish to relinquish my role as plaintiff but I don't even know how to go about it. This is a plea for help." How did you react to that?

Ruskamp: This was a unique situation. Ms. Lyman did not appear to testify in the plaintiffs' case or otherwise at trial. She was outside the court's subpoena power, so we could only play some of her deposition testimony in UMB's case.

While her deposition was not as explicit as her April email, it did provide helpful testimony. When she contacted us directly in April, we notified the court and her counsel.

**What will you remember most about this matter?**

Ruskamp: I will remember UMB's unwavering commitment to defend the case. The Bank's trust department, legal team and senior leadership were encouraging and supportive throughout the case. Some days go well at trial, others not so much, but UMB was side-by-side with us and did not second-guess our strategy, effort or advice. I will also remember the exceptional patience and courtesy that the Honorable Mark Styles Jr. extended to the parties and lawyers all day, every day in his courtroom over five months in trial.

Kenney: There are so many significant memories from this case given its unique nature and enormous significance for our client. If I had to pick one memory, it would be working with all of our incredible expert witnesses. Dr. Clare McAndrew was our witness on the economics of art markets. She publishes the annual Art Basel report on the global fine art market and is widely considered the foremost expert on the economics of the fine art markets. Betty Krulik and her team of American art appraisers (Deborah Spanierman, Reagan Upshaw, Susan McDonough, and Cynthia Herbert) are highly regarded fine art appraisers and instructors on appraisal methods (you can see Betty and Deborah on the PBS TV show "Antiques Roadshow"). Michael Cragg and the Brattle Group are the best damages experts I have worked with in 25 years of practice. Our experts on art history (Dr. Jennifer Greenhill), trust administration (David Folz and Dan FitzPatrick), and monetization of copyrights (Dr. Kenneth Crews) were all at the top of their fields of expertise. Working with these talented and relaxed professionals made the complex and, at times, contentious expert witness work a joy to do.

Shankland: A team of four incredible associates—**Emily Pedersen, Rachel Groves, Jenn Hatcher** and **Luci McMurray**—poured themselves into the case. Our success was possible only through their late nights, insightful contributions, and sophisticated work. Each associate took on a speaking role in the courtroom. Watching them grow, professionally and personally, has been a joy.

**One last question: What’s your favorite work by Benton? I’m going to guess “Trial by Jury”—even though this was a bench trial.**

Russkamp: “The Twist” is a Benton “picture” of young friends in Kansas City having fun with an evening of music and dancing. Benton loved music and combining it with his love of painting created a wonderful scene.



**Thomas Hart Benton, "The Twist" (1964).**

Kenney: “Trial by Jury” is a great Benton, but not my favorite. Interestingly, the attorney featured in “Trial by Jury” is Lyman Field, Benton’s long-time friend and the co-trustee of the trust from 1979 through his death in 1999. My favorite Benton is another work featuring Lyman Field, “Trail Riders.” Lyman Field and Benton went on an extended trail ride in Wyoming. The painting

shows Field and Benton on their horses at the base of a mountain.



**Thomas Hart Benton, "Trail Riders" (1964-1965).**

Shankland: Benton’s murals stand out as his best work. While “America Today” displayed at the Metropolitan Museum of Art in New York City, is his most famous, I appreciate his “A Social History of the State of Missouri.” In the House Lounge of the Missouri State Capitol, the mural vividly emphasizes the bond that Benton enjoyed with his home state.



**Thomas Hart Benton, "A Social History of the State of Missouri" (1936), northeast and southeast walls; located in the west wing of the Missouri state capitol building, Jefferson City, Missouri USA.**