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Private Sales

The purchase and sale of fine art is, as a commercial transaction, in many ways unique. The artwork, for one thing, is often singular and irreplaceable. Moreover, its value, which largely depends on the artist's reputation at the time of the sale, may fluctuate extensively because an artist's reputation is largely subject to public whim. And artwork is frequently purchased on impulse by a shockingly uninformed buyer: The buyer often turns a blind eye to securing a written purchase contract (let alone to having the contract reviewed by legal counsel), neglects to have the property physically inspected or professionally appraised, fails to do a title search, and, if the work is a fine-art multiple, makes no inquiry about the technique of production.

Defects abound in artwork as frequently as in other property. Accordingly, the art buyer should observe the same precautions ordi-

narily used by the prudent buyer in other commercial transactions of like value. Those precautions are addressed at length throughout the three main sections of this chapter: Sales by Dealers, Sales by Collectors, and Secured Transactions.

SALES BY DEALERS

Whether the dealer is a private dealer, a single commercial gallery, or a gallery with numerous branches or franchised outlets, the dealer's art sales are governed by principles of contract and tort law, by federal and state penal statutes, and in certain jurisdictions by specific legislation regulating sales of art. The art dealer may be selling works of art consigned to it by the artist (see chapter 1), works of art it owns, or works of art consigned to it by a collector. The most important commercial statute, the Uniform Commercial Code (U.C.C.), applies to most of the issues arising from the sale of artwork, including assurance of authenticity. It is here, therefore, that the discussion begins.

Warranties

Art's unique characteristics argue against total applicability of the U.C.C. to all art transactions. The U.C.C. deals exclusively with transactions of tangible personal property, and not all art is personal property. Art can also take the form of real property, such as buildings, earthworks, and such temporary installation pieces as Christo and Jeanne-Claude's *The Gates*, consisting of 7,503 orange nylon fabric constructions that adorned New York City's Central Park in February 2005.¹ However, to keep this discussion manageable, whenever artworks are referred to in this chapter, we are referring to those traditionally regarded as personal property. Moreover, art that is tangible personal property embodies significant intangible rights that are more or less ignored by the U.C.C. Further still, many states—New York,² Iowa,³ and others⁴—doubting the sufficiency of the U.C.C. alone to safeguard art buyers, have enacted legislation

that in some cases overrides the U.C.C. Nevertheless, the U.C.C. governs an array of issues arising in art transactions, and our discussion of warranties, therefore, mandates a review of both U.C.C. principles and legislative and judicial expansions of protection.

Express Warranties

Under common law, the buyer of goods generally labored under the rule of *caveat emptor*, absolving the seller from all responsibility for the quality of the goods sold unless the quality was expressly guaranteed. As the law evolved, the courts turned a compassionate ear to the purchaser, whereupon the rule of *caveat emptor* was relaxed, and the doctrine of express warranty emerged. An express warranty is created without the use of particular words of guarantee as long as the buyer can reasonably understand that the seller is affirming essential qualities of the goods and the buyer relies on such affirmation in good faith.⁵

The U.C.C. codified the judicially created rule. The foundation of the express-warranty provision as codified in the U.C.C.⁶ is twofold: It rests, first, on the core description of goods to be sold⁷ and, second, on those statements of the seller that become “part of the basis of the bargain.”⁸ Express warranties may arise regardless of a seller’s intention; good faith is no defense to the falsity of an assertion.⁹ They may arise in documents other than a sales contract; affirmations in catalogs,¹⁰ brochures,¹¹ or advertisements,¹² for example, may give rise to express warranties if the buyer knows of and relies on the affirmation. Further, an advertisement need not necessarily set forth the precise warranty asserted by the buyer as long as it conveys the essential idea underlying the claimed warranty.¹³ Express warranties may arise from assertions made before, after, or during a sale.¹⁴ Express warranties may also arise from oral representations made by the seller; the U.C.C. does not require that all material terms of an agreement be included in a written contract.¹⁵

Warranty by Affirmation of Fact or Promise

The U.C.C. provides that an express warranty arises on “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.”¹⁶ If the goods do not conform to the affirmation or promise made, the warranty is breached, and an action may be brought, regardless of the seller’s good-faith or malicious intentions in making the false statement. If the documentation alone of a work of art has been forged, that, too, constitutes a breach of warranty¹⁷ as the authorship of the work has been rendered questionable. In such a case, at least one commentator has suggested¹⁸ that the seller reimburse the buyer for any diminution in value caused by the lack of certification or compensate the buyer for expenses reasonably incurred in resolving the question of attribution through scientific analysis or expert opinion and that punitive damages be allowed if the seller acted in bad faith.

An example of breach of express warranty is illustrated by the New York federal court case of *Tunick v. Kornfeld*,¹⁹ a case of apparent first impression in New York and in the Second Circuit.²⁰ The case underscores the imperfect fit between the U.C.C. and fine art. The New York gallery of David Tunick, a preeminent dealer in the United States in Old Master prints, purchased at auction in June 1990 from the gallery of E.W. Kornfeld, a noted Swiss dealer in nineteenth- and twentieth-century prints, a print of a Minotaur that Kornfeld represented was signed by Pablo Picasso. Tunick paid Kornfeld \$1.4 million for the print.

Subsequent to the purchase, Tunick began to have doubts about the Picasso. Although Tunick originally believed that the artwork was made by Picasso in the 1930s, he came to suspect that the signature was a forgery. Tunick informed Kornfeld of his suspicion, offered to return the print to Kornfeld, and demanded his money back. Kornfeld refused to rescind the contract but did offer to exchange the print for another print in the series of the Minotaur that also was allegedly signed by Picasso. Tunick rejected Kornfeld’s offer and, some sixteen months after the purchase, filed suit against Kornfeld. Among other claims, Tunick alleged that Kornfeld breached express warranties that (1) the signature on the print was authentic and

(2) the print had been signed in 1942 and had gone directly from Picasso to a private collector, whose widow had consigned it to Kornfeld for sale at auction.

Kornfeld, seeking dismissal on summary judgment, contended that even if the signature was not authentic, his offer to exchange the print for another print in the series, also allegedly signed by Picasso, constituted an exercise of his right under New York's U.C.C. section 2-508(2) to substitute conforming goods for the allegedly nonconforming goods rejected by Tunick. Kornfeld claimed that because his offer met the standards of the U.C.C. provision, Tunick could not properly reject the offer and seek other recourse. That claim raised an issue of apparent first impression. Does section 2-508 of New York's U.C.C. apply to artwork? That is, can a nonconforming tender of a work of art be cured by an offer of a different but similar work?

The federal district court in New York determined that two prints by the same artist and from the same plates are not interchangeable. Therefore, New York's U.C.C. section 2-508 "does not, as a matter of law, obligate a buyer to accept in lieu of a nonconforming print, a substitute print from the same series of prints."²¹ In making its determination that prints are not interchangeable, the court noted that

prints, unlike petroleum or produce, are not purchased strictly for utilitarian purposes. A print is selected by a purchaser because the traits of that print please the purchaser's aesthetic sensibilities. Thus, whether prints in a series are largely similar or slightly different is of no critical importance. The real fact to be considered is that the purchaser chose a given print because *he* viewed it as uniquely beautiful, interesting, or well suited to his collection or gallery. Nothing else will satisfy that collector but that which he bought.²²

Because, as the court concluded in denying summary judgment to Kornfeld, prints are unique due to differences in impression, quality, and condition, New York's U.C.C. section 2-508 does not apply to prints and, therefore, did not provide Kornfeld with a defense to Tunick's claim of breach of warranty. The court's reasoning regarding

fine art multiples is arguably even more applicable to cases involving individual works of art.

In a postscript to *Tunick*, which had been headed for a jury trial in a New York federal district court, the parties reached an amicable settlement, whose terms are strictly confidential but, reputedly, involve a number of works of art.²³

Warranty by Description

A warranty may also arise from the seller's description of the goods,²⁴ provided the description becomes part of the basis of the bargain. The U.C.C. places no limits on what may be considered a description; included are blueprints and technical specifications²⁵ and, for a work of art, the results of a scientific analysis or an expert examination of the stylistic evidence.²⁶ Therefore, assertions made by an art merchant about a work's authenticity (whether the assertion is that the work is by a specific artist, is by a specific school, or was created during a particular period of time) and statements asserting a work's provenance are deemed to give rise to express warranties.

This is well illustrated in *Weber v. Peck*.²⁷ Here, the plaintiff entered into a sales contract with the defendant art dealer whereby plaintiff agreed to buy a painting by Jacob van Ruisdael for \$388,500 plus 5% of the proceeds from its resale at auction. In return, the defendant promised to provide original letters of authenticity from two Ruisdael experts. Additionally, the parties signed a bill of sale in which defendant warranted that "the above described painting is authentic and as described above."²⁸ The applicable description included a reference to the painting's provenance. The bill of sale referred to the painting as follows:

Artist:	Jacob Van Ruisdael (1628–1682)
Description:	Painting entitled "A wooded river landscape with a waterfall, and travelers on a bridge" signed, being an oil on canvas; stretcher size 26" × 21"
Condition:	Excellent
Provenance:	"see Attached exhibit A" ²⁹

After the parties signed the contract and bill of sale, the painting was taken to Sotheby's, which determined that it was an authentic Ruisdael and placed it in its May 1996 Important Old Masters auction.

At the closing of the sale, the defendant failed to furnish either of the promised authenticating letters.

Approximately ten days before the auction, the plaintiff discovered that Sotheby's could not verify certain aspects of the painting's provenance, and also that the painting had previously sold as "attributed to Ruisdael"—a lesser degree of certainty than an "authenticated" painting and one that usually translates into a lower sale value. Sotheby's catalog for the painting stated its authenticity but also reflected its previous sale history, and estimated its value as \$300,000 to \$400,000. With the realization that changes to the provenance would devalue the painting, the plaintiff, on Sotheby's advice, proceeded with the sale.

At the auction, a high bid of \$300,000 was accepted, but payment was never made. Plaintiff alleged that because the painting was bid on at auction, it could not be sold in the aftermarket, nor could it be marketed for more than \$300,000.

Plaintiff sued the dealer for breach of warranty of authenticity and for breach of warranty of the accuracy of the painting's provenance. On motions for summary judgment by both parties, the New York federal district court denied the motions on the breach of warranty of authenticity claim, since plaintiff's reliance on the warranty, that is, his reservation of the right to receive the authenticating letters, was in dispute. However, the court granted the plaintiff's motion with regard to the warranty of provenance claim:

It is apparent from the plain language of the bill of sale that it warrants the painting's provenance. The bill of sale states that the seller warrants the painting as described. The applicable description includes a reference to the painting's provenance which was attached to the bill of sale.³⁰

Citing section 2-607(2) of New York's U.C.C., the court also noted that plaintiff was not entitled to rescind the sale of the paint-

ing: That is, acceptance of goods with a knowledge that they are nonconforming cannot be revoked because of the nonconformity, unless the acceptance was based on the reasonable assumption that the nonconformity would be cured. Here, the court observed, the plaintiff was aware of the missing letters of authentication at the time of the closing and was aware of problems with the painting's provenance just before the auction. In the weeks following the closing, the plaintiff repeatedly—and to no avail—requested defendant to furnish the letters of authentication. Accordingly, the plaintiff could not reasonably have believed that these nonconformities would be cured just days before the auction; on the contrary, despite these nonconformities, plaintiff never indicated to the defendant a desire to rescind the sale, but rather, proceeded with the auction of the painting.

Statements of Opinion

Both warranties by description and warranties by affirmation of fact must be distinguished from a seller's expression of opinion, which does not necessarily give rise to a warranty.³¹ For example, a seller's opinion concerning the aesthetics or the value of a work of art is viewed as mere "puffing,"³² whereas the seller's opinion as to a work's authenticity or provenance may well give rise to an express warranty if the seller is an art merchant. Since art is customarily valued on the basis of expert opinion, experts—including art merchants—are deemed to bear the commercial responsibility for rendering such opinions. Thus, it has been held that when the party making the representations has superior knowledge regarding the subject of those representations and the other party's level of expertise is such that she may reasonably rely on such supposedly superior knowledge, representations may be considered as facts and not as mere opinions.³³

Exclusion of Warranty: Examination of Goods

In the absence of suspicious circumstances, a buyer need not examine the purchased goods to affirm the accuracy of the seller's representations: It is enough that the buyer believes in and relies on those representations. If, however, a buyer elects to inspect the pur-

chased goods, the U.C.C. does not provide an unqualified answer as to whether that inspection nullifies the U.C.C.'s express warranties. Rather, the U.C.C. indicates that various factors surrounding the transaction must be weighed.³⁴ A buyer with experience in the goods being sold may be able to discover defects not discernible by an inexperienced purchaser. On the other hand, when a defect is obvious, even an unsophisticated purchaser may be held to have relied on her inspection, rather than on the seller's warranty.³⁵

When the buyer is aware of the falsity of the seller's representation, that representation cannot be relied on, does not become part of the basis of the bargain, and, therefore, does not give rise to an express warranty.³⁶ Sales of artwork consummated for prices below market value do not in themselves necessarily constitute notice sufficient to deny relief to buyers for claimed breaches of warranty.³⁷ If, however, a buyer and a seller have approximately the same level of sophistication about the type of goods purchased or if there is an absence of documented pedigree, those facts, when coupled with a low price, may be sufficient to present a factual determination for a jury.³⁸

Exclusion of Warranty: Disclaimer

Generally, disclaimers of warranties are viewed as contradicting the warranties and are, therefore, disfavored by the courts. Where possible, disclaimer language is construed as being consistent with the express warranty;³⁹ where consistency is not possible, the disclaimer language is found to be inoperative.⁴⁰ Reconciliation of the warranty and the disclaimer depends on the language used. In certain jurisdictions, such as New York⁴¹ and Michigan,⁴² the enactment of state statutes has clearly delineated the circumstances under which disclaimers are given effect. Other jurisdictions must rely on case law; although disclaimers in certain instances have been upheld when found to be clear, conspicuous, and adverting to the attribute or attributes being disclaimed with sufficient particularity to apprise the buyer of the risk,⁴³ such judicial precedent is not unanimous. The *Weisz* cases described below, for example, illustrate how two different courts examined the issue of a disclaimer's effects.

*Weisz v. Parke-Bernet Galleries, Inc.*⁴⁴

At a Parke-Bernet auction in 1962, the plaintiff Arthur Weisz purchased a painting listed in the auction catalog as the work of Raoul Dufy. In 1964, plaintiff David Schwartz likewise purchased at a Parke-Bernet auction a work listed in the catalog as a painting by Raoul Dufy. Subsequent to a criminal investigation, Weisz and Schwartz learned that their Dufys were forgeries and commenced lawsuits against Parke-Bernet. The cases were tried jointly, and the court found that at the time of the auctions Parke-Bernet also believed the paintings ascribed to Dufy in the catalogs to be his work. Parke-Bernet defended on the grounds that in both cases the sales were “as is” and subject to the various disclaimers contained in the Conditions of Sale set forth in the auction catalogs.

The court found that plaintiff Weisz did not know of the Conditions of Sale and could not, therefore, be charged with knowledge of its contents. In contrast, the court found that plaintiff Schwartz was chargeable with knowledge of the Conditions of Sale. Consequently, the court had to determine whether the language of the disclaimer set forth in the Conditions of Sale in the Schwartz auction catalog was effective to immunize Parke-Bernet from the legal consequences flowing from the sale.

The court concluded that the disclaimer was inoperative. It found, instead, that Parke-Bernet intended and expected that its bidders at auctions would rely on the accuracy of its descriptions, that Parke-Bernet was vested in the mind of the public with an aura of expertise and reliability, that the wording and the organization of its auction catalog were designed to emphasize the genuineness of the works to be offered, and that the disclaimer was worded in a highly technical manner that the average reader would not interpret as affecting her understanding that she was buying authentic works of art.⁴⁵

Weisz was appealed, and in a brief per curiam opinion the appellate court reversed the judgments and dismissed the complaints of both Weisz and Schwartz. It held that at the time of each of the plaintiffs’ purchases neither the applicable statutory law nor decisional law recognized the seller’s expressed opinion or judgment as giving

rise to any implied warranty of authenticity of authorship and that the disclaimer in the defendant's auction-sale catalog gave

prominent place . . . to a clear, unequivocal disclaimer of any express or implied warranty or representation of genuineness of any paintings as products of the ascribed artist.⁴⁶

Were the U.C.C., rather than the former Uniform Sales Act, applied to the *Weisz* transactions and were *Weisz* appealed today, the disposition of the appellate court would probably remain unchanged. Even though under the U.C.C. the catalog description by Parke-Bernet would probably be deemed to create an express warranty, the court's reasoning as to the disclaimer's effect would still govern (provided the catalog disclaimer was found to be sufficient to inform a purchaser in the plaintiff's position as to the risk of title), since the disclaimer specifically repudiated a representation of genuineness with respect to the items sold.

Parol Evidence Rule

The effectiveness of a disclaimer also depends on the U.C.C.'s parol evidence rule, which states that terms of a writing intended as the final expression of the parties' agreement may not be contradicted by evidence of prior or contemporaneous oral agreements.⁴⁷ Therefore, under the parol evidence rule, an oral disclaimer will be disqualified, even if it is attached to a written warranty. Similarly, an oral warranty, attached to a written disclaimer, will be excluded from evidence. The rule does, however, permit parol evidence of usage of trade or the parties' course of dealing or course of performance when that evidence explains or supplements the contract terms.⁴⁸ Moreover, evidence of consistent additional terms is admissible "unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."⁴⁹

Implied Warranties

After the evolution in common law of express warranties, the early nineteenth century witnessed the development of two distinct

implied warranties for the quality of the goods sold: (1) that of merchantability and (2) that of fitness for a particular purpose. Today there is a somewhat Procrustean fit between commercial transactions in artworks and the law of implied warranties as embodied in the U.C.C.⁵⁰ From the U.C.C. language and the examples used in the comments, the primary thrust of the warranty of merchantability seems to be directed at the sale of goods more fungible than artworks. Nevertheless, it is entirely possible to envision those warranties being used to afford redress to the consumer in a case of art forgery. Only in the future, however, will we discover the extent of the judicial application of those warranties to the unwitting purchase of forged works.

Warranty of Merchantability

The implied warranty of merchantability, as it evolved, has come to mean that goods must be capable of passing under the description specified in the agreement of sale and be reasonably fit for the ordinary uses to which such goods are put. Unless disclaimed, that warranty is implied in a contract for the sale of goods by a merchant seller.⁵¹ The warranty's scope limits liability to a "merchant with respect to goods of that kind," and, unlike the seller in an action for fraud, in which it is generally necessary to prove that the seller knew that her representation was false, the merchant will incur liability regardless of her knowledge of the existence of any defect in the goods sold.⁵² Under the U.C.C., "merchant," in part, means a person who deals in goods of the kind or otherwise by her occupation holds herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.⁵³

Thus, as it relates to dealing in art, "merchant" includes a commercial art gallery, an art auctioneer, and a private art dealer⁵⁴ and excludes a collector whose occupation is not related to art and who sells items from her art collection only occasionally.⁵⁵ Reliance by the buyer on the seller's skill and judgment is not required under this warranty.⁵⁶

Section 2-314(2) of the U.C.C. defines "merchantability" with particularity. For goods to be merchantable, they must at least:⁵⁷

- a. Pass without objection in the trade under the contract description;
- b. (If fungible goods) be of fair average quality within the description;
- c. Be fit for the ordinary purposes for which such goods are used;
- d. Run, within the variations permitted by the agreement of even kind, quality, and quantity within each unit and among all units involved;
- e. Be adequately contained, packaged, and labeled as the agreement may require; and
- f. Conform to the promises or affirmations of fact made on the container or label, if any.

Note that all the requirements must be met. In addition, U.C.C. section 2-314(2) comment 6 states that subsection (2) “does not purport to exhaust the meaning of ‘merchantable.’”

For works of art, the most relevant tests of merchantability are found in subsections (a), (c), and (f).

As to subsection (a), whether goods would pass without objection is determined with reference to the standards of the particular line of trade. Accordingly, merchantability of artwork is interpreted by reference to dealer recognition, categorization, and evaluation of specific artists, periods of art, and specific works relating to those artists and periods. An original, documented work of art, therefore, would pass without objection in the trade and, consequently, be merchantable. Similarly, a poorly rendered fake or an item of significant worth without adequate documentation of provenance would not pass without objection in the trade and, accordingly, would not be merchantable.⁵⁸

A different situation is posed by the skillfully rendered fake, say a painting purportedly by J.M.W. Turner, complete with documentation, that has passed unnoticed for 150 years. Even though it passed without objection in the trade for years, discovery that it is a fake renders the work unmerchantable, and the buyer has redress under the U.C.C. The art industry has tried to minimize the possibility of

that situation arising by creating a standard classification for degrees of certainty in attributions of works of art. For example, the glossary of attributions below is reproduced from a May 2005 catalog of Christie's New York.

EXPLANATION OF CATALOGUING PRACTICE

FOR PICTURES, DRAWINGS, PRINTS AND MINIATURES

1. PABLO PICASSO

In Christie's opinion a work by the artist.

2. Attributed to PABLO PICASSO*

In Christie's qualified opinion a work of the period of the artist which may be in whole or part the work of the artist.

3. After PABLO PICASSO*

In Christie's qualified opinion a copy of the work of the artist.

4. 'signed'

Has a signature which in Christie's qualified opinion is the signature of the artist.

5. 'bears signature'

Has a signature which in Christie's qualified opinion might be the signature of the artist.

6. 'dated'

Is so dated and in Christie's qualified opinion was executed at about that date.

7. 'bears date'

Is so dated and in Christie's qualified opinion may have been executed at about that date.

* This term and its definition in this Explanation of Cataloguing Practice are a qualified statement as to Authorship. While the use of this term is based upon careful study and represents the opinion of experts, Christie's and the consignor assume no risk, liability and responsibility for the authenticity of authorship of any lot in this catalogue described by this.

As to subsection (c) of section 2-314(2), even if a work of art passes without objection in the trade, it is subject to another test of merchantability: its fitness “for the ordinary purposes for which such goods are used.” A U.C.C. comment⁵⁹ elaborates on the latter test by explaining that merchantable goods must be “honestly resalable in the normal course of business because they are what they purport to be.” The purchase of a forgery defeats the purpose of buying an original, and a forgery is certainly not “honestly resalable” as an original.

Still another test of merchantability for artwork is posed by subsection (f), whereby, to be merchantable, goods must “conform to the promises or affirmations of fact made on the container or label, if any.” Paintings and sculptures are often sold with wooden or brass plaques attached to the frame or the base of the piece. Such plaques bear the title of the work and its attribution. If plaques are regarded as labels and if a work of art and its plaque are inconsistent, it could be argued that a breach of the implied warranty of merchantability occurred. Such a breach also arises from an artist’s forged signature. In fact, if a signature is fraudulently added to an original painting to improve its salability, the buyer may be able to recover for any difference in value between an unsigned work and a signed original under this subsection.

Warranty of Fitness for a Particular Purpose

Goods may be merchantable and yet still be unfit for a particular purpose. The warranty of fitness for a particular purpose arises if three requirements are met:⁶⁰

1. The seller must know of the buyer’s particular purpose; an explicit statement of purpose is unnecessary if the circumstances are such that the seller should realize the purpose.
2. The seller must have actual or constructive knowledge that the buyer is relying on the seller’s skill.
3. The buyer must actually rely on the seller. A seller’s intention to create this warranty is immaterial,⁶¹ and a seller’s good faith is no defense in a suit for breach of warranty.

Moreover, the fact that a defect is difficult to find does not eliminate the warranty if the warranty is otherwise created. Although the usual fact situation involves a merchant-seller, on rare occasions the warranty of fitness can be applicable to nonmerchants.⁶²

Exclusion of Implied Warranties: Examination of Goods

In certain circumstances, the implied warranties of merchantability and fitness may be excluded by a buyer's examination of the goods bought or by the buyer's refusal to examine them.⁶³ If, for example, before the purchase a buyer of artwork refuses the seller's demand that the buyer examine it, the implied warranties are excluded as to any defects that "an examination ought in the circumstances to have revealed."⁶⁴ That exclusion results because the demand constitutes notice to the buyer that the buyer is assuming the risks of any defects that the examination would reveal. If, however, a seller's offer of examination is accompanied by statements relating to the quality or the characteristics of a work of art and the buyer indicates that she is relying on those statements, rather than on any examination, the seller will probably be deemed to have given an express warranty.⁶⁵

Whether the buyer's examination of the goods results in the exclusion of the warranties depends on the buyer's sophistication, the normal method of examining goods in the circumstances, and the obviousness of the defect.⁶⁶ If a flaw is discernible on visible inspection before purchase, the implied warranties are excluded. If, however, a defect in forged artwork can be detected only by scientific investigation or extensive research, a buyer's inspection should not ordinarily result in an exclusion of the implied warranties.⁶⁷

Exclusion of Implied Warranties: Disclaimer

The U.C.C. permits sellers to disclaim implied warranties under circumscribed conditions.⁶⁸ The warranty of merchantability may be disclaimed either orally or in writing.⁶⁹ If written, the disclaimer must be conspicuous.⁷⁰ The disclaimer language must specifically include the word "merchantability."⁷¹ Alternatively, the language may be general, provided it informs the buyer that no warranties are at-

tendant to the transaction and that the buyer assumes the risk of the quality of the goods purchased. Examples of such general language are “as is,” “as they stand,” and “with all faults.”⁷² (See discussion of *Weisz v. Parke-Bernet* at pages 84–85.)

The warranty of fitness for a particular purpose may be disclaimed only in writing,⁷³ and the disclaimer must be conspicuous.⁷⁴ The disclaimer language may be general, such as, “there are no warranties that extend beyond the description on the face hereof.”⁷⁵ Alternatively, the disclaimer language may include such phrases as “with all faults,” “as they stand,” and “as is.”⁷⁶

In addition, both implied warranties may be disclaimed through a course of dealing between the parties, a course of performance by the parties, or usage of trade.⁷⁷

With all that said, however, the courts have significantly limited the ability of the seller of artwork to disclaim implied warranties. Courts have strictly construed the warranty disclaimer language,⁷⁸ determined that the disclaimer was not sufficiently “conspicuous,”⁷⁹ and found the disclaimer to be unconscionable.⁸⁰ Moreover, legislation in a number of states⁸¹ has significantly impeded the ability of a seller to disclaim implied warranties of merchantability or fitness with respect to consumer goods,⁸² within which category artwork falls.

Implied Warranties and Privity

Privity is that connection or relationship existing between two or more contracting parties, such as the relationship between a seller and a purchaser. Traditionally, that relationship has been the basis of liability. Although the U.C.C. takes no position with respect to the seller’s liability to a subpurchaser,⁸³ the trend as developed by case law is away from privity and toward foreseeability as a criterion for liability.⁸⁴ The presence of advertising encourages the dispensing with privity.⁸⁵ It has been asserted that in an action for the transfer of fake art the ultimate purchaser should be able to disregard lack of privity on the basis of advertisements, and that even in the absence of advertising lack of privity should not preclude recovery by the ultimate purchaser against the remote seller if it is reasonably foreseeable that

breach of an implied warranty will cause that ultimate purchaser economic loss.⁸⁶

Warranty of Title

At common law, under the doctrine of caveat emptor, the buyer bore the risk of poor title. Today the buyer is afforded substantial protection by the U.C.C., which provides that unless specifically excluded or modified a warranty of title by the seller exists in every sales contract.⁸⁷ The statutorily imposed warranty of title includes the following assertions:

1. That the title to the work or works being conveyed is good.⁸⁸
2. That the seller has the right to transfer title.⁸⁹
3. That the works are delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contract has no knowledge.⁹⁰

In addition, when the sellers are merchants, there is an implied warranty on the part of the seller that the goods will be delivered free “of the rightful claim of any third person by way of infringement.”⁹¹

Exclusion of Warranty of Title: Disclaimer

Warranty of title may be excluded or modified only by specific language⁹² or by circumstances that give the buyer reason to know that the seller does not claim title in herself or that she is purporting to sell only such rights in the goods as she or a third person may have.⁹³ Since the U.C.C.’s objective is to prevent surprise, general disclaimer language that merely negates all warranties does not nullify the warranty of title, because it does not give the buyer reason to know of any risk of title failure. Thus, language in a bill of sale to the effect that the seller “does hereby sell . . . any right, title, and interest seller may have” was not sufficient to constitute a disclaimer of the warranty of title.⁹⁴ More than mere constructive notice imported by public recordation or filing is required to give a buyer reason to know that the seller does not claim to have full title.⁹⁵ Circumstances sufficient to put the buyer on notice would include an announcement at

an art auction that the seller does not claim title in the work or that the seller is purporting to sell only such title as third persons may have.⁹⁶ Other circumstances in which a buyer should be aware that a warranty of title is not present are judicial sales and foreclosure sales.⁹⁷

If, when there is no exclusion of warranty, a buyer can establish that the goods are subject to a security interest that was not known to the buyer or that the seller had neither the right nor the power to deliver good title, the buyer can surrender the property and recover damages.⁹⁸ If the rightful property owner brings an action against the buyer to recover the property, the buyer may sue the seller and require the seller to defend the action.

*Warranty of Title and Measure of Damages: Menzel v. List*⁹⁹

In 1932, the plaintiff Erna Menzel and her husband (who died in 1960) bought a painting by Marc Chagall at auction in Brussels for approximately \$150. In 1940, the Germans invaded Belgium, and the Menzels fled, leaving the Chagall painting in their residence. Six years later, the Menzels returned to find that their painting had been removed and that a receipt for the painting had been left. The Germans had, in fact, removed the painting as degenerate art in 1941, and its whereabouts remained unknown until 1955, when it was purchased for \$2,800 from a Parisian art gallery by Klaus Perls and his wife, Amelia, proprietors of a New York gallery. Later that same year, the Perls, who knew nothing of the painting's previous history and made no inquiries concerning it, sold it to Albert List for \$4,000. In 1962, Mrs. Menzel noticed a reproduction of the Chagall in an art book, along with a statement that the painting was in Albert List's possession.

List refused to surrender the painting to Mrs. Menzel on demand, so she instituted a replevin action (a lawsuit to reclaim possession of the painting) against him, and List, in turn, sued the Perls, alleging that they were liable to him for breach of the warranty of title. Expert testimony was introduced to establish the painting's fair market value at the time of the trial. The judge charged the jury that if it found for Mrs. Menzel against List, they were to assess the

present value of the painting. The jury did find for Mrs. Menzel, requiring that List either return the painting to her or pay her its then fair market value (\$22,500). In addition, the jury found for List as against the Perls in the amount of \$22,500 plus the legal costs incurred by List.

List returned the painting to Menzel, and the Perls appealed on the issue of damages. The appellate court reduced the amount awarded to List to \$4,000 (the price he paid for the painting) plus interest from the date of the purchase. The court also held that Mrs. Menzel's action was not barred by the statutes of limitation of either New York or Belgium, since her cause of action for replevin and conversion arose not on the taking of the painting but on List's refusal to return the painting on demand.

List and the Perls each appealed the appellate court's modification order, and the New York Court of Appeals reversed the order, finding that the modification order would not have fully compensated List for his loss, since he would have been deprived of the benefit—that is, the appreciated value—of his bargain. In the court's reasoning:

Clearly, List can only be put in the same position he would have occupied if the contract had been kept by the Perls if he recovers the value of the painting at the time when, by the judgment in the main action, he was required to surrender the painting to Mrs. Menzel or pay her the present value of the painting. Had the warranty been fulfilled, *i.e.*, had title been as warranted by the Perls, List would still have possession of a painting currently worth \$22,500 and he could have realized that price at an auction or private sale. If List recovers only the purchase price plus interest, the effect is to *put* him in the same position he would have occupied *if the sale had never been made*. Manifestly, an injured buyer is not compensated when he recovers only so much as placed him in *status quo ante* since such a recovery implicitly denies that he had suffered any damage.¹⁰⁰

Thus, in *Menzel v. List*, the plaintiff recovered her painting, List was awarded a sum of money equal to the painting's then fair market value, and the Perls were left to seek recourse from a foreign defen-

dant, the Parisian art dealer.¹⁰¹ The court's refusal to impose mere rescission on List as a remedy indicates judicial awareness that works of art, unlike most other chattel, sometimes appreciate in value after an initial sale. More to the point was the court's relatively highhanded treatment of the Perls. In dismissing their objection to the court's measure of damages, the court noted that a seller is in a position to ascertain a work's provenance before acquiring it for resale. Furthermore, if the seller has any doubts about its provenance, the seller can secure protection on resale of the work by employing suitable disclaimers of warranties.¹⁰² The court, however, ignored the reality that if the seller seeks the protection of such disclaimers, she may well have trouble selling the work.

Warranty of Title and Measure of Damages: The U.C.C.

Menzel was decided under the Uniform Sales Act, as enacted in New York, which predated the U.C.C. In *Menzel*, the New York Court of Appeals, in upholding the trial court's award of damages, concluded that the proper damages in breach of warranty cases involving commodities that appreciate in value should place the injured party in the position the party would have occupied had the warranty not been breached. Thus, the buyer List was awarded damages based on the then-market value of the painting. In contrast, the U.C.C. provides that the measure of damages for breach of warranty is the difference at the time and the place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.¹⁰³ The *Menzel* measure of benefit of the bargain (which requires damages, in cases involving appreciating commodities, to acknowledge the appreciation in value) was again reinforced, despite the U.C.C. provision, in a more recent case discussed below.

In *Koerner v. Davis*,¹⁰⁴ plaintiff Henry Koerner, a Viennese artist living in Pennsylvania, brought one of his paintings, *The Family*, to New York City in 1964 for framing. While running an errand in the city, he left the painting in a taxi and told the driver to wait. When he returned from his errand, the taxi was gone. Koerner reported the

loss to the police department and to his insurer, who paid him the insured value of the painting, \$1,000.

In June 1983, the painting appeared on the market for sale at the William Doyle Galleries, and it was sold that month at auction to defendant David J. Davis for \$1,200. At the time of the sale, the painting's provenance was unknown. In September 1983, after a search by Davis, he learned that Koerner was the artist, and Koerner learned that Davis had his painting. Koerner demanded the return of the painting, whereupon Davis refused and, instead, placed it for sale with the Gertrude Stein gallery. In March 1984 Koerner demanded of both Davis and the Stein gallery that the painting be returned. The gallery responded by returning the work to Davis, who did not return it to Koerner, whereupon Koerner brought suit against Davis and the gallery to recover the work of art or its fair market value. In the face of the action, Davis delivered the work to an antiques dealer, who then died. The painting had disappeared once again.

In holding for the plaintiff, the court noted that since the painting was originally stolen from the plaintiff, no title to the property could be conveyed and that, moreover, both Davis and the gallery were converters: Davis when he refused Koerner's demand to return the painting in March 1984 and the gallery when it disposed of Koerner's property by returning it to Davis with full knowledge of competing claims to it. The court further noted that plaintiff's insurance proceeds did not cover the full value of the stolen property, nor did the insurance proceeds divest him of all interest in the painting; he was, therefore, a proper party plaintiff.

As to damages, the court was satisfied with the evidence that Koerner's work had appreciated in value and that his painting, *The Family*, would command a price in the 1984 market of \$30,000. Accordingly, the court applied the benefit-of-the-bargain measure propounded in *Menzel* and awarded damages to the plaintiff in the amount of \$30,000.

New York and other states, however, measure damages differently where the claim is based on fraud. *Nacht v. Sotheby's Holdings*¹⁰⁵ exemplifies this point. There, in 1981, the plaintiff purchased a painting from Sotheby's for \$23,815. In 1996, following an appraisal

by Sotheby's that valued the painting at \$225,000, plaintiff decided to sell the painting through Sotheby's. It was thereupon discovered that the painting's authenticity was questionable, because a group overseeing the artist's *catalogue raisonné* refused to include the painting. The plaintiff's lawsuit alleged a number of causes of action, most of which were dismissed under Sotheby's five-year warranty of authenticity limitation or other principles of law. What survived was the cause alleging fraudulent inducement, whereby plaintiff claimed that Sotheby's knew or had reason to know of the painting's questionable authenticity in 1981. In allowing that claim to proceed to discovery, the court noted that the damages recoverable in a fraud case are designed to compensate the aggrieved party for what she lost due to the fraud, not to compensate her for what she might have realized in the absence of fraud. Therefore, assuming that the plaintiff successfully proved her claim, the measure of damages would be her cost, \$23,815 (plus interest), and not the fair market value if the painting had been authentic, or \$225,000. This should be contrasted with *Menzel*, which was based on a breach of warranty or contract.

When there is a dispute as to a contract claim, as in *Menzel*, courts apply a "benefit of the bargain" rule, seeking to place the injured party in as good a position as she would have occupied had the contract been fully performed. But in a claim for fraud, the "out-of-pocket" rule merely returns the injured party to as good a position as she would have been in had she never entered the contract. The rationale for applying the lesser measure of damages in fraud is that the wrongdoing in fraud is the inducement to the contract, not the failure to fulfill the contract.

Notice of Breach of Warranty¹⁰⁶

If, after accepting delivery of a work of art, a buyer discovers that the seller has breached a warranty, the buyer must notify the seller, either orally or in writing,¹⁰⁷ of that breach within a reasonable time after its discovery or risk losing whatever remedy the buyer has against the seller.¹⁰⁸ What constitutes reasonable time of notification

varies with the facts; a more stringent test may be applied to a merchant buyer than to a consumer buyer.¹⁰⁹

If the buyer is sued by a third party, the buyer should notify the seller in writing of the litigation. The notice should include all relevant information pertaining to the litigation and a demand that the seller defend the action or else be bound by any determination of fact in the litigation.¹¹⁰

The Statute of Frauds

Section 2-201 of the U.C.C. provides that a contract for the sale of goods costing \$500 or more is unenforceable unless documented by a writing indicating that such a contract between the parties has been made. The document must be signed by the party against whom enforcement is sought or by that party's authorized agent or broker.¹¹¹ Therefore, in *Hoffmann v. Boone*,¹¹² a New York federal district court granted the defendant-art dealer Mary Boone's motion to dismiss a case in which plaintiff Paul Hoffmann, a collector-client of Mary Boone, claimed Boone agreed to sell him in April 1988 a work of contemporary art, Brice Marden's *Grey #1*, for \$120,000. Although both parties agreed that there was no written contract and that the statute of frauds would apply, Hoffmann contended that Boone was barred by the reliance-based doctrine of promissory estoppel from asserting the statute of frauds.

The federal district court, noting that New York's highest state court never addressed the issue of whether New York recognizes estoppel in U.C.C. cases, held that estoppel principles are applicable to U.C.C. contracts but determined that Hoffmann did not make a satisfactory showing of promissory estoppel. In New York, the elements of promissory estoppel are

- (1) a clear and unambiguous promise,
- (2) a reasonable and foreseeable reliance on that promise, and
- (3) an unconscionable injury.

The court determined that although the particular facts in the case satisfied the first two requirements, the injuries Hoffmann suf-

ferred—traveling to New York from Florida three times to settle the contract, plans to include the painting in an exhibition of his collection at Chicago’s Museum of Contemporary Art, and the painting’s special characteristics, which led him to purchase that particular work—do not rise to the level in New York of “unconscionable.”¹¹³ Therefore, promissory estoppel was not established, and the case was dismissed on Mary Boone’s assertion of the statute of frauds.

In the absence of other statutory provisions, one who promises to purchase a work of art costing \$500 or more has to have signed a memorandum in order to be bound to consummate the purchase.¹¹⁴ An agreement memorialized in a bill of sale will suffice, as suggested by *Andre Emmerich Gallery, Inc. v. Frost*,¹¹⁵ in which the plaintiff-gallery sought and won a court order, based on the existence of such a bill of sale, directing the defendant, Kenneth Frost, to return a Jackson Pollock drawing to the gallery. In that case, Frost, reputedly an art collector, contacted the Andre Emmerich Gallery in September 1993, seeking to buy an artwork by Jackson Pollock. After some discussion, the executive director of the gallery, on the following day, delivered to Frost’s apartment “on approval” an untitled 1984 Pollock watercolor, ink, and graphite drawing.

After several days and further discussions between the parties, they entered into an agreement for Frost to buy the drawing for \$297,687.50. The agreement was memorialized in a bill of sale dated September 29, 1993. It included a schedule of installment payments, with the first payment of \$100,000 due by October 4, 1993, followed by additional specific payments due on particular dates of succeeding months. On October 25, having never received the first payment, the gallery sent Frost a written demand for return of the drawing. Frost responded by fax the following day, indicating that the “painting has been delivered to insured third party. To be delivered to your gallery.” Later that day, an attorney representing Frost advised the gallery that Frost intended to pay the full price of the drawing by November 3. When the gallery still was not paid by November 9, Frost’s attorney attempted unsuccessfully to facilitate the return of the drawing to the gallery.

Meanwhile, the gallery discovered that despite Frost's professed intent to buy the drawing for his own collection, he had, in fact, delivered the drawing to Christie's auction house in New York City around October 1, pursuant to a court-ordered settlement in a lawsuit requiring Frost to deliver an artwork by Jackson Pollock to Christie's by August 27, 1993.

The gallery sued Frost for the return of the Pollock drawing, alleging, among other things, fraud in the inducement to enter a contract. In response, one of Frost's contentions was that the parties orally modified the contract to extend the time in which payment was due. The New York State Supreme Court ordered Frost to return the drawing to the gallery. The court found that the September 29 bill of sale was a writing sufficient to satisfy the statute of frauds; an oral modification to extend the time of payments—if such a modification existed—did not satisfy the statute of frauds and was, therefore, not valid.

Where both the buyer and the seller are merchants, a written confirmation of the sale by either party correctly stating all material terms of the agreement and received within a reasonable time by the other party, when she should know its contents, is binding against that second party unless she objects in writing to the confirmation within ten days after its receipt.¹¹⁶

A contract not yet put into writing but otherwise meeting all U.C.C. criteria for a valid contract may be enforceable if goods are to be specially manufactured, if the person against whom enforcement is sought admits the contract in court, or if the contract is for goods for which payment has been made and accepted or that have been received and accepted.¹¹⁷ An interesting question is whether the commission of any artwork is one for the sale of services or for the sale of goods. In *National Historic Shrines*¹¹⁸ it was held that the commission was a contract for the sale of services and, therefore, not addressed by the sale-of-goods provision of the statute of frauds. (See chapter 15 at pages 1784–1786, which discusses the sale of services versus the sale of goods from a tax perspective vis-à-vis the artist.)

Offer and Acceptance

In *Sands & Company v. Christie's*,¹¹⁹ Sands, an art dealer, claimed that Christie's breached an agreement to sell him privately an Andy Warhol painting. Christie's sent Sands an email offering the Warhol at \$660,000, and Sands replied by email that "your offer is accepted at \$660,000 pending my firsthand confirmation that the painting is in good condition, and also is signed." Before Sands could inspect the painting, Christie's withdrew its offer since its consignor had changed his mind about selling it. The New York State Supreme Court found that Sands had added a condition to his acceptance allowing him to reject the Warhol if it was not in good condition or not signed; as a result, a contract was not formed. Sands argued, to little avail, that acceptance conditional on inspection was standard practice in the art trade. But the court correctly pointed out that trade usage cannot be used to create a contract. It is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer, and if a purported acceptance is qualified with conditions, it is equivalent to a rejection and counteroffer. The email sent by Sands did not operate as an acceptance, because acceptance was made conditional on Christie's assent to the additional term.

The Statute of Limitations

In another New York case, a federal district court determined that because of the nature of the relationship between two art dealers, a suit by one against the other over money owed from the sale of paintings was not time-barred by the applicable limitations period. In *Tasende v. Janis*,¹²⁰ the Tasende Gallery and the Sidney Janis Gallery jointly held an exhibition from November 1989 through January 1990 in an attempt to sell certain paintings. Subsequently, a dispute arose over the proceeds from paintings sold during and following the exhibition's closure. Tasende contended that it was owed money arising from

- (1) the 1997 sale of a certain painting,
- (2) paintings sold at the exhibition, and

- (3) two purchases related to paintings not sold at the exhibition, one of which was purchased by Janis, and the other purchased jointly by Janis and Tasende.

Janis believed that the obligation to pay for these last two purchases had accrued in 1990, and was therefore barred by the six-year statute of limitations, since the complaint was not filed until 1998. Tasende, however, alleged that there had been a continuous joint venture between the two parties, which began with the November 1989 exhibition and ended with the sale of the final painting in 1997. Hence, the six-year limitations period began to run in 1997 and not in 1990. The federal district court, evidently agreeing, held that the allegations in the complaint based on the continuing joint venture were sufficient to allow the suit to move forward, and accordingly the court denied Janis's motion to dismiss.¹²¹

The Unconscionable Contract

The U.C.C. provides that a court may refuse to enforce any contract or any portion of a contract that it finds as a matter of law to have been unconscionable at the time it was made.¹²² Unconscionability alone may not support a claim for damages; it merely gives the court the right to refuse to enforce the contract.¹²³ Whether a contract or any clause of a contract is unconscionable is a matter for a court to decide against the background of the contract's commercial setting, purpose, and effect.¹²⁴ Although the statute has no guidelines as to the determination of unconscionability, the thrust of the provision is to prevent oppression and unfair surprise to the contracting parties, not to disturb the allocation of risks to a party merely because the other party has superior bargaining power.¹²⁵

An example of unconscionability is found in the case of *Vom Lehn v. Astor Art Galleries, Ltd.*¹²⁶ The plaintiff-buyers of twenty Oriental jade carvings for the sum of \$67,000 brought an action against the sellers, alleging conspiracy to fraudulently induce them to buy the carvings by misrepresenting their true value and by fraudulently misrepresenting them as being Ming dynasty jade. In the course of the transaction, which included drinks at the prospective buyers'

house and going out to dinner, the sellers allegedly told a tale of woe as to their personal circumstances, and the prospective buyers ultimately made a down payment of \$19,000 on the merchandise and issued four postdated checks totaling \$48,000 for the balance. On subsequently discovering that the carvings were not Ming dynasty jade as represented, the buyers brought suit against the sellers. The New York State Supreme Court, among other findings, noted that no conspiracy or fraud was proved, but it did find that the purchase price was unconscionable; therefore, the court would not enforce the contract requiring the buyers to pay the balance of the purchase price.¹²⁷

In addition to unconscionability, a court can find a contract unenforceable where the language of the contract is ambiguous. In doing so, a court will look both to the reasonable and ordinary meaning of the contract's language and to the actions of the parties. In *Weil v. Murray*,¹²⁸ a New York federal district court granted summary judgment to the plaintiff, a collector, on an action for price where the defendant, a dealer, failed to show contractual ambiguity and acted in a manner consistent with ownership. The case involved a painting entitled *Aux Courses* by French impressionist Edgar Degas. After viewing the painting at Weil's Alabama residence, Murray had the painting sent to his New York gallery for a one-week consignment period to show to a prospective buyer. Within five days, Murray informed Weil that a buyer had been found, and a price of \$1 million was agreed to in writing. The signed agreement defined Murray as the "buyer" and stated that the eventual buyer was an undisclosed principal client of Murray's and that the principal was also bound by the contract. Neither Murray nor anyone else ever paid Weil the \$1 million. Murray retained possession of the painting for more than four months, during which time he had the painting cleaned and restored.¹²⁹

In granting Weil's motion for summary judgment on the contract price, the court found that pursuant to section 2-709(1)(a) of the New York U.C.C.

- (1) there was a contract;
- (2) the buyer failed to pay the purchase price; and
- (3) the buyer accepted the goods.

In response to Murray's argument that the language of the contract made him neither a buyer nor an agent, but rather an intermediary, the court said that reference to a third party did not extinguish Murray's obligation as buyer or agent and that "a contract is not made ambiguous simply because the parties urge different interpretations."¹³⁰ The court also found it indisputable that Murray had accepted the goods: He had inspected the painting, had not expressed dissatisfaction, and had acted in a manner consistent with ownership by permitting the painting to be cleaned. Having established that Murray agreed to purchase the Degas, accepted it, and failed to pay the purchase price, Weil was entitled to the contract price plus incidental damages of interest from the date the payment was due.¹³¹

Title in Works of Art

Passage of Title

The U.C.C. emphasizes a functional approach to sales. It attempts to avoid resolving disputes through a determination of who holds title, recognizing that it is often difficult to determine at what point in the sales transaction a seller's rights in an artwork are transferred to the buyer. But because some issues continue to turn on who holds title, U.C.C. section 2-401 was drafted to treat the topic of title and when it passes. Under the U.C.C.,¹³² title to goods passes from the seller to the buyer on physical delivery of the goods, irrespective of when or even whether payment has been made. U.C.C. section 2-401(2) provides that

[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with respect to the physical delivery of the goods.

When an art seller delivers a work of art to the buyer and sends an invoice to the buyer that states, “Title does not pass until payment in full is made,” a question arises as to whether the seller has retained title or some other interest. The majority view is that title passes and that the seller is left with, at most, a security interest.¹³³ One of the goals of article 2 of the U.C.C. was to replace the formalism of title inquiries with a functional approach to sales disputes. U.C.C. section 2-401(1) provides: “Any retention of or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.” The majority of cases support the conclusion that title passes at the completion of the seller’s performance—that is, when the work of art is delivered.¹³⁴

A persistent minority view is that the parties may contract for a time when title will pass. A New York case involved title to a yacht in which the seller was deemed to maintain title despite delivery, and several courts have read the language of U.C.C. section 2-401(2) to mean that parties may contract to allow the seller to retain title to a delivered good in much the same way that a pre-U.C.C. conditional sales contract did.¹³⁵

The case of *AB Recur Finans v. Andersson*¹³⁶ sheds some light on the issues. On November 20, 1989, Peder Bonnier, a Swedish art dealer with a gallery in New York City, sold a Cy Twombly painting to Lennart Andersson, a Swedish art dealer based in Stockholm, for \$2,800,000. It was a credit sale in that the invoice provided, “Terms: \$100,000.00 deposit due upon receipt of invoice—\$2,700,000.00 due February 17, 1990.” The invoice was silent as to when title would pass. Shortly thereafter, the Twombly painting was transferred from Bonnier’s storage space at Judson Art Warehouse—a well-known art warehouse located in Long Island City, New York, where the painting had been stored—to Andersson’s storage space at Judson.

To pay for the painting, Andersson borrowed \$2 million from Fortune Finans AB, a Swedish finance company. Fortune retained a security interest in the painting. In addition, Fortune required that Judson execute an agreement with Andersson whereby Judson acknowledged Fortune’s security interest in the Twombly and agreed

not to release the painting without the prior written consent of Fortune. The letter agreement between Andersson and Judson was stated to be for the benefit of Fortune.

In early April 1990, Andersson still had not paid Bonnier for the Twombly, including the initial \$100,000 deposit. On learning of Andersson's financial difficulties, Bonnier called Judson and persuaded its director, a longtime friend, to transfer the Twombly from Andersson's storage space back to Bonnier's storage space. Bonnier told Judson's director that Bonnier was still the owner of the painting because Bonnier had not been paid for it. Judson transferred the painting, despite its agreement with Andersson, which was for Fortune's benefit, not to release the Twombly without Fortune's written consent. Within a few days of reacquiring the Twombly, Bonnier resold the painting to another New York City art dealer, who immediately shipped the painting to Japan, where it was purchased by a Japanese buyer.

Fortune sued Judson for breach of contract as the third-party beneficiary of the agreement between Andersson and Judson. As its primary defense, Judson argued that because Andersson never paid for the painting, Anderson never became its owner—that is, title never passed—and, therefore, Andersson could not have conveyed a valid security interest in the Twombly to Fortune. If Fortune did not have a valid security interest in the painting, Fortune could not have suffered any damage by Judson's releasing the painting to Bonnier in violation of the agreement.

The question was thus whether Andersson had acquired rights in the Twombly. Judge Edward Greenfield concluded that Andersson had acquired title to the Twombly, since the Twombly was delivered by Bonnier (the seller) to Andersson (the buyer) when it was transferred from Bonnier's storage space to Andersson's storage space, and the invoice was silent as to the passage of title. Judge Greenfield held that "Andersson acquired title even though he owed the purchase price when there was physical delivery of the painting."¹³⁷ The court concluded that Andersson had sufficient "rights" in the Twombly to enable Fortune to acquire a valid security interest in the painting.¹³⁸

In commenting that the invoice from Bonnier to Andersson did not specifically state any reservation of title, the judge did not address the question of whether the result would have been different if the invoice had so stated. However, in the decision on a later motion¹³⁹ in the same case dismissing Judson's claims against Bonnier for fraudulent or negligent misrepresentations, Judge Greenfield made it clear that delivery is the most crucial element in the question of the passage of title. The decision on the motion states the following:

Judson has been held liable because it, as bailee, disregarded the acknowledged rights of others with a superior claim of right. The sale from Bonnier to Andersson was unconditional. Bonnier reserved no rights in the painting by way of security or otherwise in the bill of sale. This contrast [*sic*] with the bill of sale in evidence of Gagosian (Exhibit 33) which provides "title will pass and delivery will be made when payment is received in full." Even with an explicit reservation of a security interest, title will pass (UCC § 2-401[2]) and "if the goods are at the time of contracting already identified (as was the Twombly painting), and no documents are to be delivered, title passes at the time and place of contracting" UCC § 2-401(3)(b). Before Bonnier attempted any rescission of the sale, the rights of *bona fide* third parties had intervened. UCC § 2-705 permits a seller to stop delivery of goods in the possession of a bailee where the buyer has failed to make a payment, but not after the bailee has acknowledged to the buyer that he is holding the goods for the buyer (or his designee).¹⁴⁰

Sales of art are often conducted in a casual manner, compared with normal business sales involving comparable sums of money. Because article 9's strict standards spring into action when third parties are involved, it is unwise for art sellers to deliver a work of art and hope that by reserving title on the invoice they will protect their interest in the unpaid-for work of art. An art seller should effect a security interest and perfect it by filing a UCC-1 form, ideally at the time of the delivery of the work of art, and by notifying existing creditors.

Voidable Title

It has long been settled law that one who acquires goods from a thief has no title in and to the goods and, therefore, cannot pass ownership of the goods to successive transferees.¹⁴¹ Distinguishable from that situation is one with voidable title in which valid title is passed but the sale is voidable. The U.C.C. provides that a person with voidable title has the power to transfer good title to a good-faith purchaser for value.¹⁴² The key to the concept of voidable title is this: The original transferor voluntarily relinquishes possession of the goods and intends to pass title. The original transferor may be defrauded, the check that the transferor received may have bounced, or the transferor may have intended to sell to Y, rather than to Z; nevertheless, the transferor intended to pass title. In such cases the transferor may void the sale, but the transferee can pass good title.¹⁴³

In the case of *Morgold, Inc. v. Keeler*,¹⁴⁴ a title dispute over an oil-on-canvas painting by Alfred T. Bricher of the Hudson River school, was resolved in favor of the buyer. In the absence of decisional law in either California or the Ninth Circuit on issues of title to art, a federal district court in California, seeking guidance elsewhere, applied New York case law in the decision. In the California case, two art dealers bought the painting in question in 1987; each contributed one-half of its purchase price, and each acquired a one-half interest in the painting. One of the dealers sold his interest to Morgold, Inc., in 1989, and the other dealer, Andre Lopoukhine, retained his interest. In 1990, a dispute arose between Lopoukhine and Morgold about how the painting was to be sold. The dispute was resolved through an agreement, which stated that each party owned a one-half interest in the painting and which laid out a procedure for exhibiting and selling it. Later that year, Lopoukhine, who had possession of the painting, sold it to a collector in violation of his agreement with Morgold. The collector then sold it to an antiques dealer, who in turn sold it to an art dealer named Fred E. Keeler. Keeler inspected the painting and did some research into its history. Keeler's research as to the painting's provenance did not turn up any warning signs of a potential title problem.

The court held that Keeler was entitled to possession and title to the painting because

- (1) under New York law the agreement between Morgold and Lopoukhine was a joint venture and Lopoukhine's breach of the joint venture agreement with Morgold did not destroy Lopoukhine's power to convey good title;
- (2) Lopoukhine was the owner of a one-half interest in the painting and, thus, was not liable for conversion when he sold it; and
- (3) even if Lopoukhine did not have the power to convey good title to the painting because he was in breach of the joint-venture agreement, he had voidable title that allowed him to transfer valid title to a good-faith purchaser for value, as value is defined in U.C.C. section 1-201(44).

The court's reasoning is in line with the U.C.C., which provides that a person with voidable title still has the power to transfer valid title to a good-faith purchaser for value.¹⁴⁵

Not only did Lopoukhine hold voidable title but the court also found that Keeler took the necessary steps to make himself a good-faith purchaser. The court, citing *Porter v. Wertz* and *Cantor v. Anderson*,¹⁴⁶ discussed below, emphasized that an art dealer must take reasonable steps—that is, those that are consistent with reasonable commercial standards in the art trade—to inquire into a painting's title in order to be a good-faith purchaser for value.

Another case animating section 2-403(1) of the U.C.C. is *Holm v. Malmberg*,¹⁴⁷ a dispute involving the ownership of a painting. Holm and Malmberg, dealers in contemporary art, had engaged in numerous previous art transactions. As a result of those transactions, by February 2000, defendant Malmberg was in debt to plaintiff Holm for approximately \$1 million, a debt Malmberg sought to cure by offering Holm a half-share in the future purchase of two works by the French artist Yves Klein (referred to as the "Pink Klein" and the "Blue Klein"). The purchase price was \$2 million and Malmberg subsequently offset its debt to Holm against the purchase price. Then, in August, Holm paid Malmberg \$2 million for one-half in-

terest in several other pieces, including another by Yves Klein (“Gold Klein”). Two months later, Malmberg sold the Pink Klein and the Blue Klein.

Subsequently, defendant Magnus Lindholm, a private collector, alleged that he had owned all three Kleins since 1981, and that the plaintiff and defendant had entered into the Klein transactions without his knowledge. According to Lindholm, he had contacted Malmberg, concerned that his Klein paintings were undervalued and therefore underinsured. Malmberg responded that it knew of a museum’s interest in the Kleins; Lindholm expressed interest in having his Kleins assessed by the museum. In preparation for the museum assessment, Malmberg picked up the Kleins from Lindholm’s Connecticut home and put them into storage at Lebron’s, a storage and shipping facility in Queens, New York. On the blank receipt of the storage facility, Lindholm wrote a brief description of the three Kleins and then the following: “All Works above by Yves Klein for temporary storage on behalf of Magnus Lindholm.”¹⁴⁸

The next day, the storage facility released the Gold Klein to Holm without contacting Lindholm. Shortly thereafter, Holm acquired Malmberg’s one-half interest in the Gold Klein, thereby reducing Malmberg’s outstanding debt to Holm. In January 2001, Lindholm learned from Christie’s auction house that it was selling the Gold Klein for \$3.5 million. He then contacted the storage facility and demanded return of the three Kleins. The Pink and Blue Kleins were returned in February and Lindholm was advised that the Gold Klein would be returned in two days. Holm then sued Malmberg and Lindholm, alleging, among other contentions, breach of contract and seeking a declaration that it owned the Gold Klein and half-interests in the Pink and Blue Kleins.

Holm withdrew its claim to the Pink and Blue Kleins, but it argued that it took title to the Gold Klein as a good-faith purchaser under New York’s U.C.C. section 2-403(1)–(3).¹⁴⁹ That is, when goods have been delivered under a purchase transaction, the purchaser has the power to transfer good title to a good-faith purchaser for value even though the delivery was procured through fraud punishable as larcenous under the criminal law. In denying Lindholm’s mo-

tion to dismiss, the court found that Holm's allegations—that following a solicitation by Malmberg to buy a half-share in the Gold Klein, it forwarded significant funds to Malmberg and that Lindholm shortly thereafter released the Gold Klein to the storage facility, which acted as Malmberg's agent—comprised sufficient facts to claim it bought the Gold Klein from Malmberg after Malmberg bought it from Lindholm.¹⁵⁰

Void Title

In contrast to the validity of a transfer of voidable title, where a seller has no title to convey because the title is void, it has been held that the U.C.C. does not protect the good-faith purchaser. In *Kenyon v. Abel*,¹⁵¹ a Wyoming State Supreme Court affirmed a lower court's holding that the nonvoluntary (accidental) transfer of a painting to the Salvation Army and its later resale constituted a conversion by the charity to which the good faith of the buyer was not a defense. The painting, a Western scene by artist Bill Gollings, valued between \$8,000 and \$15,000, was among the plaintiff's aunt's possessions when she died. Plaintiff, her sole heir, cleaned out her house, choosing items to retain and items to donate to the Salvation Army. By mistake the Salvation Army took a box containing the painting. It was subsequently sold to the defendant through the charity's thrift store for \$25. Immediately after discovering that the painting was not included in the items he had retained, the plaintiff tracked down the defendant to request its return. Unsuccessful, plaintiff brought suit seeking possession of the painting through actions in replevin and conversion.¹⁵²

The court agreed with the district court's finding that plaintiff's testimony that he unintentionally included the painting with items meant for the Salvation Army and immediately attempted to recover it upon finding it missing evidenced its nonvoluntary transfer. Thus the district court's award of the painting to the plaintiff could be upheld either under the law of gifts, for lack of intent to make a gift, or under the law of conversion. The painting was converted because

- (1) as the heir, plaintiff had legal title to the painting;
- (2) he possessed it at the time it was removed;
- (3) the Salvation Army exercised dominion over it and by its sale denied plaintiff's right to enjoy its use;
- (4) plaintiff's demand for return was refused; and
- (5) plaintiff suffered damages through loss of the asset without compensation.

“[A] converter has no title whatsoever (*i.e.*, his title is void) and, therefore, nothing can be conveyed to a bona fide purchaser for value.”¹⁵³

The court emphasized the difference between voidable title and void title under the U.C.C. Voidable title occurs where the transferor voluntarily delivers goods to a purchaser even though the delivery was procured by fraud. Under section 2-403(1), the transferor runs the risk of the purchaser's fraud as against innocent third parties because the transferor is best able to protect against the fraud. But where the goods are wrongfully transferred, as in a theft, section 2-403(1)(d) does not create voidable title; it makes the title void. It follows, the court reasoned, that as here, where the goods cannot be defined as “delivered” for purposes of the statute because they were obtained against the will or intent of the owner, then under section 2-403(1)(d) the Salvation Army had no title to convey to the defendant. As title never passed from the plaintiff, he was entitled to possession.¹⁵⁴

Entrustment

Entrustment covers various situations where one person delivers goods to another person for a particular purpose. The two most common categories of entrustment are consignments and bailments.

Consignments were formerly governed by article 2 of the U.C.C.—specifically section 2-326(3). That section was repealed effective July 1, 2001. Consignments are now governed by article 9 of the U.C.C. and are defined in section 9-102(a)(20). Consignments

under article 9 of the U.C.C. are discussed in detail beginning at page 151.

Bailments are not defined in the U.C.C. Generally, a bailment is deemed to arise when one person entrusts property to another person temporarily for some purpose and, upon fulfillment of that purpose, the property is either delivered back to the first person or otherwise in accordance with her directions.¹⁵⁵ For example, a loan of an artwork to a museum exhibition for a specific period of time is a bailment.

Entrustments are defined generally in section 2-403(3) of the U.C.C. to involve any delivery of goods by one party to another party and any acquiescence by the entrustor in the trustee's retention of possession. This is so regardless of any condition expressed between the parties to the delivery or acquiescence, and regardless of whether the procurement of the entrustment or the trustee's disposition of the goods qualifies as a crime.

The concept of entrustment, codified in the U.C.C., "converts voidable title to good title and . . . expands the merchant's power to transfer title."¹⁵⁶ As U.C.C. section 2-403(2) provides, when goods are entrusted to a merchant who deals in goods of that kind, that merchant is empowered to transfer all rights of the entruster to a buyer in the ordinary course of business.

"The buyer in the ordinary course of business" under the U.C.C. means

a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. . . . "Buying" . . . does not include a transfer . . . in total or partial satisfaction of a money debt.¹⁵⁷

In *Cantor v. Anderson*,¹⁵⁸ the plaintiff Edward Cantor, a private art collector, received as security for a debt a Pierre-Auguste Renoir drawing valued at approximately \$160,000 from the defendant Dennis Anderson, an art dealer, after Cantor repeatedly demanded payment for debts owed to him by Anderson. A New York federal

district court held that Cantor was not a buyer in the ordinary course of business; therefore, the entrustment principle did not apply. Rather, the court held that Wildenstein & Co., Inc., the art dealer that consigned the Renoir to Anderson and that intervened in the suit to seek return of its Renoir, was, in fact, entitled to recover possession of the artwork. Cantor was not the type of creditor that U.C.C. section 2-326 (Consignment Sales and Rights of Creditors) was intended to protect, since he had knowledge that Anderson was in financial trouble.

As to the requirement of good faith, what standard must a party observe to qualify as a buyer in the ordinary course of business? In the case of a merchant, the U.C.C. defines good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”¹⁵⁹ Good faith cannot include indifference on the part of the merchant-buyer as to the provenance or history of ownership of the artwork purchased by the buyer.

Thus, in *Porter v. Wertz*,¹⁶⁰ in which an owner of a Maurice Utrillo painting sought to recover its possession from the Richard Feigen art gallery, which had sold the painting to a buyer out of the country, the court held in favor of the plaintiff-owner. In that case, plaintiff Samuel Porter, an art collector, had a number of dealings with Harold von Maker. Von Maker used the name Peter Wertz (Wertz was an acquaintance of von Maker’s) and was known as Peter Wertz to Porter. In the spring of 1973, Porter permitted von Maker to take Porter’s Utrillo home temporarily, pending von Maker’s decision whether to buy the painting. In July 1973, Porter discovered that von Maker had purchased another of Porter’s paintings with bad notes. After an investigation, Porter learned that he had been dealing not with Peter Wertz but with a man named von Maker, who had an arrest record for theft-related crimes. Although von Maker subsequently assured Porter that he would either return the Utrillo or pay \$30,000, he had already disposed of the painting by using the real Peter Wertz to effect its sale to the Feigen & Co. art gallery for \$20,000.

Peter Wertz was a delicatessen employee, not an art merchant, and the Feigen art gallery seemed aware of that fact. Feigen & Co. found a buyer for the Utrillo and collected a commission. The buyer

in turn sold the painting, resulting in its shipment to Venezuela. On ruling in favor of Porter and against the Feigen & Co. art gallery, the court noted that Feigen & Co. was not a buyer in the ordinary course of business, since (1) the gallery did not purchase the Utrillo from an art dealer and (2) by departing from normal commercial standards in failing to inquire into the provenance of the Utrillo and the status of the party who sold it to the gallery, the gallery was not acting in good faith.¹⁶¹

In the New York federal district court decision of *Graffman v. Espel*,¹⁶² Sture Graffman, the owner of a Picasso painting, contracted with Miguel Espel to sell it on Graffman's behalf. The contract appointed Espel as the exclusive agent to sell the painting and authorized him to sell it through intermediaries. Espel contacted his brother-in-law Michael Delecea, a sometime private art dealer, to assist him in the sale of the painting and shipped it to him in New York. Delecea then approached the Avanti Gallery in New York City and asked for its help in identifying a buyer. Avanti found buyers—identified in the court's opinion as John and Jane Doe—who purchased the painting for \$875,000. The Does paid Avanti, which, after deducting its commission, transferred the balance to Delecea. Delecea paid part of the money to Espel and used the balance to pay some of Espel's personal debts. Espel and Delecea disappeared. Graffman was never paid. Without painting or payment, Graffman then sued the Avanti Gallery and the Does.

The defendants argued that Graffman authorized Delecea to sell the painting, while Graffman claimed Delecea's sale of the painting was unauthorized. If Delecea, as an intermediary agent of Espel, had authority to sell, then the Does under section 2-403(1) of the U.C.C. would as good-faith purchasers have acquired good title. But Delecea's authority to sell, said the court, was a question for the jury.¹⁶³

The court then addressed Graffman's claims under the U.C.C. and pointed out that section 2-403 is not applicable when a person given possession of goods makes an authorized sale of them. For purposes of the decision, the court assumed that Delecea did not have authority to sell the painting to the Avanti Gallery. Even so, said the court, "when an agent has violated his or her instructions, Section

2-403 may operate to bind the principal such that the purchaser acquires good title from the principal's agent."¹⁶⁴ Therefore, Graffman may be bound to Delecea's actions irrespective of whether Delecea had the authority to sell to Avanti. As a matter of public policy, section 2-403(2) operates to protect the buyer in the ordinary course of business over the owner by providing that an owner who entrusts an item to a merchant who deals in goods of that kind gives the merchant the power to transfer all rights of the owner to a buyer. Under this provision, a buyer who makes a purchase in the ordinary course of business will prevail over the claim of an owner who entrusts such item to the seller merchant. This entrustment provision is designed to enhance the reliability of commercial sales by merchants who deal in goods of the particular kind by shifting the risk of resale to one who releases her property to the merchant. The loss is placed upon the party who vested the merchant with the ability to transfer the property with apparent good title.¹⁶⁵

Graffman then argued that Avanti was not entitled to the protection of the entrustment provisions because the painting was never entrusted to Delecea. Though ordinarily put to the jury, the question of whether there had been an entrustment failed for lack of evidence from Graffman to support the assertion that the painting had never been entrusted to Delecea. Graffman had never objected to Delecea's custody of the painting. Furthermore, the court concluded, Delecea was, for the purposes of section 1-201(9), an art dealer—that is, a merchant who deals in works of art. The painting was therefore entrusted to Delecea, a merchant within the meaning of the U.C.C.¹⁶⁶

Graffman did not allege that Avanti Gallery bought the painting from Delecea with knowledge the sale was in violation of his rights. Rather, he argued that Avanti was required, in accordance with reasonable commercial standards applicable to art dealers, to inquire into the provenance of the painting. Failure to do so was a failure to observe reasonable commercial standards of fair dealing in the trade and a failure to act in good faith.¹⁶⁷ Avanti, citing *Morgold*, argued that art dealers are only required to make a reasonable inquiry "if there are warnings that something is wrong with the transaction."¹⁶⁸

The court, noting that summary judgment is inappropriate where industry customs are at issue, determined that whether Avanti met the reasonable commercial standards of the art industry was a question for the trier of fact. If a jury were to determine that Avanti acted in good faith, then it would be entitled to protection under the entrustment section of section 2-403. That issue never went to trial since Avanti Gallery ceased doing business. This left Graffman's claim against the Does.

Irrespective of whether Delecea was authorized to sell the painting, the Does claimed that they were innocent purchasers entitled to protection of section 2-403(1), which provides in part that a person with voidable title has power to transfer good title to a good-faith purchaser for value. Graffman alleged that for the Does to have acted in good faith they must have inquired into the painting's provenance on their own, rather than rely on the Avanti Gallery to conduct an investigation. The Does, having had substantial dealings in the past with Avanti, made no such inquiry. In distinguishing both *Porter* and *Morgold*, where the innocent purchasers were art dealers obligated to adhere to industry standards of a merchant under the U.C.C., the court held, as a matter of law, that the Does as nonmerchant collectors had no obligation to investigate the provenance of the painting. Summary judgment was granted in favor of the Does and was later affirmed by the court of appeals.¹⁶⁹

Agency Distinguished from Entrustment

The result in *Graffman* can be contrasted with the New York state court decision of *Dark Bay International, Ltd. v. Acquavella Galleries*,¹⁷⁰ where the plaintiff Dark Bay International (DBI) sued the defendant art gallery for breach of an alleged contract whereby the gallery was to sell Pablo Picasso's *Les Deux Enfants* to DBI. The parties' dispute centered on the role of one Michel Cohen.

The gallery claimed to have sold the painting to Cohen. According to the gallery, it delivered the painting to Cohen in September 2000, with payment due no later than October 31, 2000. When Cohen could not pay, he returned the painting to the gallery on No-

vember 1, 2000. The gallery sold the painting in June 2001 to a third party.

According to DBI, however, the gallery had, through Cohen, agreed to sell the painting to DBI. John Fielding, DBI's founder, was shown the painting by Cohen in October 2000, but Fielding rejected the price that Cohen offered. Disputing the gallery's evidence that Cohen had returned the painting to the gallery in November, DBI asserted that Cohen brought the painting to Fielding again on December 13, 2000, and offered to sell it for a reduced price of \$2.27 million. After that meeting, Cohen took the painting with him. Several days later, DBI agreed to the deal, and on December 28, it paid Cohen, but it never received the painting. Cohen disappeared with the money.

DBI sued the gallery for breach of contract and conversion, seeking either damages or replevin of the painting and specific performance of the sale. Both parties moved for summary judgment. The gallery argued that it never authorized Cohen to act on its behalf and had no contract to sell the painting to DBI. DBI countered that the gallery had authorized Cohen with express, implied, or apparent authority to sell the painting to it.

Though ordinarily the question of agency is one reserved for a jury, the court found no evidence to support plaintiff's claim that the gallery had control over Cohen (an essential element to an agency relationship) and reserved the question for itself. The disappearance of Cohen, the court said, prevented DBI from establishing express authority by Cohen's testimony. Authority could be implied, however, if verbal or other acts by the gallery could reasonably give the appearance of Cohen's authority as an agent. To establish the implied authority, DBI argued that the transaction between the gallery and Cohen was a consignment. In support of its argument, DBI pointed to nine previous transactions in which the gallery had consigned work to Cohen. But the court rejected this evidence, stating that "DBI cannot impute express authority to sell the painting . . . from these earlier consignments. Otherwise, an agent would be an agent forever. . . ." ¹⁷¹ The gallery challenged DBI's consignment theory, arguing that its invoice to Cohen evidenced a sale, not a consign-

ment. DBI responded by citing an 1875 U.S. Supreme Court decision holding that “an invoice is not a bill of sale, nor is it evidence of a sale.”¹⁷² The court stated that the previous consignments were evidenced by consignment agreements and where, as here, there was no evidence of any such agreement or invoicing for the painting in question, DBI’s theory was questionable.

The court then turned to the alleged apparent authority of Cohen to sell the painting, which required DBI to show

- (1) words or acts of the gallery communicated to DBI made it reasonable to believe that Cohen possessed the authority to act for the gallery;
- (2) reasonable reliance by DBI, and
- (3) that DBI made reasonable inquiries as to Cohen’s actual authority.

The court concluded that even if the gallery had given Cohen apparent authority, DBI could not show reasonable reliance. “In the world of art,” the court explained, “a buyer must inquire into [the art’s] provenance.”¹⁷³ DBI made no meaningful inquiry and, unlike in *Graffman*, where the proceeds of the sale were never forwarded and the issue was whether the consignee had the authority to sub-consign, there was no consignment agreement in this case and therefore no need to look to industry customs.

Having failed to establish an agency relationship between the gallery and Cohen where Cohen had the right to sell, DBI could not prove itself the rightful owner and allege conversion.

Furthermore, the court noted, DBI’s entrustment theory could not be reconciled with the sequence of events as documented. Cohen was not in possession of the painting either when Fielding agreed to its purchase or when DBI transferred payment to Cohen. The gallery therefore could not have entrusted the painting to Cohen at the time of the alleged sale. Accordingly, the gallery’s motion for summary judgment was granted.

The Duty of Inquiry into Title

If an art dealer, on buying a work of art, fails to make any inquiry into the nature of the seller's authority to sell that artwork, particularly when the circumstances are somewhat out of the ordinary, the dealer is not deemed to be a buyer in the ordinary course of business and, accordingly, is no better than a converter.¹⁷⁴ For example, in *Howley v. Sotheby's, Inc.*¹⁷⁵ the defendant purchased plaintiff's lithograph from a thief who represented himself as the plaintiff's nephew and agent. The court found that the circumstances surrounding the purchase of the lithograph were such that the defendant, an art dealer, was obligated to investigate the transaction scrupulously to insure its legitimacy. Because the purchaser did not investigate the transaction, as he was obligated to do, he was liable to the plaintiff for conversion of the lithograph. A dealer should always make some inquiry into a seller's authority to sell an artwork. A purchaser of art who is not a dealer, however, is subject to somewhat less stringent requirements in satisfying good faith.¹⁷⁶

Similarly, in *Taborsky v. Maroney*,¹⁷⁷ a federal court of appeals affirmed a district court's holding that the suspicious circumstances surrounding the purchase and sale of a Grant Wood drawing between two art merchants imposed on the buying merchant a duty to inquire as to the selling merchant's authority. Citing Wisconsin law, the court noted that a merchant dealing in goods and entrusted with the possession of goods of that kind can transfer all rights of the entruster to a buyer in the ordinary course of business.¹⁷⁸ The court further addressed the more stringent standard pertaining to buyers who are also merchants and noted that a merchant buyer must

- (1) be honest in fact,
- (2) not have knowledge that a sale would be in violation of the ownership rights of a third party, and
- (3) observe reasonable commercial standards of fair dealing in the trade and be charged with the knowledge or the skill of a merchant.¹⁷⁹

That higher than usual level of knowledge attributed to a merchant means that actual knowledge of certain information concern-

ing unusual circumstances surrounding a transaction can prevent a merchant from becoming a buyer in the ordinary course of business, even though the buyer does not have knowledge that the sale is in violation of the ownership rights of a third party. If, as in *Taborsky*, a merchant-buyer fails to inquire into the propriety of the transaction when suspicious circumstances arise, the merchant-buyer has failed to conform to the reasonable commercial practices of fair dealing in the trade and, therefore, cannot qualify as a buyer in the ordinary course of business.¹⁸⁰

In *United States v. Crawford Technical Services*,¹⁸¹ a jewelry dealer's purchase of a 5.04-carat diamond was found not to have been made in "good faith" when he failed to inquire into the diamond's title before acquiring it. The diamond had been reported stolen to the Las Vegas police in 1994 when it was allegedly stolen from a salesman to whom it had been consigned. After investigation by the diamond's insurer, which paid the salesman's claim of more than \$69,000, the theft was reported to the Gemological Institute of America (GIA).

In early July 1996, the diamond resurfaced when a woman tried to exchange it for several items of jewelry at a retail store owned by Charles Cohen. The customer produced no bill of sale or invoice documenting the diamond's value or how she had come into its possession. Cohen then swapped several items in his store for the diamond and the customer's check for \$5,069. There was no other documentation of the transaction. Cohen did not cash the check for some time (it bounced when he did), nor did he do anything with the diamond until he agreed to sell it to another dealer in September 1997. Before completing the transaction, the second dealer submitted the diamond to the GIA for a grading report; because it had been reported stolen, the GIA confiscated it and alerted the FBI.

In determining whether Cohen or the insurer was the rightful owner, the court, citing *Guggenheim*,¹⁸² stated that "a purchaser of stolen property does not have clear title, even if the purchase was made in good faith" because "a thief has no title to give."¹⁸³ The court found it "therefore incumbent upon a good faith purchaser to inquire about the validity of title before completing the transaction."¹⁸⁴ In determining that Cohen could not have acted in good

faith and that his claim was inferior to that of the insurance company, the court focused on the fact that he had fifty years of experience, failed to ask for a bill of sale or other documentation, undervalued the ring by more than half its value, and pursued collection from the customer lackadaisically. Had Cohen at least inquired into the customer's title, it would have been apparent she had none. The court also noted that Cohen could not be prejudiced because the report of the theft to the local police and the GIA were steps "appropriate and sufficient" to defeat a defense of laches.¹⁸⁵

The Merchant's Duty of Disclosure

Case law indicates that the dealer as seller must disclose information relating to possible title problems in the works it offers for sale. In *Van Rijn v. Wildenstein*,¹⁸⁶ a Dutch art dealer contracted with the Wildenstein dealership to buy two paintings, one by El Greco and one by Sandro Botticelli. Michael van Rijn in turn agreed to sell the two works to a Tokyo art dealership. However, the Tokyo dealership canceled its contract with van Rijn on discovering that the government of Romania had a claim of ownership in and to the El Greco work. Van Rijn brought suit against Wildenstein for breach of warranties and fraud, claiming that Wildenstein falsely and fraudulently represented the title of the two paintings as being free of all claims. The trial, in a New York federal district court, took place in October and November 1987 and resulted in a jury verdict against the defendant for \$450,000 for breach of warranty of merchantability. (There was, however, no finding of fraud or breach of warranty of title.) The parties later reached a settlement, the terms of which are confidential.

California has a unique statutory provision that requires a merchant to whom property is consigned to reveal, on demand from the consignor, the name and address of the buyer and the sales price. Any person violating this requirement may be guilty of a misdemeanor.¹⁸⁷

Risk of Loss

As the U.C.C. makes clear,¹⁸⁸ the risk of loss for goods, including artwork, that are damaged or stolen while consigned is borne by the consignee, usually an art dealer. Even so, the consignor, usually a collector, is wise to insist that the consignee maintain insurance covering artwork delivered to it for consignment so that the consignor will be paid in full in the event of any loss. When artwork is purchased from a nonmerchant seller, the risk of loss of the goods passes to the buyer on the buyer's receipt of notification necessary to enable the buyer to take the delivery.¹⁸⁹ However, when artwork is purchased from a merchant, the risk of loss of the goods passes to the buyer only on actual receipt of the goods.¹⁹⁰

Principles of Contract and Tort Law

An aggrieved purchaser seeking recourse through the application of existing general contract and tort law principles generally finds fewer protections than those mandated by the U.C.C. A case in point is *Mennella v. Schon*¹⁹¹ in which the Fifth Circuit applied the law of Louisiana (where article 2 of the U.C.C. has not been adopted) to an art sales contract in which passage of title was the issue. The plaintiff-collector Opal Mennella agreed to buy from defendant Kurt E. Schon's New Orleans art gallery in April 1988 the painting *Princess Mary* by the Flemish master Anthony Van Dyck for \$350,000. She paid Schon \$50,000 up front, with a balance of \$300,000, according to the invoice, to be paid on June 1, 1988.

Experiencing cash-flow problems, Mennella amicably secured a few months' extension. By Christmas of 1988, when she had managed to pay only an additional \$90,000, she demanded authentication of the painting, to be used to secure a loan to pay the balance of the purchase price. Schon duly complied. Concerned that the portrait might be counterfeit, Mennella repudiated the painting's value and demanded the return of the money she had already paid. Schon responded by a letter in the spring of 1989, a full year after the ostensible sale, demanding payment of the balance of the purchase

price within five days and threatening that otherwise he would be forced to return the painting to the gallery's active sale stock. When Mennella failed to respond to the letter, Schon, in May 1989, notified Mennella in writing that he considered the sale canceled and that he viewed her inaction as a default. He subsequently offered to refund \$95,000—the \$140,000 she paid minus the \$45,000 cost of the authentication—or provide her with \$140,000 of store credit. Mennella rejected both offers.

In November 1989, unbeknownst to Mennella, the painting was shipped to Christie's London, where it sold for more than \$1.4 million. Unaware of the London sale, Mennella in December 1989 filed suit, seeking rescission of the sale and damages. Mennella claimed that she only agreed to buy the Van Dyck on proper authentication and that the painting was a fraud. When she learned of the London sale, her attitude changed. She now alleged that the painting was hers, that the London sale constituted a conversion, and that she was entitled to those sale proceeds.

In applying Louisiana law, the Fifth Circuit determined that title to the Van Dyck passed to Mennella in April 1988, since, in credit sales, “when the parties agree as to the price and the thing, title passes instant[ly].”¹⁹² However, the Fifth Circuit also found that by refusing to perform, Mennella had repudiated the contract, and the court deemed the contract dissolved when Schon sent Mennella notice of default on May 2, 1989. Therefore, Schon had legal title to the painting when it was sold in London and was required to refund to Mennella merely the full amount of her payments with interest from the date of the London sale.

Contractual Mistake

Mutual Mistake

Separate and apart from a warranty claim is the legal theory of mutual mistake, in which both the buyer and the seller of a work of art are mistaken as to a material aspect of that work—for example,

the identity of the artist. In the event of mutual mistake, the sole form of relief ordinarily available to the aggrieved party is rescission and restitution. If a sold object is discovered to be significantly more valuable than both parties had assumed, the seller may rescind the sale.¹⁹³ Similarly, if the object is significantly less valuable than both the buyer and the seller thought, the buyer may seek recourse.¹⁹⁴ When a seller, ignorant of the value of an item, sells it and the item turns out to be worth much more than its purchase price, generally the seller may get no relief. Presumably conscious of her ignorance, the seller has made no operative mistake of fact that would justify any relief.¹⁹⁵ If in a transaction, however, a mistake is the fault of the seller or the seller knows or has reason to know of a mistake, a buyer may obtain rescission and restitution, even if the mistake was unilateral on the buyer's part.¹⁹⁶

As illustrated in such cases as *Uptown Gallery, Inc. v. Doniger*¹⁹⁷ and *Feigen & Co. v. Weil*,¹⁹⁸ the theory of mutual mistake is of particular importance to an art dealer who buys from a nonmerchant an artwork that turns out not to be authentic. The rulings in those cases, which favor the merchant-buyer, make clear that under the theory of mutual mistake an art merchant may be an aggrieved party in the course of dealing with a nonmerchant and that as an aggrieved party the art merchant may secure rescission and restitution as forms of relief. The protection the theory offers the merchant-buyer assumes particular significance, since both the U.C.C. and special statutes in a number of states—including Florida,¹⁹⁹ Iowa,²⁰⁰ New York,²⁰¹ and Michigan²⁰²—provide that when an art merchant sells artwork to a nonmerchant, the transaction generally presumes an express warranty that the artwork is authentic. Similar statutes in several states cover multiples.²⁰³ Despite the rulings in *Doniger* and in *Feigen*, the applicability of the U.C.C. and such state legislation to a transaction in which a merchant-buyer purchases art from a nonmerchant-seller remains an open question.

In *Doniger*, the plaintiff Uptown Gallery was an art gallery in New York City. The defendant Marjorie Doniger, who was never in the art business, once purchased a painting through Philip Williams, the president of Uptown. Williams came to Doniger's house to hang

the painting for her, and there he saw a painting that he assumed was by the French artist Bernard Buffet and that, in fact, bore the signature “Bernard Buffet.” Sometime later, in March 1990, Williams persuaded Doniger, after some initial hesitancy on her part, to sell Uptown her Bernard Buffet painting. Williams returned to Doniger’s house, examined the painting closely, questioned her about its provenance (she was unclear as to the painting’s ownership history), and then on behalf of Uptown bought the painting for \$55,000. The purchase invoice, prepared by Uptown and signed by Doniger under the phrase “agreed and accepted,” described the painting as a Bernard Buffet. In addition, in all prior discussions between the parties, the painting was referred to as a Bernard Buffet, and there was evidence that both parties genuinely believed that the painting was by Bernard Buffet.

After acquiring the painting, Uptown, in the process of seeking a certificate of authenticity for the Buffet in order to close a potential sale quickly, learned that the painting was a forgery. Uptown relayed that finding to Doniger and demanded a refund of the purchase price. Doniger expressed shock at the news but refused to refund the purchase price to Uptown. In the New York State Supreme Court, Uptown subsequently sought recovery of the \$55,000 purchase price plus interest and costs from Doniger on two grounds: (1) breach of an express warranty pursuant to section 2-313 of the U.C.C. and (2) mutual mistake.

In asserting breach of express warranty, Uptown alleged that Doniger, by adopting the phrase “agreed and accepted” in the invoice, warranted that the painting was a genuine Buffet and that a merchant buyer like Uptown may enforce an express warranty as freely as may a nonmerchant. Uptown, however, did not address the issue as to whether an express warranty attaches to a transaction having a nonmerchant-*seller* like Doniger as readily as to a transaction involving a merchant-seller. The New York State Supreme Court, in its decision, did not address the plaintiff’s breach of warranty claim at all.

In asserting the doctrine of mutual mistake, Uptown cited the instant facts as a textbook example of a contract voidable on the basis

of that doctrine. That is, that “at all times throughout the chain of events leading up to and including” the sale of the painting by Doniger to Uptown for \$55,000, both parties believed the painting to be a genuine Bernard Buffet; that the mistake creates such an imbalance in the agreed exchange that the aggrieved party cannot fairly be required to carry it out; and that the mistake demonstrates the absence of the “meeting of the minds” required to create a contract.²⁰⁴ Uptown noted the similarities between its case and that of *Feigen & Co. v. Weil* (see below), also a transaction involving the sale by a nonmerchant to a merchant-buyer of a work of art. In that case too, the non-merchant-seller argued, unsuccessfully, that the merchant-buyer should bear the loss for the mistake, since the buyer acted with conscious ignorance in failing to authenticate the artwork before purchasing it. The New York State Supreme Court in *Doniger* adopted the reasoning of *Feigen*: This was not a situation in which the parties were uncertain of a material fact and, ignoring the uncertainty, contracted anyway. Rather, both parties entered into the sale transaction on the assumption that the painting was an authentic Bernard Buffet. Accordingly, the court granted the plaintiff Uptown rescission on the contract based on mutual mistake.²⁰⁵

In *Feigen & Co. v. Weil*, the defendant Frank A. Weil, a nonmerchant art collector, sold an ink drawing entitled *Le Vase d'opaline* and signed “H. Matisse '47” to Richard L. Feigen & Co., a well-known art dealer in New York City. Weil, a prominent New York businessman of outstanding integrity, received the drawing as a gift in the late 1960s from his mother, a member of the founding family of Sears Roebuck and Co. Weil’s mother had owned the drawing for ten to fifteen years before giving it to her son. Weil had made inquiries of various art dealers as to its approximate value and decided he would sell it if he could receive \$100,000. Weil telephoned Feigen & Co. in early April 1989 and requested that the gallery pick up the drawing. The gallery sold it to Tom Hammons on May 5, 1989, for \$165,000 and remitted \$100,000 to Weil on May 15, 1989. The facts indicated that both Feigen and Weil strongly believed that the drawing was by Matisse.

One year later, the purchaser, Hammons, brought the drawing to the Acquavella Galleries in New York City, which contacted the administrator of the Matisse estate about the drawing's authenticity. The administrator responded that the drawing was a forgery, and Feigen & Co. immediately informed Weil and arranged to reimburse Hammons for his purchase price of \$165,000. When Weil refused to return the \$100,000 that Feigen & Co. had paid him, the gallery instituted a lawsuit, alleging

- (1) rescission of a consignment contract,
- (2) breach of such contract,
- (3) breach of express and implied warranties relating to such contract,
- (4) fraud,
- (5) negligent misrepresentation, or
- (6) some combination of the above causes.

Feigen & Co. moved for summary judgment, seeking rescission based on mutual mistake. Although Weil acknowledged that both parties honestly assumed that the drawing was authentic, he argued that rescission should not apply because

- (1) Feigen & Co. was consciously ignorant of the drawing's authenticity;
- (2) it would be most equitable under the circumstances to impose the risk of loss for a contractual mistake on Feigen & Co.;
- (3) Feigen & Co. acted in bad faith and should thus bear the loss; and
- (4) if there was a consignment contract between the parties, Feigen & Co. breached its fiduciary duty as an agent to Weil by failing to authenticate the work before selling it.

The court, in finding for Feigen & Co., correctly stated the following:

[W]here a mistake in contracting is both mutual and substantial, there is an absence of the requisite “meeting of the minds” to the contract and relief will be provided in the form of rescission. . . .²⁰⁶

The purpose of the doctrine of mutual mistake is to prevent the injustice that would arise when one party to a contract, realizing that a mutual mistake is to its advantage, seeks enforcement of the contract. By allowing rescission of the contract, the parties can return to the status quo.²⁰⁷

Weil argued that Feigen & Co., in failing to authenticate the drawing in a timely fashion, was “consciously ignorant” of its authenticity and, therefore, cannot claim mutual mistake. The court pointed out that all the cases Weil cited arose when the parties to the contract assumed a risk as to the facts underlying the transaction. For example, if a person brings a stone to a jeweler, is uncertain as to its true nature, and sells it to the jeweler for less than its true value, a mutual mistake has not occurred because conscious ignorance is present; the price was fixed between the parties with consciousness of the fact that the stone may or may not be worth the price paid.²⁰⁸ But both Feigen & Co. and Weil honestly believed that the drawing was a Matisse, and neither assumed the risk that it was a fake. Therefore, the court concluded,

if a party does not make a conscious decision to proceed in the face of insufficient information, the conscious ignorance exception to the mutual mistake doctrine does not apply.²⁰⁹

The court pointed out that there is no authority for the proposition that in a contract between an expert and a nonexpert rescission based on mutual mistake is unavailable to the expert.

The court did not find that Feigen & Co. had any legal duty to authenticate the drawing. Its acceptance of the drawing as a Matisse was based on its examination of the work, on its rational assessment of the source and the style of the work, and on Weil’s family reputation and known integrity. Feigen & Co. was not asked to go beyond

a cursory inquiry as to the drawing's authenticity, nor did it have any substantive or legal obligation to do so.

The case of *Feigen & Co. v. Weil* should be compared with *Porter v. Wertz*, discussed earlier²¹⁰ (see page 114) in which the same Feigen & Co. had purchased a Maurice Utrillo painting from Peter Wertz. Wertz was a delicatessen employee, and the gallery was aware of that fact. Wertz had obtained the painting from Samuel Porter through trickery. When Porter learned that Feigen & Co. had sold the painting, he sued to recover it. The court, in finding for Porter against Feigen & Co., noted that the gallery, by departing from normal commercial standards in failing to inquire into the provenance of the Utrillo and the status of the party who sold it, was not acting in good faith. In other words, the fact that the Utrillo was sold by a delicatessen employee should have been sufficient to cause Feigen & Co. to inquire further into the nature of the transaction.

In contrast, in *Feigen & Co. v. Weil*, neither the facts nor Weil's behavior should have caused Feigen & Co. to suspect that the drawing was not authentic. We believe the court correctly found a mutual mistake. Weil was ordered to return the \$100,000 plus interest to Feigen & Co.

The result in *Feigen* should also be contrasted with *Firestone & Parson, Inc. v. Union League of Philadelphia*,²¹¹ in which the Union League (not an art merchant) sold a painting supposedly by Albert Bierstadt to Firestone & Parson, an art merchant. As in *Feigen & Co. v. Weil*, both parties believed at the time of the sale in 1981 that the painting was authentic. Although the court found for the Union League on the basis of the fact that the Firestone & Parson's claim was time-barred by the four-year statute of limitations, it indicated that a mutual mistake had not occurred.

Although the procedural posture of the case is such that only the statute of limitations bar can now be addressed, my ruling that plaintiffs' claims are time-barred should not be interpreted as suggesting that plaintiffs' claims would otherwise have been valid: in the arcane world of high-priced art, market value is affected by market perceptions; the market value of a painting is determined by the prevailing views of the marketplace con-

cerning its attribution. Post-sale fluctuations in generally accepted attributions do not necessarily establish that there was a mutual mistake of fact at the time of the sale. If both parties correctly believed at that time that the painting was generally believed to be a Bierstadt, and in fact it was then generally regarded as a Bierstadt, it seems unlikely that plaintiff could show that there was a mutual mistake of fact.²¹²

In *Feigen & Co. v. Weil* there was no allegation that it was generally believed in the art world that the Matisse drawing was authentic (neither Feigen nor Weil had contacted the Matisse estate in Paris); only Weil and Feigen believed it was authentic. In contrast, in *Firestone* both Firestone and Parson and the Union League admitted that the painting had been attributed to Bierstadt and that it was generally regarded in art circles as being a major Bierstadt work. Only later, when the accepted scholarship about the painting changed, did the problem arise.

Although we agree with the technical legal result in *Feigen & Co. v. Weil*, since no suspicious circumstances imposed a duty on Feigen & Co. to inquire further about the Matisse, we believe that Feigen & Co. could have avoided the lawsuit if it had acted in a more prudent manner. An art dealer, when buying from a collector, should inform the collector, particularly when purchasing a work of art that originates in France or another country where a recognized authenticity committee exists, that the work of art should be authenticated before completion of the transaction. A collector who is selling to an art dealer should ask the art dealer to perform that service without cost to the seller before entering into a sale or consignment agreement.²¹³ Further, a collector who buys a work of art from an art dealer should always require the art dealer to furnish a certificate of authenticity before completing the sale.

Mutual Mistake Rebutted by Authenticity

In *Greenberg Gallery v. Bauman*,²¹⁴ a group of four art dealers purchased a sculpture that was represented to them to be by Alexander Calder. The testimony and the exhibits established that in 1959 Al-

exander Calder created and signed with the initials “AC” a black hanging mobile entitled *Rio Nero*. In 1962 Klaus Perls of the Perls Galleries sold the *Rio Nero* to Anspach. Before selling the work, Perls took an archival photograph of the mobile. In 1967, Perls reacquired the mobile from Anspach and sold it to Patricia Bauman’s father, Lionel Bauman, a collector. Except for its exhibition in 1984 at a gallery in Los Angeles, the mobile hung in Mr. Bauman’s home in Palm Springs, California, until his death in 1987. Patricia Bauman inherited the mobile from her father and sold it in March 1990 for \$500,000 to the four art dealers. Before the sale, Patricia Bauman obtained from the Perls Galleries documentation of the 1967 sale to her father and furnished the documentation to the dealers. She also had the mobile photographed and sent the photograph to Perls Galleries for identification. Perls Galleries then confirmed the 1967 sale. Klaus Perls is recognized as one of the world’s experts on the work of Alexander Calder.

In November 1990, the four art dealers, who had originally satisfied themselves that the mobile was authentic, began to have doubts. The mobile was then sent by the dealers to Perls Galleries for inspection and review by Klaus Perls. After a ten-minute inspection, Perls concluded that the mobile was not authentic. The dealers then requested that Patricia Bauman rescind the contract. After she refused, the dealers sued her for fraud, breach of express warranty, and material mistake of fact.

Notwithstanding the testimony of Klaus Perls that the mobile was not authentic, the court found otherwise on the basis of the testimony of Linda Silverman, an art expert of less imposing stature than Klaus Perls. The court found Silverman to have been more thorough than Klaus Perls, and the court gave great weight to the provenance of the mobile—that is, the fact that “the chain of ownership from the original artist to the present owner is accepted in the art world as persuasive evidence of a work’s authenticity.” The court concluded that despite the great weight that must be accorded the opinion of Perls and his premier credential with respect to Calder’s work, the record and the circumstantial evidence surrounding the mobile created a strong presumption that it is an authentic Calder.

That case is an excellent example of why disputes as to the authenticity of a work of art should be settled between the parties if it is at all possible before going to court. Here the dealers were double losers. Not only did they lose on the issue of rescission of the contract when the court found the mobile to be authentic, but they were also left with a court-authenticated Calder mobile that in the art market was not authentic, according to Klaus Perls's assessment and reputation, and therefore not salable.

At times, courts have erroneously voided a contract on the grounds of mutual mistake, although mutual mistake in reality did not exist. One such case is *Arnold Herstand & Co. v. Gallery: Gertrude Stein, Inc.*,²¹⁵ an action between two art galleries to rescind the sale of a drawing, *Colette de Profil*, by the renowned European artist Balthazar Klossowski de Rola (also known as Balthus) that was alleged to be a fake. The New York State Supreme Court granted the plaintiff-purchaser (Herstand) rescission based on mutual mistake of fact. The decision was reversed on appeal: The appellate court found that the defendant-seller (Stein), far from participating in any supposed mistake by Herstand, effectively defended the authenticity of the drawing as the genuine work of Balthus²¹⁶ by citing a compelling provenance and the persuasive testimony of an expert, thereby presenting a triable issue with respect to the authenticity of the work itself.

Apparently, after purchasing the drawing from Stein, Herstand in turn sold it to Claude Bernard, the operator of a Parisian art gallery. Around 1990, Bernard reportedly showed the artist Balthus a photograph of the drawing he had purchased. Balthus denounced it as a fake, writing "*faux manifeste*" on the back of the photograph. On two later occasions, in September 1991 and in January 1992, Balthus, in writing, disclaimed authorship of similar photographs of that work. Bernard subsequently rescinded his purchase of the drawing from Herstand, who, in turn, sought to rescind his purchase from Stein. Stein refused to rescind the purchase, and, in the course of the ensuing legal proceedings, Andre Emmerich, a noted American art dealer, opined, on behalf of Herstand, that an artist is the definitive expert on her own work. "When a living artist repudiates a work as

a forgery or a fake, the work becomes unmerchantable and unsalable.”²¹⁷ The lower court, in taking a broad perspective of that view, granted rescission of the contract, finding that the artist’s rejection was the ultimate comment on the authenticity of the artwork.

The appellate court disagreed, citing *Greenberg Gallery v. Bauman*, discussed above. There, the same Andre Emmerich, testifying on the genuineness of a particular mobile sculpture attributed to the late Alexander Calder, asserted that an artwork’s “flawless provenance” was “the best proof of authenticity.” Applying that test in the *Herstand* case, the appellate court noted that the defendant Stein acquired the *Colette* drawing in the late 1960s directly from Frederique Tison, who was then married to Balthus, who owned a number of works by him, and who commonly authenticated works by him, and that the work remained continuously in Stein’s possession until Stein consigned it to the plaintiff Herstand in 1988. Therefore, according to the appellate court, the drawing’s provenance argued in favor of its authenticity. In addition, the court was open to the supposition that an artist may well, at times, have a motive for repudiating her own genuine work. In considering evidence that Balthus, in repudiating the drawing, might now be acting “from personal animus against his former wife,” the court made the following comment:

A fundamentally false assumption would appear to animate both the views of Mr. Emmerich and the motion court: that nothing can be imagined which would induce an artist to repudiate his own genuine work. History tells us otherwise.²¹⁸

Accordingly, the case was remanded for further proceedings on the issue of the drawing’s authenticity.

Fraud and Misrepresentation Versus Breach of Warranty

Fraud

The tort of fraud occurs when the seller of a work of art makes an intentional or knowing²¹⁹ misrepresentation of a material existing

fact about the artwork, either by positive conduct or by willful non-disclosure or concealment, intending the misrepresentation to be relied on, and the purchaser in fact relies on the representation to her detriment.²²⁰ The misrepresentation must ordinarily be one of fact, not mere opinion or the seller's puffing.²²¹ If, however, a seller represents herself as possessing an expertise with respect to the artwork to be sold, the seller's misrepresenting opinion may be sufficient for fraud.²²² In addition, if a seller presents a matter as fact, rather than opinion, that statement may be actionable.²²³

By virtue of the tortious character of fraud, injured parties have a choice of remedies: They can, as in the case of innocent misrepresentation or mutual mistake, rescind the transaction and obtain restitution of the money paid on redelivery of the artwork to the seller, or they can elect to affirm the contract and collect damages proximately resulting from the fraud.²²⁴

Negligent Misrepresentation

Like fraud, negligent misrepresentation is a tort. However, unlike fraud, which generally requires intent or knowledge of the misrepresentation, negligent misrepresentation may lead to recovery even if the wrongdoer believed the false statements to be true, provided the statements were made without reasonable grounds.²²⁵ As in a case of fraud, a party bringing suit in negligent misrepresentation can elect either to rescind the transaction and obtain restitution or to affirm the contract and collect proximate damages.²²⁶

Comparisons with Breach of Warranty

There are several important distinctions between fraud or negligent misrepresentation and breach of warranty. First, in a fraud or negligent misrepresentation case, the buyer must be able to prove the requisite state of mind of the seller at the time the false statement was made; such proof is not necessary in an action for breach of warranty.²²⁷ Second, since the concepts of both warranty and mistake are contractual, the rules governing venue and the statute of limitations

are those applicable to contract actions; fraud and negligent misrepresentation are governed by rules applicable to actions in tort.²²⁸ Third, since a warranty is a term of the sales contract, the buyer cannot offer extrinsic evidence of its exclusion or modification unless the requirements of the parole evidence rule are first satisfied.²²⁹

Despite those salient differences, it should be noted that fraud, negligent misrepresentation, and breach of warranty are not mutually exclusive theories of liability. An aggrieved purchaser of fine art can use all three theories in a single lawsuit against an art dealer. An example is *McKie v. R.H. Love Galleries, Inc.*,²³⁰ in which plaintiff Paul McKie, a collector, in 1983 purchased from Chicago-based R.H. Love Galleries, Inc., a William Merritt Chase oil painting for \$370,000. The painting was accompanied by an authentication and appraisal report on which McKie relied, as well as on representations by the dealer that the painting had excellent potential to appreciate in value and was “wax-resin lined.” When McKie determined that the statements he relied on contained material misinformation, he brought suit against the gallery on a variety of theories, including fraud, negligent misrepresentation, breach of express warranty, breach of implied warranty of merchantability, breach of warranty for a particular purpose, and breach of contract. In denying the gallery’s motion to dismiss, a federal district court in Illinois held that McKie sufficiently pleaded each count in his complaint.

A more illuminating example of the coexistence of fraud and breach of warranty, both of which were held to have occurred, is found in the case of *McCloud v. Lawrence Gallery, Ltd.*²³¹ The defendant Lawrence Gallery, a New York art dealer specializing in twentieth-century modern art, in September 1986 solicited plaintiff Jerry McCloud, a private collector in Ohio who was interested in upgrading his collection with modern artwork having potential investment value. On October 8, 1986, believing that McCloud might be interested, the gallery purchased at a Sotheby’s auction what was represented to be a drawing by Pablo Picasso. After the gallery bought the drawing, Sotheby’s advised the gallery that there was a question about its authenticity and sought the opinion of the Comité Picasso, a committee of art experts and members of Picasso’s family who

make definitive assessments of the authenticity of works allegedly by the artist. In November 1986, the committee officially notified Sotheby's that it did not accept the drawing as authentic. Sotheby's relayed that information to Lawrence gallery that month, advising the gallery that if Sotheby's could not locate proof of the drawing's authenticity, it would rescind the sale and refund the gallery's purchase price.

Meanwhile, in mid October, the plaintiff McCloud agreed to acquire from the gallery, on an installment plan, the Picasso drawing for \$16,000, as well as a small work by Pierre-Auguste Renoir for \$5,000. Believing the Picasso drawing to be authentic, the gallery on December 22, 1986, issued to McCloud an unconditional guarantee of the "absolute authenticity" of the drawing. On receipt of full payment in early January 1987, the gallery delivered the artwork to McCloud in Ohio.

After McCloud received the artwork, Sotheby's advised the gallery that the Comité Picasso had reconfirmed its negative opinion of the drawing's authenticity. In a letter dated February 2, 1987, Sotheby's repeated its offer to rescind the sale to the Lawrence Gallery on the basis of the drawing's lack of authenticity. The gallery decided not to rescind the purchase. Moreover, on receipt of the letter and against Sotheby's advice, the gallery allegedly did not even disclose to McCloud the existence of the dispute regarding the drawing's legitimacy, let alone the decision of the Comité Picasso.

McCloud, apparently on his own, hired an art expert who contacted the Comité Picasso, which again, in December 1988, rejected the drawing's authenticity. In February 1989, McCloud advised the Lawrence Gallery that the Picasso was not genuine and threatened to bring suit if the transaction was not rescinded. In April 1989, in an Ohio state court, McCloud filed suit, asserting, among a variety of claims, fraud, breach of express and implied warranties under Ohio and New York law, and violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act. The Ohio court entered a default judgment in September 1989, which was enforced in the New York courts in 1992.²³²

Arts and Consumer Legislation

In addition to the redress offered the injured buyer by the U.C.C. and by tort and contract law, a number of states have enacted legislation to provide further protections to the consumer. Below is a brief survey of some of that legislation.

Penal Statutes

Most applicable penal statutes throughout the United States are concerned with forgery and fraud. The relevant forgery statutes focus on written instruments, which include certificates of authenticity and other documents related to the purchase, consignment, and sale of artwork. The forgery statutes are of a general nature and require proof of criminal intent to injure or defraud,²³³ as well as proof of the forged or counterfeit nature of the work.²³⁴ In most states, the relevant forgery statutes range from mid-level to low-level felonies to misdemeanors. Depending on the nature of the forgery and the laws of the jurisdiction, penalties range from prison terms of up to twenty years²³⁵ to payment of a small fine.²³⁶

In addition, a number of states have enacted what are generally known as criminal-simulation statutes.²³⁷ Typical is New York's statute, which provides for criminal penalties for the making or the altering of any object so that "it appears to have an antiquity, rarity, source or authorship which it does not in fact possess."²³⁸ As with forgery, the criminal-simulation statutes require proof of criminal intent to defraud or injure,²³⁹ as well as proof of the altered or counterfeit nature of the work.²⁴⁰ Violation of the statute in most states constitutes a high-level misdemeanor, although a few states have statutes predicating the level of the crime on the value of the object altered or forged.²⁴¹

Warranties of Authenticity

To date, New York, Florida, Iowa, and Michigan have enacted art legislation²⁴² providing assurances as to the authenticity of art

purchases beyond those found in the U.C.C. Each of the four statutes hold art-merchant-sellers responsible to nonmerchant—buyers for any statement pertinent to the authorship of a work of fine art, notwithstanding that the statement may be merely the seller’s opinion. In addition, the Michigan statute provides that

an art merchant whose warranty of authenticity of authorship was made in good faith shall not be liable for damages beyond the return of the purchase price which the art merchant receives.²⁴³

However, such a warranty made in bad faith may entitle the buyer to consequential damages, rather than the mere return of the purchase price.²⁴⁴

Those statutes clarify the express warranty provision of the U.C.C.²⁴⁵ by (1) ensuring that the identification of a work of fine art with any authorship in a written instrument is itself part of the basis of the bargain and (2) abolishing, insofar as authorship is concerned, the distinction between fact and the seller’s mere opinion.

The New York statute at section 13.01 provides in part as follows:

Notwithstanding any provision of any other law to the contrary:

1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it:
 - (a) Shall be presumed to be part of the basis of the bargain; and
 - (b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.

Under the New York Arts and Cultural Affairs statute, a standard for determining liability for breach of warranty has evolved from the case of *Dawson v. G. Malina, Inc.*²⁴⁶—that is, whether the representations by the art merchant had a reasonable basis in fact at the time the representations were made, as shown by the testimony taken as a whole. In *Dawson*, the plaintiff purchased a number of allegedly an-

tique Chinese jade and ceramic art objects from the defendant art gallery for a total price of \$105,400; he then sought to cancel his purchase under section 13.01 of the New York Arts and Cultural Affairs statute for breach of warranty when he came to believe that the art objects were forgeries. The court, in applying the above standard, stated:

[I]t appears that the proper standard to be applied here in determining whether defendant is liable for breach of warranty is whether the representations furnished [plaintiff] Dawson by [defendant] Malina with respect to each of these objects can be said to have had a reasonable basis in fact, at the time that these representations were made, with the question of whether there was such a reasonable basis in fact being measured by the expert testimony provided at trial. Since the plaintiff has the burden of proof on the issue of breach of warranty, the issue presented here, when reduced to its simplest terms, is whether plaintiff Dawson has established by a fair preponderance of the evidence that the representations made by defendant were without a reasonable basis in fact at the time that these representations were made.²⁴⁷

The court weighed the expert testimony with respect to each object and concluded that the plaintiff was entitled to rescind his purchase of three of the five objects at issue because in each case the defendant's representations lacked a reasonable basis in fact. In other words, the art gallery's failure to undertake sufficient investigation in substantiating the provenance of three of the art objects allowed the buyer to rescind the transaction as to those items and obtain a refund of the purchase price. With respect to the other two art objects, the court concluded that the expert testimony at trial indicated that the art gallery had a reasonable basis in fact for its representation and therefore there was no breach of warranty.

Almost twenty years after *Dawson* was decided, the 1997 case of *Pritzker v. Krishna Gallery of Asian Arts*²⁴⁸ involved the purchase of two purportedly antique Indian sandstone sculptures for a total purchase price of \$1,075,000. Once again, shortly after their purchase, the buyer came to believe that the art objects were fakes and wanted

his money back. The *Pritzker* case shows that the New York warranty of authenticity under section 13.01 of the Arts and Cultural Affairs statute applies when a work of art is sold from an art merchant to someone who is not an art merchant. Section 11.01.2 defines an “art merchant” as a person who by her occupation holds herself out as having knowledge or skill peculiar to such works or “to whom such knowledge or skill may be attributed by his employment of an agent or other intermediary.” In *Pritzker*, the defendant art gallery argued that since Pritzker had an art adviser who had specialized knowledge in the field, the knowledge of that art adviser was imputed to Pritzker, and, therefore, the warranty provision did not apply. The magistrate judge’s report and recommendation, confirmed by the court,²⁴⁹ adopted a narrow view by holding that the art adviser had no authority as an agent to bind Pritzker to purchase the art objects and, therefore, Pritzker was not deemed to be an art merchant.

On the question of breach of warranty, the federal district court confirmed the reasonable-basis-in-fact standards set forth in *Dawson*, discussed above, as the applicable criteria. In declining to grant summary judgment to either party, the court concluded that there were genuine issues of material fact regarding the authenticity of the sandstone sculptures. On this issue, the magistrate judge’s report stated that

[b]ased on the standards in *Dawson* and *Balog*, Plaintiff [Pritzker] may need to show that Defendant [the art gallery] failed to undertake a sufficient investigation of the authenticity of the pieces when it sold them to Pritzker and thus lacked a reasonable basis in fact from which to assert that the objects were genuine.²⁵⁰

However, Judge Blanche Manning ruled in an unpublished in limine order that what the defendant art gallery did or did not do in order to establish its belief as to the authenticity of the sculptures is irrelevant, since liability under *Dawson* is measured by expert testimony.²⁵¹ As held in *Dawson*, whether there was a “reasonable basis in fact” for the representations which were made at the time of sale is

“measured by the expert testimony provided at trial.”²⁵² The court’s unpublished order did note the following:

This court’s reading of *Dawson*, however, is different from that of the Hawaii district court in *Balog*. In *Balog*, the court read *Dawson*’s standard to “h[o]ld that the defendant’s failure to have undertaken sufficient investigation in substantiating the provenance of the items in question would allow for rescission of the transaction with a refund of the purchase price plus interest.” *Balog*, 745 F. Supp. at 1567. Unlike the Hawaii district court in *Balog*, this court does not construe *Dawson* to require an inquiry into the actual investigation undertaken by defendant prior to making representations as to the items of sale. Indeed, *Dawson* did not make such an inquiry. See *Dawson*, 463 F. Supp. at 467–71. The court in *Dawson* inquired into whether the representation made at the time of sale was supported by a reasonable basis in fact—as measured by the expert opinion testimony. See *id.* This court finds *Dawson* persuasive and does the same.²⁵³

The judge’s instructions to the jury followed *Dawson*. At trial, on May 7, 1997, the plaintiff Pritzker was awarded \$1.7 million.²⁵⁴

*Rogath v. Siebman*²⁵⁵—a breach of contract, breach of warranty, and fraud case based on the sale of an alleged Francis Bacon painting accompanied by a written warranty of authenticity in the bill of sale—provides caution to any seller of a work with doubtful authenticity. The plaintiff David Rogath purchased the painting from the defendant for \$570,000 and resold it three months later to Acquavella Contemporary Art, Inc. for \$950,000. When Acquavella learned of the painting’s doubtful authenticity, it requested the refund of the purchase price and returned the painting to the plaintiff. The plaintiff then sued the defendant and was able to recover \$950,000 in damages, the amount lost in the aborted sale to Acquavella, for a breach of warranty of authenticity, without having to prove that the work was actually a fake. The warranty provision in the bill of sale stated the following in part:

In order to induce David Rogath to make the purchase, Seller . . . make[s] the following warranties, representations and covenants to and with the Buyer.

1. . . . ; that the Seller has no knowledge of any challenge to the Seller's title and authenticity of the Painting; . . .

The court granted partial summary judgment to the plaintiff, finding that “the undisputed evidence before the Court leaves no doubt that Defendant was aware of the challenges to the authenticity of the painting.” Among other things, the court considered comments and questions about the shininess of the black paint used (Francis Bacon's other works used matte black) and the presence of pink paint (Bacon generally did not use pink), Sotheby's refusal to handle the sale of the painting, and the fact that Bacon's longtime dealer, Marlborough Gallery, had expressed doubts about the painting's authenticity to the defendant. The plaintiff did not have to prove that the painting was not authentic (a fact that is often difficult to prove) but only had to show that the defendant knew of the doubts about the painting's authenticity, since the defendant had made an express warranty, as indicated above, to induce the plaintiff to buy and the defendant had breached that warranty.

New York's Door-to-Door Sales Protection Act

Enacted to afford consumers of goods primarily for personal or household purposes a cooling-off period from high-pressure sales tactics when payment of the purchase price is deferred over time, New York's Door-to-Door Sales Protection Act²⁵⁶ has been applied in at least two judicial cases to the purchase of art by a collector. Briefly, the act is applicable when a seller personally solicits the sale of a consumer good and the buyer makes an offer or agreement to purchase at some place other than the seller's place of business. The act gives the buyer up to three business days after a door-to-door sale to cancel the offer or agreement to purchase the goods in question.²⁵⁷ The act further directs that at the time of the transaction the seller must inform the buyer, both orally and in writing, of the right to cancel.²⁵⁸ Until the seller has complied with those requirements, the buyer may cancel the sale by notifying the seller in any manner and by any means of her intention.²⁵⁹

In the *Vom Lehn* case²⁶⁰ (see page 102), in which the New York State Supreme Court found that the purchase price for twenty jade carvings was unconscionable and, therefore, would not enforce the contract requiring the plaintiffs to pay the balance of the purchase price, the court applied the Home Solicitation Sales Act (the predecessor statute to the Door-to-Door Sales Protection Act) to enable the plaintiffs to recover their down payment on the carvings, along with reasonable legal fees. The court noted that the purchase price was to be paid in five installments, the defendants solicited the sale at the buyers' home, and there were no prior negotiations at the defendants' shop.²⁶¹

More recently, in *Pritzker* (see pages 140–142), the federal district court for the Northern District of Illinois was called on to interpret the act as it applied to the sale of two antique Indian sandstone sculptures for more than \$1 million. The court, in deciding not to grant a motion for summary judgment for the defendant, found that there were genuine issues of material fact as to whether the sale of the sculptures was a door-to-door sale within the meaning of the act. The court noted that the *Vom Lehn* court had held that the act is not limited to door-to-door sales.²⁶² In *Pritzker*, the main issue to be decided at trial was whether Pritzker offered or agreed to purchase the sculptures “at a place other than the place of business of the seller.” That element is necessary in order to come within the purview of the act. At trial, the jury found in favor of Pritzker.

Native American Arts

A number of states have enacted legislation addressing the representations of authenticity made in connection with Native American arts.²⁶³ Those statutes render it a crime for a seller to place a state-registered label on fake Indian arts and crafts or otherwise to represent those items as being authentic for the purpose of reselling them. Violations of the statutes are generally classified as misdemeanors.

Magnuson-Moss Warranty Act

Supplementary to and not in restriction of existing consumer rights and remedies under federal and state laws, the Magnuson-Moss Warranty Act²⁶⁴ mandates that sellers who give written warranties with respect to the sale of consumer products adhere to certain requirements:

1. If a consumer product costs more than \$15, the seller must adhere to the Federal Trade Commission (FTC) rules relating to the disclosure of warranty terms.²⁶⁵
2. The seller must clearly and conspicuously designate the written warranty as either a “full warranty” or a “limited warranty.”²⁶⁶ A full warranty must conform to certain federal minimum standards.²⁶⁷ A limited warranty need not meet those standards but must be clearly and conspicuously labeled as a limited warranty.²⁶⁸ Not subject to those designation provisions are general statements of policy concerning consumer satisfaction,²⁶⁹ such as “satisfaction guaranteed or your money back.”
3. A seller may not make what is deemed to be a deceptive warranty under the act. A deceptive warranty includes any written warranty that (a) contains an affirmation of fact, false or fraudulent representations, or promises or descriptions that would mislead a reasonable person exercising due care; (b) fails to contain sufficient information to prevent its terms from being misleading; or (c) uses the terms “guarantee” or “warranty” when other terms limit the breadth and the scope of the protection apparently granted, so as to deceive a reasonable person.²⁷⁰

The rules and regulations under the act are promulgated by the FTC.²⁷¹ For the act to apply to a transaction, the following conditions must be fulfilled:

1. The subject of the transaction must be a consumer product.²⁷²

2. The seller must have issued a written warranty in connection with the subject of the sale.²⁷³ (Nothing in the act, however, requires that such a warranty be given.)
3. The product must either be distributed in interstate commerce or affect interstate trade, traffic, transportation, or commerce.²⁷⁴ Consequently, if an artwork is produced locally and sold locally, without the use of the mails, the act may not apply.

Truth-in-Lending Act

If a collector buys a work of art on credit with the price payable in more than four installments or if a finance charge is imposed, the disclosure of the credit terms in accordance with the federal Truth-in-Lending Act²⁷⁵ may be required. Willful and knowing failure to comply with the act triggers criminal penalties: a fine of up to \$5,000, imprisonment for up to one year, or both.²⁷⁶ Civil liability may also be incurred for failure to comply with certain provisions of the act.²⁷⁷

Federal Trade Commission Act

The Federal Trade Commission Act prohibits unfair or deceptive acts or practices in commerce.²⁷⁸ Accordingly, a collector who believes that a dealer is engaged in deceptive acts or practices in the sale of artwork may lodge a complaint with the FTC. As discussed in chapter 3 (see pages 251–253), the FTC has brought at least three actions²⁷⁹ in which it has sought temporary, preliminary, and permanent injunctive relief, as well as rescission and restitution for injured consumers.

New York City Truth-in-Pricing Law

The New York City Truth-in-Pricing Law,²⁸⁰ which dates back to 1971, has only recently been enforced against art galleries located in New York City. The New York City Department of Consumer

Affairs (DCA) has interpreted the law to require all galleries to post prices next to exhibited works and to list those prices in a public space at the art gallery or have sheets listing those prices readily available to members of the public. The new attention to art galleries resulted from the DCA's investigation of the auction industry, which led to the recently revised New York City auction rules discussed in chapter 4. In March 1988, DCA inspectors visited numerous art galleries and issued seventeen citations for failure to conspicuously display prices. Most galleries have complied with the requirement to post prices, although at least one may challenge the requirement in court.²⁸¹

Antitrust Claims and Restrictions on Sales—Right of First Refusal

Chapter 7, pages 624–626, addresses antitrust claims and authentication—specifically, whether a committee's determination that a work of art is or is not included in the *catalogue raisonné* for an artist can amount to a Sherman Antitrust Act violation due to the alleged control over the market for the works of that artist.²⁸² A related restraint-of-trade issue arises from a “right of first refusal” provision in an art dealer's invoice: that is, a requirement that before the collector can freely sell the artwork to a third party, the collector must first offer the dealer the opportunity to buy it back. Is a right of first refusal enforceable by the art dealer, or does it amount to an unreasonable restraint on the alienation of property?

In *Wildenstein & Co. v. Wallis*,²⁸³ a New York Court of Appeals case decided in 1992, Wildenstein brought an action against the Hal Wallis estate to enforce a right of first refusal. During Wallis's life, he and Wildenstein had a dispute over the ownership of a Monet painting and a Gauguin painting. As part of the formal settlement of that dispute in 1981, the paintings were returned to Wallis; the settlement agreement further provided that Wildenstein would have a right of first refusal to purchase on thirty days' notice fifteen other paintings owned by Wallis, if he ever wanted to sell them, under the same terms and conditions offered by a third-party purchaser. Wallis died

in 1986. Three years later, his heirs decided to sell some of the paintings at auction at Christie's, at which point Wildenstein sued to enforce its right of first refusal.

Holding for Wildenstein, the court examined the common law rule against unreasonable restraints on the alienation of property, which invalidates unduly restrictive controls on future transactions. The court explained that the rule must be applied on a case-by-case basis, and that the analysis measures the reasonableness of the restraint by considering the price of the property and the duration and purpose of the restraint. The court also stated that the rule attempts to find a balance between society's interest in the free alienability of property and the rights of owners to direct future transactions.²⁸⁴

The court found that the right of first refusal held by Wildenstein was not unduly restrictive: It still enabled the Wallis heirs to realize the highest possible price should they decide to sell the paintings, as long as they complied with the detailed right of first refusal provisions. The court also found that the right of first refusal did not violate New York's Rule against Perpetuities.²⁸⁵

Wildenstein may not be the final word on restrictive sale provisions appearing on dealers' invoices because that case involved a formal settlement agreement negotiated between attorneys representing fully informed parties, and there was no element of coercion with respect to the right of first refusal provisions. Furthermore, the settlement agreement set forth detailed procedures for complying with those provisions. And most importantly, there was no element of control of the market by the art dealer (Wildenstein), since impressionist paintings by Monet, Gauguin, and others are sold by many art dealers and auction houses worldwide.

Different issues are presented when an art dealer is the exclusive dealer for a particular artist and tries to control the market for that artist's work by compelling buyers to agree to restrictions on resale or else be unable to purchase an artwork by that artist. This situation may be treated differently from the situation in *Wildenstein*, where a court seeks to balance society's interest in free alienability against the rights of owners or sellers of property to direct future transfers of that property.

New York State's Donnelly Act,²⁸⁶ which is similar to the federal Sherman Antitrust Act, deals with price fixing, monopolization, and restraint of trade violations. The only case touching on these issues was brought by Joan Vitale against Marlborough Gallery and the Pollock-Krasner Foundation alleging antitrust violations based on market control.²⁸⁷ Vitale alleged that the authentication committee controlled the market for Jackson Pollock's work by its ability to declare a work authentic or not authentic. Although Vitale's lawsuit was dismissed, there is language in the opinion which indicates that under certain circumstances such a claim would be valid.²⁸⁸

To date, there are no cases in New York dealing with the right of first refusal provisions that are now appearing on the invoices of art dealers. To determine enforceability, the courts will apply a balancing test based on all the facts and circumstances. The outcome will depend on whether the agreement is signed by both parties, the method of determining the price, the period of the restraint, whether there were coercing factors present in the sale, and whether there are multiple dealers or only one dealer for the artist's work, which goes to the degree of control of the marketplace.

SALES BY COLLECTORS

When a collector undertakes to sell a work of art, she is bound by most of the same principles and statutes that circumscribe the conduct of dealers. However, some allowances are made for the collector's relative lack of expertise concerning both art objects and the trade, resulting in a somewhat less stringent code of required behavior by the collector as seller. The most important variances—which are found in the U.C.C., in principles of common law, and in arts and consumer legislation—are set forth below.

Express Warranties

For purposes of determining the existence of an express warranty in the absence of words of guarantee or warranty, statements by a col-

lector concerning the attributes of a work of art, including authenticity, that are not stated as fact are more likely to be considered opinion than if those statements were made by a dealer.²⁸⁹

Implied Warranty of Merchantability

Although the implied warranty of merchantability is not applicable to a sale by someone who is not a merchant with respect to the type of goods being sold,²⁹⁰ the nonmerchant seller is nevertheless obligated on principles of good faith to disclose to the buyer any knowledge she has with respect to any hidden defects in the goods.²⁹¹

Warranty of Title

As earlier indicated, a warranty of title is statutorily imposed in every sales contract unless the warranty is specifically disclaimed or modified. However, when a nonmerchant is the seller, the warranty does not include an implied representation that the goods are free of any rightful claim of patent or trademark infringement by a third person.²⁹²

Statute of Frauds

A contract for the sale of goods for \$500 or more must be evidenced by a signed writing. An exception to that rule exists for a sale between merchants;²⁹³ the exception is not available to a sale by a collector who is not a merchant of the goods sold.

Voidable Title

A seller with voidable title can transfer good title to a good-faith purchaser for value. However, a private collector, unlike an art dealer, cannot pass good title when the collector is entrusted with a work of art by another who does not intend to pass title.²⁹⁴

Buyer in the Ordinary Course of Business

All purchasers of art, whether dealers or not, must meet the test of being a buyer in the ordinary course of business within the meaning of the U.C.C. in order to acquire unchallenged clear title. Although a more stringent standard is required of merchants who would be buyers in the ordinary course of business, a nonmerchant, to meet the test, must buy from a merchant in good faith and without knowledge that the sale would be in violation of third-party ownership rights. “Good faith” for nonmerchant buyers means honesty in fact.²⁹⁵

Collector-Dealer Consignments

Applicability of Revised U.C.C.

A collector more often than not sells a work of art through a dealer. When that is done, a written consignment contract is necessary to adequately protect the collector. Prior to the 1999 revisions to article 9 of the Uniform Commercial Code (effective July 1, 2001),²⁹⁶ it was important to know if the consignment was governed by the provisions of article 2 or article 9 of the U.C.C., or was outside both provisions and therefore governed by the common law principles of agency.

Under former section 2-326(3),²⁹⁷ goods delivered on consignment were subject to the consignee’s creditors unless the transaction was a “true consignment,” and either the consigned goods were properly evidenced by a sign giving notice of consignment status, the consignee was generally known by its creditors as selling consigned goods, or the consignor filed a financing statement against the consignee. Former section 2-326 led to more litigation than clarification because it was difficult to establish compliance with the signage and knowledge tests or to determine under non-U.C.C. law whether transactions were “true consignments” or ones intended as security.²⁹⁸

Accordingly, consignments have been deleted from article 2 of the U.C.C. and are now subject to revised article 9 or non-U.C.C. law.

Consignments are defined in section 9-102(a)(20) of the U.C.C. as follows:

- (20) “Consignment” means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:
- (A) the merchant:
 - (i) deals in goods of that kind under a name other than the name of the person making delivery;
 - (ii) is not an auctioneer; and
 - (iii) is not generally known by its creditors to be substantially engaged in selling goods of others;
 - (B) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery;
 - (C) the goods are not consumer goods immediately before delivery; and
 - (D) the transaction does not create a security interest that secures an obligation.

Under article 2 of the U.C.C., a sale is referred to as either a “sale or return”²⁹⁹ or a “sale on approval.”³⁰⁰ A sale or return occurs when a work, which may be returned even though it conforms to the contract, is delivered to a dealer primarily for resale.³⁰¹ The consignor-collector should be aware that the consigned work may be subject to the claims of the dealer’s creditors, even where title is reserved by the consignor,³⁰² while it is in the dealer’s possession, unless the consignor-collector perfects a security interest under article 9 of the U.C.C.³⁰³ The rule is designed to protect unwary creditors of the consignee-dealer by allowing them to make claims against goods delivered to the consignee for sale.

By contrast, under the U.C.C. a sale on approval occurs when a work, which may be returned even though it conforms to the contract, is delivered to a buyer who intends it primarily for use, rather than resale.³⁰⁴ In that case, such a sale does not render the work sub-

ject to the claims of the buyer's creditors until the buyer accepts it.³⁰⁵ Once the work is accepted by the buyer, it can be reached by the buyer's creditors unless a security interest is perfected by filing a financing statement and notifying the buyer's existing secured creditors.

A "true consignment" that satisfies the definition of section 9-102(a)(20) of the U.C.C. (see above) is now governed by article 9 of the U.C.C. A true consignment constitutes an agency or bailment relationship between the consignor and the consignee. The consignor, as principal, retains the ownership, may recall the goods, and sets the sale price. The consignee (dealer) receives a commission and not the profits of the sale. That type of consignment is deemed to be a sale or return, as described above, subject to the claims of the consignee's creditors³⁰⁶ unless the consignor perfects a security interest under article 9.³⁰⁷

It is possible for a true consignment (one that does not meet the definition of section 9-102(a)(20) of the U.C.C.) to be outside the provisions of article 9 of the U.C.C. For example, the consignment may not be to a dealer, or may not be to a dealer who deals in goods of that kind.³⁰⁸ Since the consignment does not fall within the purview of article 9 of the U.C.C., it is governed by the common law principles of agency and bailment. In that case, the consignment is not subject to the claims of the consignee's creditors, since the agent has no ownership interest in the consigned property; that is, a security interest cannot attach until the debtor (here the consignee) has rights in the consigned property.³⁰⁹ If the agent has no authority to subject the property to a security interest, the creditor cannot obtain a security interest in the property.

Failure to Perfect a Security Interest

The danger in not perfecting a security interest when a collector consigns a work of art to an art dealer is best illustrated in the case of *In re Morgansen's Ltd.*³¹⁰ At a shop located on Long Island, New York, Morgansen was engaged in the business of selling expensive items such as jewelry, art, collectibles, and furniture to retail customers,

other dealers, and interior decorators. Morgansen also conducted auction sales of its inventory from time to time. About 70% of the items were obtained by consignment. At Morgansen's store, the consigned items were commingled with goods obtained by direct purchase. A majority of customers walking into the store, or attending the auction sales, would not know whether a particular item was consigned by a third party or had been previously purchased by Morgansen for resale on its own account. When Morgansen filed for bankruptcy in February 2003, it had on its premises many items that were consigned to it. The bankruptcy trustee proposed to auction all of the property for the benefit of Morgansen's creditors. The consignors objected, claiming that they were entitled to remove their consigned goods prior to the auction.

The court began its analysis with the standard approach of first looking at the July 1, 2001, revised version of section 9-102(a)(20) of the U.C.C. (quoted above). If the transaction did not fit under that section, the court would turn to section 2-326 of the U.C.C. And if that section also did not apply, the court would rely upon the common law of bailments and other traditional practices. The consignors wanted out of section 9-102(a)(20), since they had not perfected their security interests and consequently would not have their goods returned by the bankruptcy trustee unless the consignment was outside the U.C.C. and treated as a common law bailment or agency. In order for a transaction to fit under section 9-102(a)(20) of the U.C.C., each of the attributes of a consignment as defined in that section must be satisfied. The burden of proof with respect to each attribute falls on the party claiming to be protected by this section. Under section 9-102(a)(20)(A)(i), Morgansen was indisputably a merchant who deals in goods delivered to it for the purpose of sale, and it operated under a trade name other than the names of the "consignors."

With respect to section 9-102(a)(20)(A)(ii), the consignors who opposed the bankruptcy trustee's auction of their property represented that Morgansen was, in fact, an auctioneer by virtue of its holding of several auctions a year, especially during the summer months, at its leased premises. The court indicated that the operative question is

whether a merchant who sells items of art, collectibles, and antique furniture to retail customers, interior decorators, or other dealers, and whose sales are generated from both its own inventory and consigned inventory by occasional auction is categorically within or beyond section 9-102(a)(20). Since Morgansen did sell its own goods and some of the consigned goods in nonauction transactions with retail customers, interior decorators, and other dealers, it did not exclusively act as an auctioneer. The court found that an occasional auction by the consignee was not enough to take the consignment out of section 9-102(a)(20).

The court then stated that under section 9-102(a)(20)(A)(iii), none of the objecting consignors presented any proof that Morgansen was “not generally known by its creditors to be substantially engaged in selling the goods of others.” The fact that a sign on the exterior of its leased premises may have indicated that the merchant was also an auctioneer was not sufficiently probative. Morgansen had significant unsecured claims from utility companies and other third party suppliers of goods and services that may not have known exactly what kind of business was conducted on the premises. The same knowledge by a few protesting consignors did not satisfy their burden of proof as to what subjectively the creditors generally knew or should have known about the exact nature of the debtor’s business activities.

The court then proceeded to section 2-326 under the amended U.C.C. The court noted that former section 2-326(3) of the U.C.C. was repealed effective July 1, 2001, and that consignments are now governed by article 9 of the U.C.C.

In finding for the bankruptcy trustee and allowing the sale of the consigned goods for the benefit of the creditors (preventing the return of the goods to the consignors), the court stated:

Under UCC Section 2-326 as amended, goods which are consigned for sale, are property of the bankruptcy estate of the “consignee,” and subject to the claims of the creditors of the entity doing the sale (Morgansen’s). If a person takes goods to one who is considered a consignee (a “buyer” for resale) and

that buyer goes into bankruptcy, the buyer/debtor's trustee will take the goods as property of the debtor's estate. . . .

The consignors were under constructive notice of the provisions of the UCC that subordinated their rights to the return of any of their goods to the superseding claims of the creditors of the buyer, the debtor. This may strike the consignors as grossly unfair, but that is the balance that the State of New York reached among competing parties in interest. The law is painfully clear—anybody who delivers goods with a “right of return” to a merchant who sells them under its own name is at risk that the merchant may file for bankruptcy relief, and the trustee will liquidate the goods for the benefit of the creditors.³¹¹

The lesson is clear.³¹² Any collector who consigns a work of art to a dealer for sale would be foolish not to comply with and require the dealer to comply with the U.C.C. filing requirements, which are, for the most part, simple and inexpensive. (See pages 163–164, dealing with perfection of a security interest.) Such compliance protects the consignor, regardless of the characterization of the consignment, if the dealer becomes insolvent or otherwise falls into difficulty with her creditors.

This lesson was again made clear in *Ganz v. Sotheby's Financial Services*.³¹³ The court was faced with cross motions for summary judgment in a dispute over title to a Marc Chagall painting entitled *Soleil couchant à Saint-Paul*. Ganz, the owner of the painting, had transferred possession of it to Michel Cohen, an art dealer, who had transferred possession of it to Sotheby's as collateral for a loan. Cohen defaulted on the loan, disappeared with Sotheby's money, and became a fugitive wanted on various criminal charges. With Cohen gone, the dispute was over who had title to the painting and the legal nature of each of the aforementioned transfers of the painting. (See page 117, where another case involving the same Michel Cohen is discussed.)

The court first found that Ganz had not sold the painting to Cohen. The transfer from Ganz to Cohen was not a “transaction of purchase” within the meaning of section 2-403(1) of the U.C.C., but

was more in the nature of an entrustment under sections 2-403(2) and (3).³¹⁴ Ganz then argued that he should prevail because Sotheby's was not a "buyer in the ordinary course of business" under section 2-403(2) and therefore Cohen could not have transferred good title to Sotheby's.

The court did not end its inquiry there but decided that it had to examine the transfers under revised article 9 of the U.C.C. dealing with consignments.³¹⁵ Section 9-319(a) of the U.C.C. provides that

for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.

The court noted that consignments are defined in section 9-102(a)(20) of the U.C.C. Applying the definition, the court found that Cohen was a merchant, that he dealt in art under names other than Ganz's, that he was not an auctioneer, and that Ganz's delivery of the painting to him did not create a security interest.³¹⁶ Therefore, section 9-319(a) of the U.C.C. would allow Cohen to transfer title to Sotheby's if it was shown that Cohen "was not generally known by [his] creditors to be substantially engaged in selling the goods of others."³¹⁷ The court found that Ganz had the burden of proving that Cohen was generally known by his creditors to be substantially engaged in selling the goods of others. Accordingly, the court decided that there was an issue of fact—how Cohen was generally known by his creditors—that precluded the granting of summary judgment in favor of either party. Ganz could have avoided this problem if he had simply filed a UCC-1 Financing Statement.³¹⁸

The Consignment Contract

The following checklist of issues that most frequently arise between owner and dealer is by no means exhaustive, nor do all the issues arise in every negotiation. Many of the points are of mutual concern, some of the issues speak mainly to the owner, and others

address largely the dealer. (See discussion of artist–dealer consignment contracts in chapter 1 at pages 26–39 and the contract forms in Appendixes 1-1, 1-2, and 1-3 at the end of chapter 1.)

1. *Exclusive Agency, Duration, Territory.* The contract should establish the principal–agent relationship so that the dealer is authorized to complete the sale of the consigned work on behalf of the owner within a specified period of time and within a defined territory.
2. *Price.* The contract should be clear that the dealer is authorized to sell the consigned work at a specific price and whether or not such a sale is authorized if on terms other than all cash. The contract should allow no deviation from the specific price unless the owner consents in writing to such a change.
3. *Commission to the Dealer.* The amount of the commission payable to the dealer must be clearly stated. Even where the work is consigned to a dealer for a net price to the owner, the owner may want to include a provision that imposes an upper limit on the total amount of the commission—for example, no more than 10% of the selling price.
4. *Warranties by Owner.* Since under the U.C.C. the dealer will be making warranties to the buyer, the dealer will want to obtain identical warranties from the owner. Those warranties should include the owner’s warranties of title and assurances that the work is free and clear of any liens or other encumbrances and that the work is authentic. An owner may not always warrant authenticity, leaving that issue up to the dealer’s expertise.
5. *Expenses.* The agreement should make clear who pays for the expenses of shipping, packing, insurance, advertising, condition reports, and other related matters.
6. *Insurance.* The owner will want all-risk insurance coverage for the work from the moment it is picked up from the owner until it is returned or sold. The agreement should state the amount of the insurance and to whom the proceeds

are payable in case of a loss. For example, if the work is insured for its full selling price, including the commission to the dealer, the agreement should provide that the dealer will receive her commission, so long as the owner has been paid the full net price due the owner.

7. *Payment terms.* The agreement should make clear who receives payment from the buyer and whether the dealer receives payment when the dealer pays the owner. If payment is not made in full, the owner should require that possession of the work not be released to the buyer unless the dealer then guarantees payment to the owner or the owner consents to such a release in writing.
8. *Noncircumvention.* Often the dealer wants a provision that protects the dealer from the owner's selling the work to a buyer to whom the dealer showed the work during the consignment period.
9. *Grant of Security Interest.* When a work of art is delivered on consignment to a dealer who maintains a place of business at which she deals in goods of the kind involved, the work of art is subject to the claims of the dealer's creditors unless the owner files a UCC-1 form. Therefore, the owner must require the dealer to grant the owner a security interest in the consigned work and must require the dealer to comply with the U.C.C. filing requirements and to comply with the notice to existing secured creditors.
10. *Miscellaneous.* The contract should make clear that the laws of a particular state apply to the consignment and clarify whether or not the parties to the contract consent to the jurisdiction of the courts in that state.

Risk of Loss

Generally, where a work of art is purchased from a merchant, the risk of loss passes to the buyer on the receipt of the work by the buyer.³¹⁹ Where a work of art is purchased from a nonmerchant seller, the risk

of loss passes to the buyer on notification that the buyer can take delivery of the work.³²⁰

Arts and Consumer Legislation

The express warranty of authenticity of authorship, as set forth by statute in Florida, New York, Iowa, and Michigan,³²¹ is not applicable to a collector in the sale of a work of fine art.

Immunity from Seizure of Artwork

When a collector lends a work for exhibition out of state, the collector, absent special protections, risks having the work seized and attached by her creditors or claimants in that jurisdiction, thus rendering the collector subject to the courts of that state. The parallel situation exists in the United States on a national level; in organizing loan exhibitions, museums must often conquer the reluctance of museums in foreign countries to lend their works of art to the United States, where they may be subject to judicial seizure. To cope with that predicament and to encourage the benefits to be derived from cultural exchanges, state and federal legislatures have enacted immunity statutes. (See chapter 16, on museums.)

It is useful to compare two such statutes briefly. The federal immunity statute³²² permits a grant of immunity from judicial seizure to cultural objects imported into the United States by nonprofit organizations for temporary display, provided that before the object enters the country, the United States Department of State, on application by the borrowing institution, determines that the object is of cultural significance and finds that the temporary exhibition of the object is in the national interest. The federal statute further requires that a notice to such effect be published in the *Federal Register* and indicates that if a dispute arises over the shipping cost of an otherwise protected artwork, the work may, in that limited connection, become subject to judicial seizure.

Like the federal statute, the New York statute³²³ is restricted to objects entering the state for display by a museum or other nonprofit

organization. The New York statute covers only works of fine art, whereas the federal statute also embraces works of cultural significance. However, the New York statute operates automatically, without the need to file an application or secure a finding that the exhibition or display is in the public interest.

SECURED TRANSACTIONS

A number of art transactions concern people who have a financial interest in a particular work of art and yet are not parties to the transaction. Examples are the artist who consigned a work to a dealer who, in turn, sold it to a purchaser; the bank that underwrites the dealer's business; and the creditor who has supplied the dealer with, for instance, framing services and has a long-standing account receivable. In addition, dealers and, to an ever-greater extent, collectors are borrowing money to purchase works of art and are pledging artworks as security for loans. Citibank in New York City has pioneered in the lending of money secured by artwork. All those situations give rise to an array of issues, such as

- (1) how to secure collateral;
- (2) the rights of a creditor in and to collateral, as against the rights of other creditors; and
- (3) the risk assumed by a consignor that a dealer can convey to a third-party good title in artwork, leaving the consignor unpaid.

Those issues are dealt with in article 9 of the U.C.C. on secured transactions. A brief survey of the subject as it applies to dealing in art is set forth below.

Creation of the Security Interest

For a security interest there must be a secured party (the creditor) and a debtor (obligor). The secured party is a lender of money, goods, or services, and the debtor is a borrower of the money, goods,

or services. The debtor is also the grantor of the security interest.³²⁴ For a security interest to exist between a secured party and a debtor, it must attach to the collateral given as security for the loan,³²⁵ and it is limited by the extent of the rights of the debtor in the collateral.³²⁶ For a secured party to enjoy the maximum protection afforded by article 9, she must make sure that the security interest in the collateral (1) attaches and (2) is perfected.³²⁷

Attachment

Attachment of the security interest is a prerequisite to perfection (a condition that generally must occur in order for the secured party to prevail over third-party claims to the collateral and that must occur before a secured party can sue to enforce her rights under the U.C.C.).³²⁸ There are three requirements for attachment:

- The debtor must execute a security agreement, or the collateral must be in the possession of the secured party.
- The secured party must give value.
- The debtor must have rights in the collateral.³²⁹

Those three prerequisites to attachment may take place in any order; the time of attachment is the time when the last of the three, whichever that may be, occurs.³³⁰

Collateral is grouped into three major categories:³³¹

- Tangible personal property or goods
- Semi-intangibles, encompassing instruments, documents, and chattel paper
- Pure intangibles, encompassing accounts, contract rights, and general intangibles

Tangible collateral, pertinent to most secured transactions involving art, is divided into four classifications:³³²

- Consumer goods, used primarily for personal, household, or family purposes

- Equipment, a catchall term meaning goods used or bought for use primarily in business
- Farm products, meaning goods of a described type not subjected to a manufacturing process and in the possession of a debtor who is a farmer
- Inventory (meaning goods held for sale or lease or to be furnished under service contracts), raw materials, work in process, and materials used or consumed in a business

The four classes of tangibles are mutually exclusive,³³³ and the proper classification of collateral hinges on its principal use or intended principal use by the debtor.³³⁴ Thus, if a debtor owns a large sculpture for purposes of display in her home, the sculpture is classified as a consumer good, whereas, if the same debtor holds the same piece of sculpture in her gallery for sale, the sculpture is classified as an item of inventory.³³⁵

Perfection

As noted earlier, the security interest in the collateral must be perfected in order for the creditor to receive priority against adverse claims by third parties to the collateral. There are three basic methods of perfection:

- (1) perfection by filing,
- (2) perfection by taking possession, and
- (3) perfection on attachment (that is, automatic perfection).³³⁶

The most common method of perfection is filing,³³⁷ and a brief financing statement may be filed in the appropriate state office³³⁸ in lieu of the actual security agreement.³³⁹ Filing is deemed to occur at the time of presentation to the filing officer³⁴⁰ and may be made before the security interest attaches and even before the security agreement is executed.³⁴¹ The financing statement is effective for five years after the date of filing and may be renewed for additional five-year periods by filing successive continuation statements.³⁴² Under the revision to article 9 a financing statement is only to be filed in the

state office, not also in the county office as under the pre-July 2001 law.

In perfection by taking possession, an alternative to filing, the collateral or pledge may be taken either by the secured party or by an agent on the secured party's behalf.³⁴³ Perfection here occurs when the secured party takes possession of the collateral or when the collateral is in the hands of the party's agent when the agent receives notice of the secured party's interest.³⁴⁴ According to the U.C.C., the secured party must use "reasonable care in the custody and preservation of collateral" in her possession.³⁴⁵

The third method, perfection on attachment, occurs in art transactions in situations involving the purchase-money security interest. Thus, an art gallery that sells a painting on credit has a perfected security interest at the time of the sale without the necessity of filing a financing statement so long as it retains possession of the painting. That is, when the buyer executes a security agreement, the gallery gives value in the form of an extension of credit, and the buyer receives a contractual right to the goods.³⁴⁶ A party other than the seller may have a purchase-money security interest, as in the case when a lender of money takes a security interest to secure the loan to a buyer to enable the debtor to buy the painting and the debtor in fact uses the money to acquire the collateral.³⁴⁷

Signature

In what may be the most dramatic change to article 9, the U.C.C. no longer requires that the debtor (obligor) sign the financing statement.³⁴⁸ The secured party can file a financing statement without the debtor's signature only if authorized by the debtor to make the filing.³⁴⁹ If there is a security agreement, the authorization to file the UCC-1 financing statement without a signature is automatic.³⁵⁰

Priorities

Most secured transaction litigation deals with the issue of who has first claim on the collateral: the secured party or a competing third-party claimant. In most cases involving art, the competing claimant is

- (1) a lien creditor,
- (2) another secured party, or
- (3) a buyer from the debtor.

Secured Party Versus Lien Creditor

Generally, an unperfected security interest is subordinate to the rights of one who becomes a lien creditor before the security interest is perfected.³⁵¹ Thus, secured party X, who on March 1 obtains a security interest in a painting owned by a debtor-gallery and lends the gallery funds but fails to file a financing statement until March 8, is subordinate to the claims of an unsecured creditor who on March 4 obtains a judicial lien against the gallery by way of judgment and levy.

An exception occurs with purchase-money security interests³⁵² in which a secured party who files within ten days³⁵³ after the debtor takes possession of the collateral prevails over one who becomes a lien creditor between the time the security interest attaches and the time of filing. Thus, an art dealer who sells a painting on March 1 to a debtor-art gallery on credit and delivers it the same day prevails over one who becomes a judicial lien holder on March 4, even though the secured party neglects to file until March 8.

Secured Party Versus Secured Party

When a debtor grants a security interest in the same collateral to two different lenders and subsequently defaults on the loans, both secured parties may assert claims to the collateral. Here are some of the general rules of priority:³⁵⁴

1. When neither security interest is perfected, the first to attach prevails.³⁵⁵

2. When one security interest is perfected and the other is not, the perfected interest prevails.³⁵⁶
3. When both security interests are perfected, one by a means other than filing, the first party to file or perfect, whichever occurs earlier, prevails.³⁵⁷
4. When both security interests are perfected by filing, the first party to file or perfect, whichever occurs earlier, prevails.³⁵⁸
5. When the collateral is other than inventory, a purchase-money security interest prevails over conflicting claims³⁵⁹ if it is perfected within ten days³⁶⁰ after the debtor takes possession of the collateral. Moreover, the interest holder automatically has a security interest in the proceeds of that collateral.³⁶¹ When the collateral is inventory, a purchase-money security interest prevails over conflicting claims in the same inventory and in identifiable cash proceeds received by the time of delivery of the inventory to a buyer if, before the debtor takes possession of the collateral, the purchase-money security interest is perfected and all secured parties with perfected interests in the same collateral receive written notice of that interest.³⁶²

Secured Party Versus Buyer

In art transactions a secured creditor may reach collateral in the hands of a buyer except for the four instances below:

1. When the creditor has authorized the sale or other disposition of the collateral “in the security agreement or otherwise,”³⁶³ her security interest does not survive the authorized transaction.
2. When the creditor has an unperfected security interest, the buyer prevails if she gives value and receives delivery without knowledge of the security interest before it is perfected.³⁶⁴
3. When there is a buyer in the ordinary course of business, the buyer takes possession free of a perfected security interest,

even if the buyer is aware of it, unless the buyer knows that the sale violates the security agreement's terms.³⁶⁵

4. In the case of a consumer-to-consumer sale, the holder of a purchase-money security interest in consumer goods may perfect without filing, but the holder must file in order to prevail over one who buys for personal, household, or family use without knowledge of the security interest.³⁶⁶

Creditor's Rights on Default

Once a default has occurred, the secured creditor may proceed under the U.C.C. against the collateral.³⁶⁷ In addition, since the options are not mutually exclusive,³⁶⁸ the creditor may proceed outside the U.C.C. by bringing suit on the debt.³⁶⁹ Some of the alternatives available to the secured creditor are noted in the following discussion.

When Default Occurs

Default most commonly occurs on the debtor's failure to make payments when due. In addition, default generally occurs whenever the parties have contractually so agreed. The well-drafted security agreement specifies which acts or occurrences are to be events of default.³⁷⁰ Virtually all security agreements contain an acceleration clause, requiring immediate payment under prescribed conditions of the entire remainder of the loan.³⁷¹ However, such clauses in consumer agreements are nullified in states that have adopted non-U.C.C. consumer-protection legislation whereby the debtor may cure default by paying delinquent installments.

Bringing Suit on the Debt

On default, the secured creditor may bring suit outside the U.C.C. on the debt, procure a judgment, obtain a levy on the debtor's property, and receive from the sheriff, after a public auction, whatever proceeds are required to satisfy the debt. When the collateral's value

is substantially less than the outstanding debt, the lien of a postjudgment levy reaches all the debtor's property, not just the collateral subject to the security interest.³⁷²

Realizing on Tangible Collateral: Right to Repossession

The secured party may proceed under the U.C.C. to repossess the collateral either through self-help, if it can be accomplished without committing a breach of the peace, or through judicial action.³⁷³ Once the collateral is repossessed, either through self-help or after the procurement of a judgment, the creditor may realize on the collateral by reselling or retaining it.³⁷⁴

Retention of Collateral in Satisfaction of the Debt

The secured party may, under the U.C.C.³⁷⁵ and in compliance with the U.C.C.'s notice provisions, resort to strict foreclosure. The collateral is retained, and the debt is discharged, with the debtor neither liable for a deficiency nor entitled to any surplus if the creditor later sells the collateral.³⁷⁶ Strict foreclosure is feasible only when the collateral's value approximates the unpaid balance of the debt, plus the anticipated costs of disposition. However, when the collateral is consumer goods and the debtor has paid at least 60% of the loan or cash price, the secured party must dispose of the collateral under the U.C.C.³⁷⁷ within ninety days after taking possession or risk exposure in a suit for conversion or other liabilities under the U.C.C.³⁷⁸

Sale or Other Disposition of Collateral

By far the most common method of realization on tangible collateral is by its sale or other disposition.³⁷⁹ The disposition, which must be in compliance with the U.C.C.'s notice provisions,³⁸⁰ can occur by auction, by private sale, or by contract,³⁸¹ so long as the disposition is commercially reasonable³⁸² as to method, time, manner, place, and terms.³⁸³ Proceeds from the disposition are applied, first, to the reasonable expenses of repossession and sale; second, to the satisfaction

of the debt; and third, to the satisfaction of third-party security interests.³⁸⁴ Any surplus is turned over to the debtor.³⁸⁵ When the proceeds cannot cover the unpaid balance of the debt, plus expenses, the debtor is personally liable for the deficiency unless it has been otherwise agreed.³⁸⁶

Debtor's Right of Redemption

Under any circumstances, until the secured party has sold the collateral or otherwise discharged the debt, the debtor may redeem the collateral by paying all the obligations secured by the collateral, plus reasonable expenses, including attorneys' fees.³⁸⁷

Liability of the Secured Party

When there is misconduct by the secured party in repossessing and realizing on the collateral, the debtor and other creditors may avail themselves of a number of remedies. One remedy is judicial intervention; a court may enjoin, for instance, a wrongful repossession or commercially unreasonable disposition.³⁸⁸ A second remedy, if an improper disposition has already occurred, is a right of recovery by the debtor or other creditors against the secured party.³⁸⁹ Other remedies not mentioned in the applicable provision of the U.C.C. but recognized in a number of jurisdictions include liability in conversion, other tort liability on grounds such as trespass and invasion of privacy, and denial of the secured party's right to recover a deficiency.

Notes to Chapter 2

1. See, e.g., ARTFORUM INT'L, May 1, 2005, at 65.
2. E.g., N.Y. ARTS & CULT. AFF. LAW § 13.01.
3. E.g., IOWA CODE ANN. § 715B.2 to .4.
4. See FLA. STAT. ANN. § 686.504; MICH. COMP. LAWS § 442.321 to .325.
5. See *Steiner v. Jarrett*, 130 Cal. App. 2d Supp. 869, 280 P.2d 235 (1954); *Cole v. Weber*, 69 Cal. App. 394, 231 P. 353 (Dist. Ct. App. 1924).
6. U.C.C. § 2-313.
7. U.C.C. § 2-313 cmts. 1, 4.
8. U.C.C. § 2-313 cmt. 8.
9. U.C.C. § 2-313(2); *Overstreet v. Norden Labs., Inc.*, 669 F.2d 1286 (6th Cir. 1982); *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 416 A.2d 394 (1980).
10. *McKnelly v. Sperry Corp.*, 642 F.2d 1101 (8th Cir. 1981).
11. *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068, 445 N.E.2d 19 (1982).
12. *Eddington v. Dick*, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (Geneva City Ct. 1976).
13. *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968).
14. U.C.C. § 2-313 cmt. 7.
15. U.C.C. § 2-202; *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974).
16. U.C.C. § 2-313(1)(a).
17. *Id.* See Alan Riding, *Art Fraud's New Trick: Add Fakes to Archive*, N.Y. Times, June 19, 1996, at C-11.
18. *Id.*
19. *David Tunick, Inc. v. Kornfeld*, 838 F. Supp. 848 (S.D.N.Y. 1993).
20. *But cf. Harper & Assocs. v. Printers, Inc.*, 46 Wash. App. 417, 730 P.2d 733 (Ct. App. 1986), *review denied*, 108 Wash. 2d 1002 (1987).
21. See *David Tunick*, 838 F. Supp. at 851.
22. *Id.*

23. ARTNEWSLETTER, Jan. 25, 1994, at 2.
24. U.C.C. § 2-313(1)(b).
25. U.C.C. § 2-313(1)(b) cmt. 5.
26. *Id.*
27. Weber v. Peck, 1999 WL 493383, 1999 U.S. Dist. LEXIS 10391 (S.D.N.Y. July 8, 1999).
28. *Id.*, 1999 WL 493383, at *1, 1999 U.S. Dist. LEXIS 10391, at *2.
29. *Id.*, 1999 WL 493383, at *3, 1999 U.S. Dist. LEXIS 10391, at *6.
30. *Id.*, 1999 WL 493383, at *3, 1999 U.S. Dist. LEXIS 10391, at *7.
31. U.C.C. § 2-313(2).
32. *Id.*
33. Grinnel v. Charles Pfizer & Co., 274 Cal. App. 2d 424, 79 Cal. Rptr. 369 (1969).
34. U.C.C. § 2-316 cmt. 8.
35. *Id.*
36. See *Overstreet*, 669 F.2d at 1291.
37. Cox v. DeSoto Crude Oil Purchasing Corp., 55 F. Supp. 467 (W.D. La. 1944); Morse v. Howard Park Corp., 50 Misc. 2d 834, 272 N.Y.S.2d 16 (Sup. Ct. 1966).
38. U.C.C. § 2-316 cmt. 8.
39. U.C.C. § 2-316(1).
40. *Id.*
41. N.Y. ARTS & CULT. AFF. LAW § 13.01.
42. MICH. COMP. LAWS § 442.321 to .325.
43. See U.C.C. § 2-316; Giusti v. Sotheby Parke Bernet, Inc., N.Y.L.J., July 16, 1982, at 5 (N.Y. Sup. Ct. 1982).
44. Weisz v. Parke-Bernet Galleries, Inc., 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. City Civ. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (App. Term 1974).
45. *Id.*, 67 Misc. 2d at 1082, 325 N.Y.S.2d at 582.
46. See *Weisz*, 77 Misc. 2d at 80, 351 N.Y.S.2d at 912.
47. U.C.C. § 2-202.
48. U.C.C. § 2-202(a).
49. U.C.C. § 2-202(b).
50. U.C.C. § 2-314 (implied warranty of merchantability); U.C.C. § 2-315 (implied warranty of fitness for a particular purpose).
51. U.C.C. § 2-314.
52. U.C.C. § 2-314(1).

53. U.C.C. § 2-104(1).
54. U.C.C. § 2-104 cmt. 2.
55. *Id.*
56. *See, e.g., Daniell v. Ford Motor Co.*, 581 F. Supp. 728 (D.N.M. 1984); *Hinderer v. Ryan*, 7 Wash. App. 434, 499 P.2d 252 (1972).
57. U.C.C. § 2-314(2).
58. U.C.C. § 2-314 cmt. 2.
59. U.C.C. § 2-314 cmt. 8.
60. U.C.C. § 2-315 & cmt. 1.
61. *Price Bros. Co. v. Phila. Gear Corp.*, 649 F.2d 416 (6th Cir. 1980), *cert. denied*, 454 U.S. 1099 (1981).
62. U.C.C. § 2-315 cmt. 4.
63. U.C.C. § 2-316(3)(b).
64. *Id.*
65. U.C.C. § 2-316 cmt. 8.
66. *Id.*
67. *Id.*
68. U.C.C. § 2-316.
69. U.C.C. § 2-316(2) & cmts. 3,5.
70. U.C.C. § 2-316(2) & cmt. 3; U.C.C. § 1-201(10).
71. U.C.C. § 2-316(2) & cmt. 3.
72. U.C.C. § 2-316(3)(a) & cmt. 7.
73. U.C.C. § 2-316(2).
74. *Id.*
75. *Id.*
76. U.C.C. § 2-316(3)(a) & cmt. 7.
77. U.C.C. § 2-316(3)(c).
78. *Alger v. Abele Tractor & Equip. Co.*, 92 A.D.2d 677, 460 N.Y.S.2d 202 (1983); *FMC Fin. Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980).
79. U.C.C. §§ 2-316(2), 1-201(10). *See, e.g., Lupa v. Jock's*, 131 Misc. 2d 536, 500 N.Y.S.2d 962 (Sup. Ct. 1986); *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (Sup. Ct. 1978).
80. U.C.C. § 2-302. *See, e.g., Industralease Automated Scientific & Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482, 396 N.Y.S.2d 427 (1977).
81. *See, e.g., CAL. CIV. CODE* § 1791.1 *et seq.*; *MD. CODE ANN., COM. LAW* § 2-316; *MASS. ANN. LAWS* ch. 106, § 2-316; *OR. REV. STAT.* § 72.8050; *WASH. REV. CODE* § 62A.2-316.
82. Consumer goods are generally defined in the statutes as goods purchased primarily for personal, family, or household use.

83. U.C.C. § 2-318 cmt. 3.
84. *See, e.g.*, *Mayes v. Harnischfeger Corp.*, 60 Misc. 2d 308, 302 N.Y.S.2d 658 (Sup. Ct. 1969).
85. *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 18 (1966).
86. 3 A.R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-314:391 and § 2-314:416 (3d ed. rev. 2002).
87. U.C.C. § 2-312.
88. U.C.C. § 2-312(1)(a).
89. *Id.*
90. U.C.C. § 2-312(1)(b).
91. U.C.C. § 2-312(3).
92. U.C.C. § 2-312(2).
93. *Id.* *See also* Duesenberg & King, *Sales and Bulk Transfers*, 3 Bender's U.C.C. Serv. § 5.03 (1987).
94. *Sunseri v. RKO-Stanley Warner Theatres, Inc.*, 248 Pa. Super. 111, 374 A.2d 1342 (1977).
95. Duesenberg & King, *supra* note 93, § 5.03. *See also, e.g.*, *Simmons Mach. Co. v. M&M Brokerage, Inc.*, 409 So. 2d 743 (Ala. 1981).
96. U.C.C. § 2-312 cmt. 5. But note that the warranty against infringement may be excluded by agreement between the parties. *See* Duesenberg & King, *supra* note 93, § 5.04[5].
97. U.C.C. § 2-312 cmt. 5.
98. *See, e.g.*, *Cady v. Pitts*, 102 Idaho 86, 625 P.2d 1089 (1981); *Smith v. Taylor*, 44 N.C. App. 363, 261 S.E.2d 19 (1979).
99. *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified as to damages*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *rev'd as to modifications*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969). *See* discussion related to the statute of limitations in chapter 3 at page 264.
100. *Menzel*, 24 N.Y.2d at 97, 246 N.E.2d at 745, 298 N.Y.S.2d at 983.
101. The Perls did not pursue their cause of action against the Parisian art dealer, as he was then deceased.
102. *Menzel*, 24 N.Y.2d at 98, 246 N.E.2d at 745, 298 N.Y.S.2d at 983.
103. U.C.C. § 2-714(2).
104. *Koerner v. Davis*, No. 85 Civ. 0752 (S.D.N.Y. May 21, 1987).
105. *Nacht v. Sotheby's Holdings, Inc.*, QDS 22701016 (Sup. Ct. N.Y. County 1999).
106. U.C.C. § 2-607.

107. U.C.C. § 1-201(25), (26).
108. U.C.C. § 2-607(3)(a).
109. U.C.C. § 2-609 cmt. 4.
110. U.C.C. § 2-607(5)(a).
111. See *Jafari v. Wally Findlay Galleries*, 1989 U.S. Dist. LEXIS 11299 (S.D.N.Y. Sept. 25, 1989) (denying defendant-dealer's motion to dismiss on the basis of statute of frauds where the dealer, although he did not sign a contract, did initial a handwritten memorandum on his letterhead in a manner that seemed to verify an alteration to the document). See *Spink & Son, Ltd. v. Gen. Atl. Corp.*, N.Y.L.J. Jan. 23, 1996, at 26 (Sup. Ct. N.Y. County 1996), which granted defendant's motion to dismiss on the basis of the statute of frauds in New York where the defendant made an allegedly oral contract to purchase art in England but allowed the case to proceed in New York applying the substantive law of England, the location where the art was purchased and where the statute of frauds defense may not apply and where an oral contract of this type was enforceable. See also Tolhurst, *Governing Law In International Art Sales*, 1 ART ANTIQUITY & LAW 153 (1996). The statute of frauds issue may also arise with respect to an agreement between two parties for a finder's fee or introductory commission for the referral of business. In *Mirisola v. Habsburg Feldman, S.A.*, 172 A.D.2d 306, 568 N.Y.S.2d 110 (1991), the court found that a written agreement or memorandum is required to enforce an agreement to pay a finder's fee for the plaintiff's successful efforts to induce prospective sellers to consign objects for sale. In *Chowaiki v. Steinhardt*, Index #600250/04 (N.Y. Sup. Ct., N.Y. County, Mar. 28, 2005), the court held as void in violation of the statute of frauds an alleged oral agreement to sell a Chagall painting. In this case, the court awarded legal fees to the defendants because of the frivolous nature of the plaintiff's claim.
112. *Hoffman v. Boone*, 708 F. Supp. 78 (S.D.N.Y. 1989).
113. *Id.* at 81.
114. See, e.g., *McCulley Fine Arts Gallery, Inc. v. "X" Partners*, 860 S.W. 2d 473 (Tex. Ct. App. 1993).
115. *Andre Emmerich Gallery, Inc. v. Frost*, N.Y.L.J., Dec. 20, 1994, at 24 (Sup. Ct. N.Y. County 1994).
116. U.C.C. § 2-201(2).
117. U.C.C. § 2-201(3).
118. *Nat'l Historic Shrines Found. v. Dalí*, 4 U.C.C. Rep. Serv. 71 (N.Y. Sup. Ct. 1967).
119. *Sands & Co. v. Christie's, Inc.*, Index #600268/04 (N.Y. Sup. Ct., N.Y. County, Feb. 28, 2005).
120. *Tasende v. Janis*, 1999 WL 179369, 1999 U.S. Dist. LEXIS 3996 (S.D.N.Y. 1999).

121. *Tasende v. Janis*, 2000 WL 377512, 2000 U.S. Dist. LEXIS 4652 (S.D.N.Y. 2000).

122. U.C.C. § 2-302. But note that this provision is omitted entirely in California.

123. *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc. 2d 1, 11, 380 N.Y.S.2d 532, 541 (Sup. Ct. 1976).

124. *Id.*, 86 Misc. 2d at 10, 380 N.Y.S.2d at 541.

125. *Id.*

126. *Id.*

127. *Id.*, 86 Misc. 2d at 13, 380 N.Y.S.2d at 543.

128. *Weil v. Murray*, 161 F. Supp. 2d 250 (S.D.N.Y. 2001).

129. *Id.* at 253–54.

130. *Id.* at 255 (citing *Seiden Assoc., Inc. v ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992)).

131. *Id.* at 257.

132. U.C.C. § 2-401.

133. Thomas H. Jackson & Ellen A. Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of the Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907, 912 (1978). See also THOMAS M. QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 2-401[A][2][a] (2d ed. 2002) (“The parties are free to agree on the point in space and time when title will shift from the seller to the buyer. The agreement should be explicit since, failing that, the working rules provided by the Code would apply. Section 2-401(1) provides that ‘title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.’ This power to determine the point at which title will pass should not be confused, however, with the common practice of a seller’s ‘reservation of title.’ This does not activate the ‘agreement’ rule. Section 2-401(2) provides expressly that ‘any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.’ Thus, the agreement envisioned by this rule is a formal agreement looking to the transfer of ownership at a given point other than a reservation of title in connection with financing.”).

134. See *White-Motor Corp. v. Bronx-Westchester White Trucks, Inc.*, N.Y.L.J., Dec. 23, 1975, at 6, 18 U.C.C. Rep. Serv. (CBC) 382 (N.Y. Sup. Ct. 1975); *Recchio v. Mfrs. & Traders Trust Co.*, 55 Misc. 2d 788, 286 N.Y.S.2d 390 (Sup. Ct. 1968), *rev'd on other grounds*, 28 N.Y.2d 222, 269 N.E.2d 809, 321 N.Y.S.2d 94 (1971); *L.B. Smith, Inc. v. Foley*, 34 F. Supp. 810 (W.D.N.Y. 1972); *Bank of N.Y. v. Margiotta*, 416 N.Y.S.2d 493 (Dist. Ct. 1979); *In re Ide Jewelry Co.*, 75 B.R. 969, 977 (Bankr.

S.D.N.Y. 1987) (“[I]f the consignment were intended as security, [the seller’s] reservation of title is limited to a security interest. . . .”); *Fulater v. Palmer’s Granite Garage, Inc.*, 110 Misc. 2d 1003, 1005, 443 N.Y.S.2d 193, 194 (1981) (“Indeed, according to [§ 2401] any reservation of title by [the seller] was limited to a security interest once the truck was delivered.”); *In re Samuels & Co.*, 526 F.2d 1238, 1246 (5th Cir. 1976) (“the UCC specifically limits the seller’s ability to reserve title once he has voluntarily surrendered possession to the buyer”); *Dixie Bonded Warehouse v. Allstate Fin. Corp.*, 693 F. Supp. 1162, 1164 (M.D. Ga. 1988) (“An unpaid cash seller may not defeat a secured party’s interest by retention of ‘title.’”); *In re Communications Co. of Am.*, 84 B.R. 822, 823 (Bankr. M.D. Fla. 1988) (“[Section 2-401] clearly dictates that despite . . . the Sales Agreement [’s reservation of title in the seller], [the seller’s] reservation of title only reserved a security interest in the equipment. . . .”).

135. *Silver v. Sloop Silver Cloud*, 259 F. Supp. 187 (S.D.N.Y. 1966). See *In re GEC Indus., Inc.*, 128 B.R. 892 (Bankr. D. Del. 1991); *Puamier v. Barge BT 1793*, 395 F. Supp. 1019 (E.D. Va. 1974); *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003 (5th Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

136. *AB Recur Finans v. Andersson*, Index No. 9422/90 (N.Y. Sup. Ct. July 7, 1995).

137. *Id.* at 35.

138. *Id.* at 36.

139. See *Judson Art Warehouse, Inc. v. Peder Bonnier*, Index No. 9422/90 (N.Y. Sup. Ct. Aug. 29, 1995).

140. *Id.* at 5. Compare with *Andrew Grispo Gallery, Inc. v. Maroney*, 187 A.D.2d 251, 589 N.Y.S.2d 445 (1992), where the court held that the buyer of a painting had no equitable interest in that painting after it had been resold by the seller because under the parties’ purchase agreement, title to the painting was to remain with the seller until the painting was paid in full. However, in this case the painting was *not* delivered so the court could find that a reservation of title on the invoice was valid. Note that under the Gagosian invoice referred to in *Judson*, the painting also was *not* delivered until payment was made in full.

141. See, e.g., *Bassett v. Spofford*, 45 N.Y. 387 (1871). See also *Menzel*, 49 Misc. 2d at 315, 267 N.Y.S.2d at 819. However, note that until recently in England, the “market overt” system permitted buyers at street markets to acquire legal ownership of all merchandise bought between sunrise and sunset, even if the goods had been stolen. This ended July 15, 1994, by act of Parliament, spurred by a fellow’s unwitting purchase for £195 of portraits by Thomas Gainsborough and Sir Joshua Reynolds, which, it

turned out, had been stolen in 1990 from one of London's Inns of Court, the training ground for barristers. ARTNEWSLETTER, July 26, 1994, at 7.

142. U.C.C. § 2-403(1).
143. See, e.g., *Ross v. Leuci*, 194 Misc. 345, 85 N.Y.S.2d 497 (City Ct. 1949); *Crocker v. Crocker*, 31 N.Y. 507 (1865).
144. *Morgold, Inc. v. Keeler*, 891 F. Supp. 1361 (N.D. Cal. 1995).
145. U.C.C. § 2-403(1).
146. See *infra* notes 158 and 160.
147. *Stellan Holm, Inc. v. Malmberg Int'l Art, AB*, 2002 WL 392294, 2002 U.S. Dist. LEXIS 4126 (S.D.N.Y. 2002).
148. *Id.*, 2002 WL 392294, at *2, 2002 U.S. Dist. LEXIS 4126, at *5.
149. *Id.*, 2002 WL 392294, at *4, 2002 U.S. Dist. LEXIS 4126, at *11.
150. *Id.*, 2002 WL 392294, at *4, 2002 U.S. Dist. LEXIS 4126, at *12.
151. *Kenyon v. Abel*, 2001 WY 135, 36 P.3d 1161 (2001).
152. *Id.*, 36 P.3d at 1163–64.
153. *Id.* at 1165 (citing *Underhill Coal Mining Co. v. Hixon*, 652 A.2d 343, 346 (Pa. Super. Ct. 1994)).
154. *Id.* at 1166.
155. *Glenshaw Glass Co. v. Ontario Grape Growers' Mktg. Bd.*, 67 F.3d 470, 475 (3d Cir. 1995); BLACK'S LAW DICTIONARY (7th ed. 1999); *In re Atl. Computer Sys., Inc.*, 135 B.R. 463, 466 (Bankr. S.D.N.Y. 1992); *SEC v. Credit Bancorp, Ltd.*, 2000 U.S. Dist. LEXIS 17171, *81–*82 (S.D.N.Y. 2000).
156. 1 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 193 (4th ed. 1995).
157. U.C.C. § 1-201(9).
158. *Cantor v. Anderson*, 639 F. Supp. 364 (S.D.N.Y. 1986).
159. U.C.C. § 2-103(1)(b). See *Morgold*, 891 F. Supp. 1361.
160. *Porter v. Wertz*, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1979), *aff'd*, 53 N.Y.2d 696, 421 N.E.2d 500, 439 N.Y.S.2d 105 (Ct. App. 1981). See also Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228 (1982).
161. See *Porter*, 68 A.D.2d at 145, 416 N.Y.S.2d at 257.
162. *Graffman v. Espel*, 1998 WL 55371, 1998 U.S. Dist. LEXIS 1339 (S.D.N.Y. 1998).
163. *Id.*, 1998 WL 55371, at *2, 1998 U.S. Dist. LEXIS 1339, at *7.
164. *Id.*, 1998 WL 55371, at *3, 1998 U.S. Dist. LEXIS 1339, at *9.

165. *Id.* (citing *Porter*, *supra* note 160).
166. *Id.*, 1998 WL 55371, at *4, 1998 U.S. Dist. LEXIS 1339, at *14.
167. *Id.*, 1998 WL 55371, at *5, 1998 U.S. Dist. LEXIS 1339, at *15 (citing *Porter*, 68 A.D.2d at 146, 416 N.Y.S.2d at 257).
168. *Id.*, 1998 WL 55371, at *5 and U.S. Dist. LEXIS 1339, at *18; *see Morgold*, 891 F. Supp. 1361.
169. *Graffman*, 1998 WL 55371, at *6, 1998 U.S. Dist. LEXIS 1339, at *20; *Graffman v. Doe*, 201 F.3d 431, 1999 WL 1295351, 1999 U.S. App. LEXIS 34236 (2d Cir. Dec. 23, 1999).
170. *Dark Bay Int'l, Ltd. v. Acquavella Galleries, Inc.*, Index No. 02-600122/02 (Sup. Ct. N.Y. County Nov. 6, 2003), *aff'd*, 12 A.D.3d 711, 784 N.Y.S.2d 514 (1st Dep't 2004), *motion to appeal denied*, 4 N.Y.3d 705, 825 N.E.2d 1093, 792 N.Y.S.2d 898 (2005). *See also* *Spanierman Gallery, Profit Sharing Plan v. Merritt*, 2003 WL 289704, 2003 U.S. Dist. LEXIS 1444, 49 U.C.C. Rep. Serv. 2d (CBC) 809 (S.D.N.Y. Feb. 6, 2003) (precluding summary judgment against gallery who bought painting at auction where entrusted dealer who sought appraisal of painting could support inference he was not a dealer in the relevant type of goods); *Merritt v. Fagan*, 2002 WL 1331839, 2002 Conn. Super. LEXIS 1772 (Conn. Super. Ct. May 17, 2002), *aff'd*, 78 Conn. App. 590, 828 A.2d 685 (Conn. App. Ct.), *cert. denied*, 266 Conn. 916, 833 A.2d 467 (2003) (holding dealer in *Spanierman* liable to plaintiff for conversion, awarding compensatory and punitive damages); and generally *Henkel, Sales: What Is "Entrusting" Goods to Merchant Dealer Under UCC § 2-403*, 59 A.L.R.4th 567 (1988) (discussing where entrusting is and is not found among merchant dealers).
171. *Dark Bay Int'l*, 12 A.D.3d at 212.
172. *Dark Bay Int'l*, Index No. 02-600122/02 (citing *Dows v. Nat'l Exch. Bank of Milwaukee*, 91 U.S. 618, 630 (1875)).
173. *Id.* at 10 (citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 320 (1991)).
174. *See Porter v. Wertz*, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1979), *aff'd*, 53 N.Y.2d 696, 421 N.E.2d 500, 439 N.Y.S.2d 105 (Ct. App. 1981); *see also* *Taborsky v. Maroney*, No. 83-2533, 745 F.2d 60 (7th Cir. 1984) (unpublished); *Taborsky v. Bolen Gallery, Inc.*, No. 83-2560, 745 F.2d 60 (7th Cir. 1984) (unpublished), *reproduced in* 2 F. FELDMAN, S. WEIL & BIEDERMAN, ART LAW § 9.2.4 (1986). *See* *Autocephalous Greek-Orthodox Church v. Goldberg*, IP 89-304C (S.D. Ind. Aug. 3, 1989); *Howley v. Sotheby's, Inc.*, N.Y.L.J. Feb. 20, 1986, at 6 (Civ. Ct., N.Y. Cty. 1986).
175. *Howley*, N.Y.L.J. Feb. 20, 1986, at 6.
176. *See Taborsky*, *supra* note 174. *See also* discussion on sales by collectors at page 149.

177. *Taborsky*, *supra* note 174.
178. *Id.*
179. *Id.*
180. *Id.* See *Morgold*, 891 F. Supp. 1361.
181. *United States v. Crawford Tech. Servs.*, 2004 WL 744670, 2004 U.S. Dist. LEXIS 5824 (S.D.N.Y. Apr. 7, 2004).
182. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y. 2d 311, 567 N.Y.S. 2d 623 (1991), *aff'g* 153 A.D. 2d 143, 550 N.Y.S. 2d 618 (1990); see discussion of *Guggenheim* in chapter 3.
183. *Crawford Tech. Servs.*, 2004 WL 744670, 2004 U.S. Dist. LEXIS 5824.
184. *Id.*, 2004 WL 744670, at *5, 2004 U.S. Dist. LEXIS 5824, at *16.
185. *Id.*, 2004 WL 744670, at *6, 2004 U.S. Dist. LEXIS 5824, at *19.
186. *Van Rijn v. Wildenstein*, 1987 WL 11551, 1987 U.S. Dist. LEXIS 3955 (S.D.N.Y. 1987).
187. CAL. PENAL CODE § 536.
188. U.C.C. § 2-327(2)(b).
189. U.C.C. § 2-503; see also U.C.C. § 2-509.
190. U.C.C. § 2-509(3); *Conway v. Larsen Jewelers, Inc.*, 104 Misc. 2d 872, 429 N.Y.S.2d 378 (N.Y. City Small Cl. Ct. 1980).
191. *Mennella v. Schon*, 979 F.2d 357 (5th Cir. 1992), *reh'g denied*, 1993 U.S. App. LEXIS 375 (5th Cir. Jan. 4, 1993).
192. *Id.* at 361.
193. See, e.g., *Ohio Co. v. Rosemeir*, 32 Ohio App. 2d 116, 288 N.E.2d 326 (1972).
194. See, e.g., *Chapman v. Cole*, 12 Gray (Mass.) 141 (1858).
195. See 7 A. CORBIN, CORBIN ON CONTRACTS § 28.35 (2002).
196. See 27 S. WILLISTON, WILLISTON ON CONTRACTS § 70:67 (4th ed. 2000).
197. *Uptown Gallery, Inc. v. Marjorie Weston Doniger*, Index No. 17133/90 (Sup. Ct. N.Y. County, Mar. 9, 1993).
198. *Richard L. Feigen & Co. v. Weil*, Index No. 13935/90 (Sup. Ct. N.Y. County, Feb. 18, 1992), *aff'd*, 191 A.D.2d 278, 595 N.Y.S.2d 683 (1st Dept. 1993).
199. FLA. STAT. ANN. § 686.504.
200. IOWA CODE ANN. §§ 715B.2 to .4.
201. N.Y. ARTS & CULT. AFF. LAW § 13.01.
202. MICH. COMP. LAWS §§ 442.321 to .325.
203. CAL. CIV. CODE § 1744.7; GA. CODE ANN. § 10-1-433; HAW. REV. STAT. ANN. § 481F-5.

204. *Uptown Gallery*, Index No. 17133/90.
205. *Id.*
206. *Richard L. Feigen & Co.*, Index No. 13935/90.
207. RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 90 (PLI 1989).
208. *Compare* Wood v. Boynton, 64 Wis. 256 (1885), *with* Sherwood v. Walker, 66 Mich. 568 (1887).
209. *Richard L. Feigen & Co.*, Index No. 13935/90.
210. Porter v. Wertz, 416 N.Y.S.2d 254 (App. Div. 1979), *aff'd*, 439 N.Y.S.2d 105 (Ct. App. 1981). *See* LERNER & BRESLER, *supra* note 207, at 79.
211. Firestone & Parson, Inc. v. Union League of Phila., 672 F. Supp. 819 (E.D. Pa.), *aff'd*, 833 F.2d 304 (3d Cir. 1987).
212. *Id.* at 822.
213. *See Uptown Gallery*, Index No. 17133/90.
214. Greenberg Gallery v. Bauman, 817 F. Supp 167 (D.D.C. 1993), *aff'd*, 36 F.3d 127 (D.C. Cir. 1994).
215. Arnold Herstand & Co. v. Gallery: Gertrude Stein, Inc., 211 A.D.2d 77, 626 N.Y.S.2d 74 (1995).
216. *Id.*
217. *Id.*
218. *Id.*
219. Aside from knowledge and belief, two states of mind that also support a suit in fraud are (1) reckless disregard for a representation's truth or falsity and (2) awareness of a lack of sufficient basis of information to make a representation. *See* W. KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 105, 107 (5th ed. 1984 & Supp. 1988).
220. 26 WILLISTON, *WILLISTON ON CONTRACTS* §§ 69:1–69:3, 69:17 (4th ed. 1999); W. KEETON ET AL., *supra* note 219, § 105.
221. W. KEETON ET AL., *supra* note 219, § 109.
222. *Id.*
223. *Id.* Here, as in the text immediately above, the seller, depending on the circumstances, may also be liable for breach of warranty.
224. *Id.* § 105.
225. *Id.* § 107.
226. *Id.* § 105.
227. *See* discussion of breach of warranties at pages 76–98.
228. R. DUFFY, *ART LAW: REPRESENTING ARTISTS, DEALERS, AND COLLECTORS* 16 (1977).
229. U.C.C. § 2-202. *See also* discussion of parol evidence at page 85.

230. McKie v. R.H. Love Galleries, Inc., 1990 WL 179797, 1990 U.S. Dist. LEXIS 14748 (N.D. Ill. 1990).

231. McCloud v. Lawrence Gallery, Ltd., 1991 WL 136027, 1991 U.S. Dist. LEXIS 9631 (S.D.N.Y. 1991), 1992 WL 6199, 1992 U.S. Dist. LEXIS 170 (S.D.N.Y.), *aff'd*, 970 F.2d 896 (2d Cir. 1992).

232. *Id.*, 1992 WL 6199, at *3, 1992 U.S. Dist. LEXIS 170, at *9.

233. A few statutes, such as Ohio's and Pennsylvania's, permit a suit in forgery on proof of mere knowledge, rather than intent, to defraud or injure. OHIO REV. CODE ANN. § 2913.31; 18 PA. CONS. STAT. § 4101.

234. See, e.g., N.Y. PENAL LAW § 170.05. See also Note, *Legal Control of the Fabrication and Marketing of Fake Paintings*, 24 STAN. L. REV. 930, 940-41 (1972).

235. MONT. CODE ANN. § 45-6-325.

236. CONN. GEN. STAT. ANN. § 53a-140.

237. See, e.g., ALA. CODE § 13A-9-10; ALASKA STAT. § 11.46.530; ARIZ. REV. STAT. ANN. § 13-2004; ARK. CODE ANN. § 5-37-213; COLO. REV. STAT. ANN. § 18-5-110; CONN. GEN. STAT. ANN. § 53a-141; KY. REV. STAT. ANN. § 516.110; N.J. STAT. ANN. § 2C:21-2; OHIO REV. CODE ANN. § 2913.32; 18 PA. CONS. STAT. § 4102; TEX. PENAL CODE ANN. § 32.22; UTAH CODE § 76-6-501; VT. STAT. ANN. tit. 13, § 2023; WIS. STAT. ANN. § 943.38(3)(A). See also CAL. PENAL CODE § 536.

238. N.Y. PENAL LAW § 170.45. See also *People v. Haiff*, 128 Misc.2d 713, 491 N.Y.S.2d 226 (Sup. Ct. 1985).

239. Again, some state statutes, such as Ohio's and Pennsylvania's, *supra* note 233, permit the bringing of suit upon mere proof of knowledge of injury or deception rather than intent.

240. See, e.g., OHIO REV. CODE ANN. § 2913.32.

241. See, e.g., UTAH CODE § 76-6-501.

242. N.Y. ARTS & CULT. AFF. LAW § 13.01; IOWA CODE ANN. § 715B.2 to .4; FLA. STAT. ANN. § 686.504; MICH. COMP. LAWS § 442.321 to .325. See also discussion of *David Tunick, Inc.*, *supra* note 19.

243. MICH. COMP. LAWS § 442.324.

244. *Lawson v. London Arts Group*, 708 F.2d 226 (6th Cir. 1983).

245. U.C.C. § 2-313.

246. *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461 (S.D.N.Y. 1978); see also *Englehard v. Duffy*, N.Y.L.J., Oct. 27, 1983, at 13 (Sup. Ct. N.Y. County 1983); *Balog v. Ctr. Art Gallery-Haw., Inc.*, 745 F. Supp. 1556, 1565 (D. Haw. 1990).

247. See *Dawson*, 463 F. Supp. at 467.

248. Pritzker v. Krishna Gallery of Asian Arts, 1996 WL 563442, 1996 U.S. Dist. LEXIS 14398 (N.D. Ill. 1996) (memorandum and order); 1995 U.S. Dist. LEXIS 8778 (N.D. Ill. 1995) (magistrate's report and recommendation).
249. *Id.*, 1996 WL 563442, at *3, 1996 U.S. Dist. LEXIS 14398, at *8–*9.
250. *Id.*, 1995 U.S. Dist. LEXIS 8778, at *54–*55.
251. Pritzker v. Krishna Gallery of Asian Arts, No. 93 C 4147, unpublished order (N.D. Ill. Mar. 17, 1997).
252. See *Dawson*, 463 F. Supp. at 467.
253. *Pritzker*, No. 93 C 4147, at 11.
254. NAT'L L.J., June 9, 1997, at A6, col. 2.
255. Rogath v. Siebman, 941 F. Supp. 416 (S.D.N.Y. 1996).
256. N.Y. PERS. PROP. LAW § 425 *et seq.* The Door-to-Door Sales Protection Act superseded the Home Solicitation Sales Act in September 1976. See N.Y. PERS. PROP. LAW § 425, historical and statutory notes.
257. N.Y. PERS. PROP. LAW § 427(1).
258. *Id.* § 428(1), (2).
259. *Id.* § 428(2).
260. See *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc. 2d 1, 380 N.Y.S.2d 532 (Sup. Ct. 1976).
261. *Id.*, 86 Misc. 2d at 11, 380 N.Y.S.2d at 542.
262. *Pritzker*, *supra* note 248, at *22.
263. See, e.g., ARIZ. REV. STAT. ANN. § 44-1231.01; COLO. REV. STAT. ANN. § 12-44.5-101 to -108; OKLA. STAT. ANN. tit. 78, §§ 71–75. See also Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13; *Symposium: The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation—Related Legislation*, 24 ARIZ. ST. L.J. 1 (1992).
264. 15 U.S.C. § 2301 *et seq.*
265. 15 U.S.C. § 2302(e); 16 C.F.R. § 701.
266. 15 U.S.C. § 2303(a).
267. 15 U.S.C. §§ 2303(a)(1), 2304.
268. 15 U.S.C. § 2303(a)(3).
269. 15 U.S.C. § 2303(b).
270. 15 U.S.C. § 2310(c)(2).
271. 15 U.S.C. §§ 2302, 2312(c).
272. 15 U.S.C. § 2302.
273. *Id.*
274. 15 U.S.C. § 2311.
275. 15 U.S.C. § 1601 *et seq.*

276. 15 U.S.C. § 1611.
277. 15 U.S.C. § 1640.
278. 15 U.S.C. § 45(a).
279. *FTC v. Fed. Sterling Galleries, Inc.*, No. 87-2072 (D. Ariz. filed Jan. 12, 1989); *FTC v. Austin Galleries of Ill., Inc.*, No. 88 C 3845, 1988 U.S. Dist. LEXIS 12380 (N.D. Ill. Nov. 2, 1988).
280. N.Y. CITY ADMIN. CODE tit. 20, ch. 5, subch. 2, §§ 20-707 to -711.
281. See N.Y. TIMES, Mar. 3, 1988, § 1, at 25; N.Y. TIMES, Mar. 20, 1988, § 2, at 33; ARTNEWSLETTER, Sept. 6, 1988.
282. See *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250 (S.D.N.Y. 1995); *Vitale v. Marlborough Gallery*, 32 U.S.P.Q.2d (BNA) 1283 (S.D.N.Y. 1994).
283. *Wildenstein & Co. v. Wallis*, 79 N.Y.2d 641, 584 N.Y.S.2d 753 (1992).
284. *Id.* See also *Metro. Transp. Auth. v. Brukan Realty Corp.*, 67 N.Y.2d 156, 161 (1986).
285. *Id.* See N.Y. EST. POWERS & TRUSTS LAW § 9-1.1.
286. N.Y. GEN. BUS. LAW §§ 340-47.
287. *Vitale v. Marlborough Gallery*, 32 U.S.P.Q.2d (BNA) 1283, 1994 WL 654494 (S.D.N.Y. 1994).
288. *Id.* at *4.
289. See, e.g., *Royal Bus. Machs., Inc. v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980).
290. U.C.C. § 2-314(1) & cmt. 3.
291. U.C.C. § 2-314 cmt. 3.
292. U.C.C. § 2-312(3).
293. U.C.C. § 2-201(2).
294. U.C.C. § 2-403(2); *Cantor*, *supra* note 158.
295. *Taborsky*, *supra* note 174.
296. U.C.C. § 9-701.
297. U.C.C. § 2-326 was amended effective July 1, 2001 to repeal prior § 2-326(3) in connection with the revision of Article 9.
298. Christenfeld & Melzer, *Entrustments and Secured Transactions*, N.Y.L.J., Oct. 2, 2003.
299. U.C.C. § 2-326(1)(b).
300. U.C.C. § 2-326(1)(a).
301. U.C.C. § 2-326(1)(b).
302. U.C.C. § 9-315(a); U.C.C. § 9-320(a); U.C.C. § 2-403(2).
303. Note that under U.C.C. § 2-403(2) if an artwork is consigned to an art dealer who deals in goods of that kind, the art dealer can

pass good title to a good faith buyer for value even if the consignor perfected a security interest under Article 9 of the U.C.C. See U.C.C. § 9-319(a); U.C.C. § 9-320(a). See also Nathan, *Consignment the Right Way: File a UCC Financing Statement*, 106 BUS. CREDIT 12 (Apr. 2004).

304. U.C.C. § 2-326(1)(a).

305. U.C.C. § 2-326(2).

306. *Id.* See Marcone, *The UCC and Consignment: Making the Code Safe for Artists and Other Little Fellows*, 12 CARDOZO ARTS & ENT. L.J. 579 (1994).

307. U.C.C. § 9-308(a).

308. U.C.C. § 9-102(a)(20).

309. *Id.*; see also *Allsop v. Ernst*, 20 B.R. 627 (Bankr. S.D. Ohio 1982); *Bischoff v. Thomasson*, 400 So. 2d 359 (Ala. 1981); *In re Mincow Bag*, 29 A.D.2d 400, 288 N.Y.S.2d 364 (App. Div. 1968), *aff'd mem.*, 24 N.Y.2d 776, 300 N.Y.S.2d 115, 248 N.E.2d 26 (N.Y. 1969).

310. *In re Morgansen's Ltd.*, 302 B.R. 784, 2003 Bankr. LEXIS 1726 (Bankr. E.D.N.Y. 2003).

311. *Id.*, 302 B.R. at 789-90, 2003 Bankr. LEXIS 1726, at *11-13.

312. Although the lesson is clear (a consignor must file a UCC-1 Financing Statement to be protected), the statutory interpretation is far from clear. The *Morgansen* case, *supra* note 310, ignores U.C.C. § 9-102(a)(20)(C) and the definition of “consumer goods” as defined in U.C.C. § 9-102(a)(23) as “goods that are used or bought for use primarily for personal, family, or household purposes.” U.C.C. § 9-102(a)(20)(C) excludes from the definition of a consignment under article 9 the consignment of a consumer good immediately before delivery. The court seems to have assumed that the consigned property (jewelry, art, collectibles, and furniture with a value of \$1,000 or more) was not “consumer goods immediately before delivery.” What is clear is that a consignor may prevent the application of U.C.C. § 9-102(a)(20) and U.C.C. § 9-319(a) and recover her goods from the bankruptcy debtor under either one of two exceptions: (1) the consignor files a UCC-1 Financing Statement under article 9 or (2) the consignor can prove that the consignee is generally known by its creditors to be substantially engaged in selling the goods of others. *In re Valley Media, Inc.*, 279 B.R. 105, 47 U.C.C. Rep. Serv. 2d (CBC) 1178 (Bankr. D. Del. 2002); see *supra* notes 286, 291.

313. *Ganz v. Sotheby's Fin. Servs., Inc.*, Index No. 114827/01 (N.Y. Sup. Ct., N.Y. County, Oct. 12, 2004).

314. *Id.*

315. U.C.C. § 2-326 was amended effective July 1, 2001, to repeal prior § 2-326(3) in connection with the revision of article 9. *See supra*, note 297.

316. U.C.C. § 9-102(a)(20) defines “consignment” as follows:

(20) “Consignment” means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) the merchant:

(i) deals in goods of that kind under a name other than the name of the person making delivery;

(ii) is not an auctioneer; and

(iii) is not generally known by its creditors to be substantially engaged in selling goods of others;

(B) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery;

(C) the goods are not consumer goods immediately before delivery; and

(D) the transaction does not create a security interest that secures an obligation.

317. U.C.C. § 9-102(a)(20)(A)(iii).

318. *Ganz*, Index No. 114827/01, *supra* note 313. Like the court in *In re Morgansen’s Ltd.*, *supra* note 310, the court in *Ganz* did not discuss U.C.C. § 9-102(a)(20)(C) and the definition of “consumer goods” in U.C.C. § 9-102(a)(23) as “goods that are used or bought for use primarily for personal, family or household purposes.” Official Comment 4a to revised section 9-102 states: “The definition of ‘consumer goods’ follows former section 9-109. The classification turns on whether the debtor uses or bought the goods for use ‘primarily for personal, family, or household purposes’.” U.C.C. § 9-102(a)(20)(C) excludes from the definition of a consignment under article 9 the consignment of consumer goods immediately before delivery. *See discussion supra*, note 312. What is or is not a consumer good “immediately before delivery” awaits further clarification from the courts.

319. U.C.C. § 2-509(3). *See also* *Conway v. Larsen Jewelers, Inc.*, 104 Misc. 2d 872, 429 N.Y.S.2d 378 (N.Y. City Small Cl. Ct. 1980), *supra* note 190.

320. U.C.C. §§ 2-503, 2-509(3).

321. See N.Y. ARTS & CULT. AFF. LAW § 13.01; IOWA CODE ANN. § 715B.2 to .4; FLA. STAT. ANN. § 686.504; MICH. COMP. LAWS § 442.321 to .325.

322. 79 Stat. 985, codified at 22 U.S.C. § 2459. The statute is also discussed in chapter 16, *infra*.

323. N.Y. ARTS & CULT. AFF. LAW § 12.03. See *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, 93 N.Y.2d 729, 719 N.E.2d 897, 697 N.Y.S.2d 897 (1999).

324. U.C.C. § 9-102(a)(72).

325. U.C.C. § 9-203.

326. 11 A.R. ANDERSON, UNIFORM COMMERCIAL CODE § 9-203 (3d ed. rev. 1999).

327. See H. BAILEY III & R. HAGEDORN, SECURED TRANSACTIONS IN A NUTSHELL (4th ed. 2000); C. COOPER, THE NEW ARTICLE 9—UNIFORM COMMERCIAL CODE (1999); 11 A.R. ANDERSON, UNIFORM COMMERCIAL CODE (3d ed. rev. 1999). It is beyond the scope of this book to present a detailed treatment of secured transactions. The works referred to provide excellent basic texts on the subject.

328. *Id.*; U.C.C. § 9-203.

329. U.C.C. § 9-203(b).

330. *Id.*

331. See U.C.C. § 9-102. Although the terms “tangible,” “semi-intangible,” and “pure intangible” are not mentioned in article 9, they are widely recognized.

332. U.C.C. §§ 9-102, 9-104.

333. U.C.C. § 9-102.

334. *Id.*

335. U.C.C. § 9-102.

336. U.C.C. § 9-308(a).

337. *Id.*

338. *Id.*

339. U.C.C. §§ 9-504, 9-521.

340. U.C.C. § 9-516(a).

341. U.C.C. §§ 9-504, 9-502.

342. U.C.C. §§ 9-515, 9-522.

343. U.C.C. §§ 9-306, 9-313.

344. *Id.*

345. U.C.C. § 9-207(a).

346. U.C.C. §§ 9-309, 9-310.

347. U.C.C. § 9-103.

348. U.C.C. § 9-502. See Official Comment 3.

349. U.C.C. § 9-509(a)(1).
350. U.C.C. § 9-509(b).
351. U.C.C. § 9-317.
352. U.C.C. § 9-317.
353. In a number of states, including New York, the secured party has a grace period of twenty days, rather than ten days, in which to file.
354. As it is beyond the scope of this book to enumerate every rule of priority, the reader is referred to ANDERSON, *supra* note 326, for a more exhaustive listing of priorities.
355. U.C.C. § 9-322.
356. U.C.C. §§ 9-317, 9-322.
357. U.C.C. § 9-322.
358. *Id.*
359. U.C.C. § 9-324.
360. *See* U.C.C. § 9-317.
361. U.C.C. § 9-324.
362. *Id.*
363. U.C.C. § 9-315.
364. U.C.C. § 9-317.
365. U.C.C. § 9-320.
366. *Id.*
367. U.C.C. § 9-601.
368. *Id.*
369. *Id.*
370. Insolvency or bankruptcy of the debtor, loss of or damage to the collateral, death or dissolution of the debtor, and, in general, nonperformance of any of the debtor's obligations under the security agreement are among the events commonly listed. In the absence of contractual stipulation, a court may well find that an occurrence other than nonpayment is not an event of default.
371. *Id.*
372. ANDERSON, *supra*, note 326.
373. U.C.C. § 9-609.
374. ANDERSON, *supra*, note 326.
375. U.C.C. §§ 9-620, 9-621, 9-624.
376. *Id.*
377. U.C.C. § 9-610, § 9-615. Unless, that is, the debtor has signed after default a statement renouncing her rights. *See* U.C.C. § 9-620.
378. U.C.C. §§ 9-620, 9-625, 9-627.
379. U.C.C. § 9-610, 9-615.
380. U.C.C. § 9-610, 9-611, 9-624.

381. *Id.*

382. U.C.C. §§ 9-610, 9-611, 9-624, 9-507(2).

383. *Id.*

384. U.C.C. §§ 9-610, 9-615.

385. U.C.C. § 9-615.

386. *Id.*

387. U.C.C. § 9-623, 9-624.

388. U.C.C. § 9-625, 9-627.

389. *Id.* Since the amount recoverable for actual loss in small ticket consumer transactions is often insufficient to discourage creditor misconduct, the consumer-debtor may choose between actual damages and a minimum recovery, for which no proof of loss is required, consisting of the “credit service charge plus 10 percent of the principal amount of the debt or the time price differential plus 10 percent of the cash price.”

