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Private Sales

In recent years, the commercial fragility of what were perceived to be preeminent New York art galleries was laid bare in newspaper headlines and lawsuits that highlighted the financial woes of the hapless collectors who consigned art to be sold, and the art purchasers who acquired more (or less) than they bargained for. That fragility renders art transactions commercially unique when it is combined with the intrinsic properties of fine art. 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 ordinarily 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 others[4]—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 sold[7] 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 warranty[17] as the authorship of the work has been rendered questionable. In such a case, at least one commentator has suggested[18] 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 specifications[25] 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 painting: 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] although as noted in the *Levin* case discussed immediately below, a merchant-seller's representations of value can be enforceable if they are part of the basis of the bargain. On the other hand, 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]

One of the objectives of the New York Arts and Cultural Affairs Law (NYACAL) was to clarify the parameters of express warranty claims brought by nonmerchants after purchasing art from art merchants. In this capacity, NYACAL supplants the otherwise applicable express warranty provision of the U.C.C.[34] Under the U.C.C., the inherent difficulty in attributing fine art—often an educated guess, particularly with works created in the remote past—allowed art merchants to affix a definite attribution to a work of art in order to raise the price, and then, if the work was later determined to be misattributed, to rely on the defense that the attribution was a mere opinion.[35] Under NYACLA, statements of authorship include not only attributing a work to a particular artist but to a specific historical period as well.[36]

An interesting discussion of express warranties, including their interplay with applicable provisions of NYACAL, is found in *Levin v. Gallery 63 Antiques*.[37] Plaintiffs Mark and Becky Levin, commencing in 1986, engaged the services of Roger Harned, an interior designer, to help design the interior of their homes (first in San Francisco, then later in Boston, and still later in Rhode Island) and to purchase antiques on their behalf and place them in their homes. In November 1996, having worked with Harned for ten years, the Levins signed a letter agreement with him which provided that he was to be paid a one-time $10,000 design fee and a commission on all purchases made for the Levins for their Boston home, including a 10% commission on purchases of antiques.

In January 2000, Harned visited defendant Gallery 63 and Harned and the Levins agreed that the Levins would purchase from the gallery five sculptures for display in the their Boston residence. As the gallery, at Harned's request, agreed to hold the sculptures until the Levins' house was ready, the gallery obtained three separate appraisals for the sculptures in order to determine the amount of additional insurance needed to cover the already-sold sculptures. The gallery had furnished Harned with a handwritten memo which included, among other sculptures not selected by the Levins, the titles and attributions and dates of the five

sculptures. The first appraiser, Laurence Casper, selected by the gallery, submitted an appraisal including the name, description, and attribution of each sculpture, concluding that the sculptures were in excellent condition, that as full-size figures they were highly valued, and that they were original—that is, created by the artist rather than copied from other works. Caspar noted that the *Nude with Butterfly* sculpture was signed "A. Gearls, 1845" but he was unable to find anything in his research about Gearls. He provided replacement values for each sculpture, with the totals for all five ranging from $1,195,000 to $1,295,000. The second appraiser, Robert Kashey, concluded that the sculptures were in good condition and affixed a fair market value (rather than a replacement value) on each of the sculptures that collectively totaled $1,305,000. Kashey's appraisal also listed the names of the artists associated with each of the sculptures and, like Casper, he did not recognize the name "A. Gearls." The third appraiser, Constinos Frangos, who also acknowledged that he was unfamiliar with "A. Gearls," affixed replacement values on the sculptures that, collectively, amounted to $1,110,000. The Levins, who had received the three appraisals, sought still another appraisal—one that had not been done at the behest of the gallery. At the same time, Harned gave the Levins a document on his letterhead with a total "dealer price" of $970,000 for the sculptures. The appraiser engaged by the Levins, Beverlee Friedman, ultimately did not provide a written appraisal for the sculptures but indicated that while they were "in pristine condition and beautiful . . . they were overvalued in price."[38] The Levins nevertheless proceeded with the transaction, and in February 2000, Harned wired $622,725 to the gallery. In August 2000, the sculptures were shipped to the Levins' Boston home and were installed.

In April 2000, the Levins signed a contract with Harned to design the interior of, and to acquire antiques for, a house they recently purchased in Rhode Island. In October 2000, the Levins wired Harned $4.9 million to buy for this house the antiques that he recommended and that they approved.

In late 2000, the Levins began to believe that they had been overcharged for some of the antiques they purchased for both their Boston home—including the five sculptures—and their Rhode Island home, a belief based on several art experts having independently questioned the quality of the antiques. In early 2004, the Levins obtained the services of an appraiser, Peter Sorlien, to appraise the sculptures, and in April 2004, Sorlien affixed a collective value on them of $125,000. Moreover, Sorlien and the appraiser retained by Gallery 63, while agreeing that the sculpture entitled *Nude with Butterfly* should have been attributed to the artist Karel Hendrik Geerts (rather than "A. Gearls"), were in dispute as to the condition of the sculptures as well as whether they were originals.

In 2004, the Levins sued Gallery 63, alleging, among other claims, breach of express warranty in that the invoice issued by the gallery and the appraisals passed on by the gallery warranted that the sculptures were originals, signed by specific artists, in excellent condition, and of a certain value—when, in fact, they were copies of sculptures made by workshops and signed by others on the artists' behalf, and were damaged.

The gallery first challenged the contention that the invoice and appraisals

amounted to an express warranty, but further argued that even if they were express warranties, the warranties had not been breached—because, under both the New York Art and Cultural Affairs Law (NYACAL) and prevailing terminology used in the trade, the Levins received "original" sculptures.

The gallery then challenged the allegation that the sculptures were damaged, arguing that Sorlien's assessment was inaccurate in that it took place more than four years after the sculptures were delivered to the Levins and after they were cleaned by people hired by the Levins.

The court noted that under NYACAL, an express warranty is created "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."[39] The court further noted that the provision of NYACAL addressing express warranties "supplants the otherwise applicable provisions of the Uniform Commercial Code [U.C.C. section 2-313]."[40] Therefore, as the court concluded,

> [t]he relevant provision of [NYACAL] "provides that where an art merchant states to a lay person that a piece is by a specific author or can be attributed to a specific period, the statement 'shall create an express warranty.'"[41]

The court, quoting NYACAL, noted that a certificate of authenticity is

> a written statement by an art merchant confirming, approving, or attesting to the authorship of a work of fine art or multiple, which is capable of being used to the advantage or disadvantage of some person.[42]

The court concluded, accordingly, that the invoices and three appraisals given to the Levins by the gallery attested to the authorship of the sculptures and were, therefore, certificates of authenticity. The court then noted that under New York law, if the warranty at issue is material to the contract, a party need not prove actual reliance on that warranty when entering into a transaction to establish a claim in breach of warranty.

The gallery then argued that because the Levins hired Harned as their agent, and he had held himself out as having knowledge about the sculptures, he was an "art merchant" under NYACAL and accordingly the Levins could not avail themselves of the protections of the warranty provisions of the statute. The court, however, disagreed, stating that while an interior designer may have some knowledge in selecting furnishings for a home, nothing suggested that Harned had or held himself out to have "knowledge or skill *peculiar* [italics the court's]" to works like the sculptures.[43]

The gallery next asserted that the sculptures were "multiples" and therefore did not qualify as fine art under NYACAL. In rejecting this argument and finding that the Levins' claim was properly a warranty claim under the fine art provision of NYACAL, the court stated that it "defies logic to suggest that someone who allegedly mis-warrants a work to be an original could escape sec-

tion 13.01's heightened protection by later claiming that the work is, in fact, a multiple."[44]

"Original" and "signed." The parties, through their respective experts, disagreed over what constitutes "original" in the context of Nineteenth Century Italian Academic sculpture (the historical period of the sculptures) and what it means for the sculptures to be "signed" by an artist. As to originality, the gallery first argued, relying on section 11.01(18) of NYACAL, that the statute contemplates sculptures solely as "multiples." However, the court stated that the above-noted section of NYACAL is not dispositive, as sections 11.01(9) and 11.01(20) define, respectively, fine art to include a "sculpture . . . , but not multiples" and "multiples" to include "sculpture . . . produced in more than one copy."[45] Accordingly, the court concluded that the statute contemplates sculpture that is distinct from a copy or multiple.

The gallery then argued that in the historical context in which the sculptures were made, they were originals created by the artists identified on the invoice, in that "original" meant a work was produced during the period and by the artist's studio where the master artist could supervise and approve the final work. The Levins argued that under the above-described circumstances, it would be largely "impossible to designate any one marble sculpture as the original and not a copy" and therefore, "the terms 'original' and 'authentic'" can apply only in a qualified manner to such sculptures.[46] The court noted that here, the artist attributions to the sculptures in the appraisals and invoice did not—and perhaps could not—explain that the sculptures were or may have been created under the supervision of the artists attributed or that they may have been copies made in the studio tradition prevailing at the time. The parties also apparently disagreed over what qualification, if any, is required when warranting the name of the artist who created works during the historical period of these sculptures. Therefore, the court concluded that the invoice and appraisals sent by the gallery to the Levins failed to establish a reasonable basis in fact both for the gallery's unequivocal statement that the sculptures were originals and for their respective unqualified attributions to the named artists. Accordingly, the gallery's motion for dismissal on summary judgment for breach of express warranty that the sculptures were originals, signed by specific artists, was denied.

Breach of warranty as to the condition of the sculptures. Although the Levins alleged that the sculptures were in worse condition than warranted, the court noted that the gallery's assertion that art dealers do not list damage, unless truly significant, in artworks of this type was uncontradicted; that the Levins' expert's inspection of the sculptures occurred four years after they took possession of them; and that the Levins' expert acknowledged that he was unqualified to assess the condition of such works. Accordingly, the court concluded that there was no genuine dispute that the gallery had a reasonable basis in fact under the standards of the trade to state, at the time the representations were made, that the sculptures were in "excellent" condition. The court therefore dismissed this claim on summary judgment.

Breach of warranty as to the value of the sculptures. The Levins also asserted

that the gallery breached a warranty in that all of the sculptures were overvalued in the invoice and appraisals. The court noted that while, unlike attributions of authorship and dating, there is no specific provision in NYACLA addressing representations of price or value, "such a representation should fall under section 13.01(1)(b), which creates an express warranty for 'the material facts' stated"[47] in a written instrument such as an appraisal or invoice. The court further noted that even if NYACLA does not supersede the relevant New York U.C.C. provisions concerning representations of value—that is, sections 2-313(1)(a) and 2-313(2)—such provisions do not change the analysis in that representations of value can be enforceable if they are part of the basis of the bargain. In the case at hand, the court found that there was a genuine issue of material fact as to whether the appraisals went beyond mere affirmation of value (which does not in and of itself create a warranty) to become part of the basis of the bargain to induce the Levins to complete the purchase of the sculptures. Accordingly, the court refused to dismiss this claim on summary judgment.[48]

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 purchased 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.[49] 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.[50]

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.[51] 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.[52] 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.[53]

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;[54] where consistency is not possible, the disclaimer language is found to be inoperative.[55] Reconciliation of the warranty and the disclaimer depends on the language used. In certain jurisdictions, such as New York[56] and Michigan,[57] 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,[58] such judicial precedent is not unanimous. The *Weiscz* cases described below, for example, illustrate how two different courts examined the issue of a disclaimer's effects.

Weiscz v. Parke-Bernet Galleries, Inc.[59]

At a Parke-Bernet auction in 1962, the plaintiff Arthur Weiscz 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, Weiscz 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 Weiscz 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.[60]

Weiscz was appealed, and in a brief per curiam opinion the appellate court reversed the judgments and dismissed the complaints of both Weiscz 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.[61]

Were the U.C.C., rather than the former Uniform Sales Act, applied to the *Weiscz* transactions and were *Weiscz* 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.[62] 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.[63] 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."[64]

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.[65] 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.[66] 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 repre-

sentation was false, the merchant will incur liability regardless of her knowledge of the existence of any defect in the goods sold.[67] 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.[68]

Thus, as it relates to dealing in art, "merchant" includes a commercial art gallery, an art auctioneer, and a private art dealer[69] and excludes a collector whose occupation is not related to art and who sells items from her art collection only occasionally.[70] Reliance by the buyer on the seller's skill and judgment is not required under this warranty.[71]

Section 2-314(2) of the U.C.C. defines "merchantability" with particularity. For goods to be merchantable, they must at least:[72]

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.[73]

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 November 2011 catalog of Christie's New York.

EXPLANATION OF CATALOGUING PRACTICE

The following expressions with their accompanying explanations are used by Christie's as standard cataloguing practice. Our use of these expressions does not take account of the condition of the lot or of the extent of any restoration. Buyers are recommended to inspect the property themselves. Written condition reports are usually available on request.

PICTURES

NAME(S) OR RECOGNISED DESIGNATION OF AN ARTIST WITHOUT ANY QUALIFICATION

In Christie's opinion a work by the artist.

* "Attributed to . . ."
In Christie's qualified opinion probably a work by the artist in whole or in part.

* "Studio of . . ." / "Workshop of . . ."
In Christie's qualified opinion a work executed in the studio or workshop of the artist, possibly under his supervision.

* "Circle of . . ."
In Christie's qualified opinion a work of the period of the artist and showing his influence.

* "Follower of . . ."
In Christie's qualified opinion a work executed in the artist's style but not necessarily by a pupil.

* "Manner of . . ."
In Christie's qualified opinion a work executed in the artist's style but of a later date.

* "After . . ."
In Christie's qualified opinion a copy (of any date) of a work of the artist.

"Signed . . ." / "Dated . . ."/"Inscribed . . ."
In Christie's qualified opinion the work has been signed/dated/inscribed by the artist.

"With signature . . ." / "With date . . ." /"With inscription . . ."

In Christie's qualified opinion the signature/date/inscription appears to be by a hand other than that of the artist.

> The date given for Old Master, Modern and Contemporary Prints is the date (or approximate date when prefixed with 'circa') on which the matrix was worked and not necessarily the date when the impression was printed or published.

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. comment[74] 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:[75]

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,[76] 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.[77]

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.[78] 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."[79] 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.[80]

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.[81] 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.[82]

Exclusion of Implied Warranties: Disclaimer

The U.C.C. permits sellers to disclaim implied warranties under circumscribed conditions.[83] The warranty of merchantability may be disclaimed either orally or in writing.[84] If written, the disclaimer must be conspicuous.[85] The disclaimer language must specifically include the word "merchantability."[86] Alternatively, the language may be general, provided it informs the buyer that no warranties are attendant 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."[87] (See discussion of *Weiscz v. Parke-Bernet* at pages 97–98.)

The warranty of fitness for a particular purpose may be disclaimed only in writing,[88] and the disclaimer must be conspicuous.[89] The disclaimer language may be general, such as, "there are no warranties that extend beyond the description on the face hereof."[90] Alternatively, the disclaimer language may include such phrases as "with all faults," "as they stand," and "as is."[91]

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.[92]

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,[93] determined that the disclaimer was not sufficiently "conspicuous,"[94] and found the disclaimer to be unconscionable.[95] Moreover, legislation in a number of states[96] has significantly impeded the ability of a seller to disclaim implied warranties of merchantability or fitness with respect to consumer goods,[97] 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,[98] the trend as developed by case law is away from privity and toward foreseeability as a criterion for liability.[99] The presence of advertising encourages the dispensing with privity.[100] 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.[101] In addition, if an expert considered a "market maker" renders and publishes an opinion about a work of art that it could reasonable anticipate would be relied on by third parties, then, all other apparent elements of fraud being satisfied, such an expert could well be liable to a third party with whom it had no direct dealings.[102]

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.[103] The statutorily imposed warranty of title includes the following assertions:

1. That the title to the work or works being conveyed is good.[104]
2. That the seller has the right to transfer title.[105]
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.[106]

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."[107]

Exclusion of Warranty of Title: Disclaimer

Warranty of title may be excluded or modified only by specific language[108] 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.[109] 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.[110] 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.[111] 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.[112] Other circumstances in which a buyer should be aware that a warranty of title is not present are judicial sales and foreclosure sales.[113]

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.[114] 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[115]

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.[116]

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 defendant, the Parisian art dealer.[117] 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.[118] 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.[119] 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*,[120] 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.

Other states—including New York until recently[121]—measure damages differently where the claim is based on fraud. The traditional approach is 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. That is, the traditional measure of damages for fraud is an "out-of-pocket" rule that 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. However, in *Shafrazi v. Christie's*,[122] addressed in chapters 3 and 7, the court stated the broader measure. There, the Shafrazi gallery purchased from Christie's, for resale, what Christie's represented to be an authentic Jean-Michel Basquiat painting; Shafrazi resold the painting to Guido Orsi, and the painting turned out to be a counterfeit work. When Shafrazi and Orsi sued Christie's in fraud, a New York state supreme court determined that, should fraud be established

> Orsi may seek to recover consequential damages and, indeed, all remedies available for non-fraudulent breach, including damages seeking the benefit of the bargain and even punitive damages.[123]

As the court noted, case law limiting recovery to out-of-pocket losses (the traditional remedy available for fraud) was intended to be superseded by U.C.C. section 2-721, the Official Comment to which indicates that it was intended to correct the traditional fraud remedies, which should now be extended to coincide with those remedies available for nonfraudulent breach.[124]

Notice of Breach of Warranty[125]

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,[126] of that breach within a reasonable time after its discovery or risk losing whatever remedy the buyer has against the seller.[127] 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.[128]

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.[129]

Under New York's U.C.C.,[130] in a case involving the breach of contract for the sale of goods, a seller may recover the full contract price "if the seller is unable to resell [the goods] at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing." Moreover, an aggrieved seller may also recover incidental damages, that is, such "commercially reasonable charges"[131] as would "put the seller in as good a position as performance would have done."[132] However, there is no comparable provision in New York's U.C.C. permitting an aggrieved seller to recover consequential damages. For example, in *Sack v. Lawton*,[133] plaintiff Sack owned a drawing by the Italian Renaissance artist Raphael entitled *St. Benedict Receiving Mauro and Placido* which she offered for sale in July 2000. At the time of the offering, the drawing was determined to be authentic and was insured for $12 million by Lloyds of London. In August 2000, Sack entered into a bill of sale agreement with defendant Lawton, signed by both parties, where Lawton agreed to buy the drawing for $12 million, the drawing remaining in the possession of Sack pending Lawton's payment of the purchase price. Despite repeated demands by Sack, Lawton failed to pay any portion of the purchase price and subsequent attempts by Sack to find a buyer for the Raphael at a comparable price were unsuccessful. In addition, Sack contended that since the agreement with Lawton was fully executed and never cancelled, she may be unable to convey clear title to the drawing in the event she did find a buyer and attempted to close an unconditional sale.

At the same time that Sack was attempting to effect a sale of the drawing to Lawton, Lawton offered to sell to Sack a work of art by the artist Giovanni Bellini

entitled *Madonna and Child*. Sack asserted that she agreed to pay Lawton $10 million for the Bellini after ascertaining that she could resell it to prospective buyers for $15 million. However, according to Sack, after Lawton agreed to sell the Bellini she was informed that Lawton did not own it and was not authorized to offer it for sale, and that furthermore, the true owner did not wish to sell it to Sack. Subsequently, Lawton failed to deliver the Bellini to Sack and refused to accept payment for it.

Accordingly, Sack brought suit against Lawton for breach of his contract with her for the sale of her Raphael drawing and averred that although she reasonably attempted to resell the drawing to mitigate damages caused by the breach, she was unable to do so. Sack sought damages in the amount of $12 million (an amount equal to the purchase price), along with interest, and consequential damages in the amount of $3 million. Additionally, Sack claimed that Lawton breached his contract with her concerning the purchase of the work by Bellini and that she sustained damages in connection with the breach in the amount of her anticipated profit, that is, $5 million.

As to the Raphael drawing, the New York federal district court awarded Sack damages in the amount of the contract price of $12 million, along with prejudgment interest. As to incidental damages, the court noted that although an injured seller may recover incidental damages under the U.C.C., here Sack failed to support a claim for such damages by submitting documentation listing the out-of-pocket expenses or types of charges that were incurred by her as a result of the breach, and so no incidental damages were recoverable. Moreover, in the absence of any U.C.C. remedy for consequential damages for an injured seller in a breach of contract situation, Sack was denied such damages. As to the Bellini artwork, the court noted that "a plaintiff is entitled to recover lost profits only if he can establish both the existence and the amount of such damages with reasonable certainty,"[134] and that such damages "may not be merely speculative, possible or imaginary."[135] Here, in the absence of any documentation proving that Sack entered into an agreement with Lawton to buy the Bellini, and in the absence of any documentary evidence of a contract for the sale of that artwork, the court found that Sack could not plausibly claim that the parties had contemplated damages for lost profits at the time a contract was made. Accordingly, Sack was denied an award of damages for breach of contract involving the Bellini.

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.[136] Therefore, in *Hoffmann v. Boone*,[137] 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 suffered—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."[138] 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.[139]

An agreement memorialized in a bill of sale will suffice, as suggested by *Andre Emmerich Gallery, Inc. v. Frost*,[140] 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.[141]

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.[142] 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*[143] 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 16 at pages 1436–1437, 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*,[144] 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.

Duty Owed by Art Dealer to Potential Buyer

In the 2008 case of *Brady v. Lynes*[145] a buyer, through a series of five agents and brokers, acquired an apparently counterfeit Georgia O'Keeffe watercolor painting and sued, *inter alia,* in fraud and negligent misrepresentation, a number of the intermediaries and others including the Georgia O'Keeffe Foundation, which had determined that the watercolor was inauthentic. A New York federal district court, in granting the defendants' motion to dismiss the complaint, noted that

> for liability to exist for negligent misrepresentation or fraud . . . there must be a relationship between the parties which gives rise to a duty owed. Courts addressing the duty owed by an art gallery to potential purchasers have noted that a duty only arises in specific situations, such as a contract specifically employing a defendant for the purpose of rendering an appraisal to the plaintiff (where the defendant knows that the plaintiff intends to rely on it) or a fiduciary relationship. However, "*allegations of superior knowledge or expertise in the art field are per se insufficient to establish the existence of a fiduciary duty.*"[146] [italics ours]

The court also went on to note that the various standards of professional conduct and ethics adopted by existing appraisal organizations for their art appraisers (and other members) do not, in themselves, create such a fiduciary duty.[147]

In *Brady,* there was insufficient contact between the parties to sustain a claim for either fraud or negligent misrepresentation. Brady did not allege that he ever met any of the defendants prior to purchasing the watercolor, let alone retain any of them, or that any of the defendants made any representation directly to him. As the court observed, the fact that the defendants may have known that the watercolor was a forgery but did not seek out Brady to so inform him, did not, as a matter of law, give rise to liability.[148]

Moreover, the court noted that even assuming the legal sufficiency of the claims, they would nevertheless be time-barred. In New York, the statute of limitations for fraud is the longer of six years following the date the cause of action accrues—in this case, October 1996 when Brady purchased the watercolor—or two years following the time the plaintiff discovered or, with reasonable diligence, could have discovered the fraud.[149] As the court observed, regarding certain of the defendants, Brady alleged that he learned of their purported fraud in June 2002 but did not file his action until May 2005, nearly three years after the discovery date. As to the other defendants' purported fraud, Brady alleged that his discovery thereof occurred in January 2003—but again, the action was not filed until May 2005, well beyond the two-year discovery period. As to the claim for negligent misrepresentation, the statute of limitations is, likewise, six years

following the date of injury—here, in October 1996. Since, as the court noted, there is no discovery rule for negligent misrepresentation claims, the limitations period expired in October 2002.[150]

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*,[151] 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.[152]

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.[153] Unconscionability alone may not support a claim for damages; it merely gives the court the right to refuse to enforce the contract.[154] 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.[155] 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.[156]

An example of unconscionability is found in the case of *Vom Lehn v. Astor*

Art Galleries, Ltd.[157] 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.[158]

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*,[159] 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.[160] 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."[161] 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.[162]

Liability of Dealers As Agents

It is customary in the art trade for a buyer and seller of art to conduct the sale transaction through a dealer. It is also generally customary for an art dealer to keep confidential the identity of the principal he is representing—whether the principal is the seller of the artwork or its ultimate buyer. While it is well-settled law that an agent of a fully disclosed principal cannot be personally liable under a contract unless the agent separately assumes individual liability,[163] art transactions between buyers and sellers generally involve "partially disclosed" principals; that is, a dealer will represent a buyer or seller whose identity is not disclosed although the agency relationship is known.[164] In the case of a partially disclosed principal, a different rule of liability applies to the dealer-as-agent: in such a case, the dealer will be liable on any contracts he makes on behalf of his principal so long as he fails to disclose the identity of the principal.[165] However, if the wording of the agreement between the dealer and the undisclosed principal is clearly that of principal and agent, then the principal is fully responsible for any failure to perform. Accordingly, in *Van Damme v. Gelber,*[166] a New York state supreme court in 2009 held that a dealer, Gasiunasen Gallery, acting as agent for an undisclosed principal, Gelber, made Gelber liable to deliver a Gerard Richter painting when payment was tendered even though the payment arrived five days late. The case also illustrates that when a person is acting as a mere intermediary between two dealers, who themselves are acting as agents for the respective buyer and seller, it is important that the intermediary have a provision in its contract that clarifies it is not liable for failure of either of the agents to act.

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.,[167] 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.[168] 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.[169]

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.[170]

The case of *AB Recur Finans v. Andersson*[171] 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."[172] The court concluded that Andersson had sufficient "rights" in the Twombly to enable Fortune to acquire a valid security interest in the painting.[173]

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 motion[174] 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).[175]

Sales of art are often conducted in a casual manner, compared with normal busi-

ness 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.[176] 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.[177] 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.[178]

In the case of *Morgold, Inc. v. Keeler*,[179] 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.[180]

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*,[181] 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*,[182] 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 interest 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."[183]

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 fa-

cility 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).[184] 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 motion 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.[185]

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*,[186] 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.[187]

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."[188]

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.[189]

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 155.

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.[190] 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 entrustee'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 entrustee'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."[191] 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 that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. . . . "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer . . . in total or partial satisfaction of a money debt.[192]

In *Cantor v. Anderson*,[193] 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."[194] While 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, it is unclear in the State of New York whether good faith on the part of a merchant-buyer actually requires him to investigate the provenance of an artwork he is buying from a reputable dealer in a transaction having no red flags. For example, in the 2005 case of *Lloyd's Underwriters as Subrogee of Segal v. Ross*,[195] where Lloyd's as insurer sought, among other recourse, a declaratory judgment that it had good title in, and could recover, the painting in issue, a New York federal district court refused to dismiss on summary judgment Lloyd's assertion that the defendant-art merchants—Multi Media and Ross—were not buyers in the ordinary course of business. Lloyd's had asserted that (1) Multi Media and Ross had "higher duties of good faith as merchants . . . to investigate the provenance of the painting"[196] and (2) the differential between the painting's market value and its purchase price and the four-month period between contract and delivery[197] should have been a red flag to the merchant-buyers that something was wrong with the transaction.

Citing *Porter v. Wertz*, discussed immediately below, the New York federal district court in *Lloyd's* observed:

> Many lower courts have held that to be a purchaser in the ordinary course within the meaning of [the entrustment provision of the U.C.C.] an art dealer must investigate the provenance of a work of art being purchased, even if the work is being purchased honestly and from a reputable dealer. The New York Court of Appeals, however, declined to endorse this position . . . in *Porter*.[198]

The court denied the defendants' motion to dismiss, observing that whether the price differential on the painting and the four-month delay between contract and its delivery constituted a red flag to an art dealer would appear to be a factual issue not to be resolved on the motion to dismiss. But more importantly, the court noted that "[w]hether a duty of inquiry exists in New York in these circumstances is accordingly unclear."[199]

Thus, in *Porter v. Wertz*,[200] 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 New York Court of Appeals held that the entrustment provision of the U.C.C. did not apply for three reasons: (1) even if Peter Wertz were an art merchant, Porter had not entrusted the Utrillo painting to him; (2) Wertz was not an art merchant; and (3) the sale was not in the ordinary course of Wertz's business because he did not deal in goods of that kind.[201] The court also observed:

> We have received *amicus* briefs from the New York State Attorney General urging that . . . good faith among art merchants requires inquiry as to the ownership of an *object d'art*, and from the Art Dealers Association of America, Inc., . . . that the ordinary custom in the art business is not to inquire as to title and that a duty of inquiry would cripple the art business which is centered in New York. In view of our disposition we do not reach the good faith question.[202]

In the New York federal district court decision of *Graffman v. Espel*,[203] 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.[204]

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."[205] 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.[206]

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.[207]

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.[208] 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."[209] 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.[210]

While purchasers who are deemed "merchants" have an added duty of inquiry, a significant line of case law provides that such an additional duty of inquiry exists only where a reasonable merchant would recognize red flags about a prospective transaction.[211] Such a holding was exemplified in the 2009 case of *Brown v. Mitchell-Innes & Nash, Inc.*[212] Here, in May 2004, plaintiff Deca Trust acquired by way of assignment a painting by the Norwegian expressionist Edvard Munch entitled *Mystery of the Beach*. On the day of its acquisition, Deca consigned the painting for sale to defendant Mitchell-Innes & Nash (MIN), an art dealer in New York City. The consignment agreement provided that MIN did not have authority to sell the painting without Deca's approval. Although MIN was limited under the agreement to selling the painting for a gross price of not less than $7 million, MIN was permitted to sell it for less, so long as Deca received at least $6 million after MIN took its commission. The consignment agreement, as amended, also provided that, other than a loan for exhibition at the Museum of Modern Art (MoMA), MIN could not remove the painting from its

New York premises without Deca's written consent. In 2006, while the painting was at MoMA on exhibition, Museum Würth, one of the holdings of the defendant Würth entities, learned that the painting was available for sale and was on consignment with MIN. MIN, at Museum Würth's request, agreed to ship the painting to Germany for a viewing and it was shipped in May 2006 after it was returned to MIN from the MoMA exhibit. Before the painting was shipped, MIN and Würth allegedly agreed on a purchase price of $6.5 million. Despite the provisions of the consignment agreement, MIN never notified Deca of its dealings with Würth or that it had shipped the painting to Germany. In late May 2006, Würth advised MIN that it would buy the painting, and in June 2006, Würth wired $6.5 million to MIN's bank in New York City. Once the sale was completed, MIN advised Deca of Würth's interest in the painting. Allegedly, MIN advised Deca that it had a prospective buyer at $6.5 million and that it would like to retain a commission that would leave Deca with $5.85 million in net proceeds. In July 2006, after Deca rejected MIN's proposal, MIN advised Deca that it had already sold the painting for $6.5 million and that it was no longer in possession of the painting. At Deca's request, MIN sent Würth a letter requesting return of the painting and cancellation of the sale but Würth refused. Deca brought suit seeking return of the painting and a declaratory judgment that it was the rightful owner. The defendants moved for dismissal on summary judgment, and the New York federal district court granted the dismissal.

Deca had argued that the Würth entities were not buyers in the ordinary course of business because they were merchants under the U.C.C. and had failed to adhere to a higher standard of inquiry regarding the painting. Deca based its assertion that the defendants were merchants on the fact that Würth entities "acquire more than 1,000 paintings a year for the art collections housed by one or another of the three museums owned by and/or associated with the Würth Entities"[213] and that the defendants "hold themselves out as having knowledge and skill in the acquisition of works of fine art."[214] The federal district court did, in fact, deem the Würth entities to be merchants under the U.C.C. "because of the allegations regarding their knowledge and experience in the art industry."[215] But because Deca failed to allege any warning signs that would put the Würth entities on notice as to the seller's authority to sell or other questionable aspects of the transaction (such as a sale price obviously below market or a sale procedure that differed from previous, uncontroversial agreements between the Würth entities and MIN), the court found that the Würth entities were buyers in the ordinary course of business and had no duty of further inquiry.

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*,[216] 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 November 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. . . ."[217] The gallery challenged DBI's consignment theory, arguing that its invoice to Cohen evidenced a sale, not a consignment. 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."[218] 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."[219] 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.[220] For example, in *Howley v. Sotheby's, Inc.*[221] 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.[222]

Similarly, in *Taborsky v. Maroney*,[223] 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.[224] 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.[225]

That higher than usual level of knowledge attributed to a merchant means that actual knowledge of certain information concerning 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.[226]

In *United States v. Crawford Technical Services*,[227] 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*,[228] 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."[229] The court found it "therefore incumbent upon a good faith purchaser to inquire about the validity of title before completing the transaction."[230] 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.[231]

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*,[232] 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[233] that requires a merchant to whom property is consigned to reveal, on demand from the consignor, the sales price. Any person violating this requirement may be guilty of a misdemeanor.

Risk of Loss

As the U.C.C. makes clear,[234] 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.[235] 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.[236]

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*[237] 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]."[238] 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.[239] Similarly, if the object is significantly less valuable than both the buyer and the seller thought, the buyer may seek recourse.[240] 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.[241] 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.[242]

As illustrated in such cases as *Uptown Gallery, Inc. v. Doniger*[243] and *Feigen & Co. v. Weil*,[244] 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,[245] Iowa,[246] New York,[247] and Michigan[248]—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.[249] 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 en-

force 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.[250] 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 nonmerchant-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.[251]

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. . . .[252]

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.[253]

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.[254]

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 in-

> formation, the conscious ignorance exception to the mutual mistake doctrine does not apply.[255]

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 earlier[256] (see page 122) 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*,[257] 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 concerning 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 gener-

> ally regarded as a Bierstadt, it seems unlikely that plaintiff could show that there was a mutual mistake of fact.[258]

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.[259] 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*,[260] 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 Alexander 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.*,[261] 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 Balthus[262] 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."[263]

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.[264]

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 knowing[265] misrepresentation of a material existing fact about the artwork, either by positive conduct or by willful nondisclosure or concealment, intending the misrepresentation to be relied on, and the purchaser in fact relies on the representation to her detriment.[266] The misrepresentation must ordinarily be one of fact, not mere opinion or the seller's puffing.[267] 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.[268] In addition, if a seller presents a matter as fact, rather than opinion, that statement may be actionable.[269]

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.[270]

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.[271]

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.[272]

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.[273] 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.[274] 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.[275]

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.*,[276] 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.*[277] 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.[278]

Lack of Transparency in Private Transactions

It is common practice for the particulars of art transactions of any value to be mired in secrecy. Elements that are normally kept confidential include the identity of the parties to a transaction, the purchase price of the artwork, particulars of the artwork itself, and, at times, the commission retained by the dealer and other intermediaries involved in effectuating the transaction. Whether the size and even the existence of a dealer's commission should be kept confidential from the principals to a transaction was an issue in a case in London, one that has gen-

erated discussion in the United States about the practice of selling a work of art on the basis of an agreed-upon "net return price" to the seller, where the actual purchase price for the work is known only to the buyer and the intermediary dealer.

In *Accidia v. Dickinson*,[279] the Accidia Foundation, owner until at least August 2007 of a drawing attributed to Leonardo da Vinci, engaged an international art dealer, Daniella Luxembourg in late 2006 to sell the drawing as Accidia's agent. Accidia assumed that Luxembourg would find the buyer, but in fact, Luxembourg entered into an agreement with London art dealer Simon Dickinson, who found an American buyer for the drawing. Dickinson had agreed to a net return price of $6 million. The purchase price to the American buyer was $7 million, and the buyer paid that sum to Dickinson. The next day, Dickinson transferred $6 million to Luxembourg, who retained $500,000 for herself as a commission, forwarded $500,000 to Gheri Sackler, who was acting for Accidia and had been Luxembourg's contact on behalf of Accidia, and forwarded the balance of the purchase price, that is, $5 million, to Accidia. At the time of the August 2007 sale of the drawing, Accidia assumed that the sale price was $6 million and that any commission payable to Dickinson would come from Luxembourg's $500,000 commission. It was not until more than a year later—after the buyer, doubting the Leonardo da Vinci attribution, returned the drawing to Dickinson, who repurchased it for $7 million[280]—that Accidia learned that the drawing's purchase price was $7 million, not $6 million.

When Accidia brought suit against Dickinson in London to recover the $1 million commission, the English High Court ruled that Dickinson must reimburse Accidia the sum of $800,000 (less £2,500, approximately $5,000, which Dickinson paid for restoration of the drawing), along with compound interest commencing as of the day after the August 2007 sale; the court allowed the remaining $200,000 to be retained by Dickinson for his services in the transaction. While the court was advised by Dickinson that the practice of net return price arrangements was commonly employed by art dealers, the court stated that "such arrangements would be objectionable, as being unreasonable and unlawful unless they were concluded with the fully informed consent of the principal seller or the dealer accounted to that principal for the secret profit secured."[281]

Given the general preference, among all parties, for secrecy in art transactions, how can the problems arising from the scenario in *Accidia* be addressed? As much as dealers may not like it, transparency is the key to avoiding problems. Dealers must ensure that their arrangements with both their clients and other dealers are memorialized in writing and understood and approved by their clients. Where a dealer under a consignment agreement is selling a work of art on behalf of an owner and there is a "net price arrangement," the consignment agreement should place a cap on the total amount of commission retained, for example, 10% or 12% above the net price. If there is no cap, then the consignment agreement should include language that the owner is satisfied with the net price—which is specified in the agreement—and that the dealer is authorized to retain any overage above the net price, regardless of the amount.

Insurance

It makes sense for both art dealers and art collectors to carry fine art insurance. Such insurance policies offer protection against involuntary damage or destruction to the artwork covered or loss due to theft. The policy will identify the artwork to be insured and may affix agreed-upon replacement-cost values on each piece of artwork covered.

What Is Covered by "All Risk of Physical Loss"?

Where a collector insures her artwork under a policy covering "all risk of physical loss to valuable articles unless stated otherwise or an exclusion applies," the scope of coverage may extend well beyond the actual loss or damage to the art, as seen in *Frigon v. Pacific Indemnity.*[282] Plaintiffs Henry and Anne Marie Frigon were art collectors who, over a number of years, bought and sold much of their collection of Early American Impressionist art through R.H. Love Galleries in Chicago. Between 1997 and 2002, each of the eleven paintings at issue in this case was consigned to the gallery for sale. The Frigons had paid more than $1 million in the aggregate for the paintings and they were consigned for a minimum total sale price of $1.6 million. Unbeknownst to the Frigons, the gallery had long been insolvent and purportedly began selling consigned property including the eleven paintings for less than the agreed minimum prices, keeping the proceeds rather than remitting them to the consignors. By 2002, the gallery had disposed of each of the Frigons' paintings contrary to the terms of the consignment either through trades or through sales for less than the minimum prices without either informing or making payments to the Frigons. In early 2003, the gallery advised the Frigons by letter that the highest-priced painting (which had been consigned for a minimum sale price of $300,000) had been sold on an installment basis and that they would receive twelve equal installment payments of $36,250 for a total of $435,000. In fact, the painting had actually been "sold" for $150,000 (which the gallery had already deposited to its own bank account) plus a trade for another painting. The Frigons received two installment payments of $36,250, and in the spring of 2003—after the payments had stopped—they demanded the return of their paintings. They were not returned; and in April 2003, the gallery admitted that all of the paintings had been sold and that the gallery had spent the proceeds and could not pay the Frigons the minimum sales price.

In May 2003, the Frigons made a loss report to the defendant Pacific Indemnity Co., their insurer, which denied coverage. The plaintiffs made attempts to recover the paintings, located some of them, and secured the return of one. Then they brought suit against their insurer in an Illinois federal district court, seeking, among other relief, a declaratory judgment that the loss of the paintings by conversion or fraud was a loss covered by the defendant's insurance policy. The court first noted that the Frigons, as the insureds, had the initial burden of showing the existence of a covered loss, and once such a burden was met, the burden then shifts to the insurer to show an exception to coverage. According to the

facts, which were not disputed, the gallery took the paintings on consignment and sold or traded them for whatever it could get, failed to remit the proceeds, and did not reveal to the Frigons that the paintings were gone—thereby converting both the paintings and the sales proceeds. In the words of the court,

> [a]s far as plaintiffs are concerned at this point in time, the conduct of the Gallery toward their paintings is no different than had the Gallery taken the paintings on consignment and destroyed them.[283]

The court then concluded that the Frigons had met their burden of showing a covered loss, and that Pacific Indemnity had failed to meet its burden of showing an exception to coverage. Accordingly, the court found that the loss of the paintings was covered by Pacific Indemnity's policy.

The *Frigon* case, in deeming as a loss under an "all risk" policy consigned property that was converted, has caused a number of commentators in the insurance industry to suggest that insurance carriers consider amending their policies to define "loss" more specifically and, perhaps, to require from the insured advance notification of any consignment of the property.[284]

Coverage and Passage of Title

Art dealers as well as collectors require adequate protection against the unforeseen: for example, theft or damage of art at an exhibition venue, or damage to art stored in a gallery or storage facility. Once the insured artwork is sold, whether through a commercial transaction or through a judicial determination, or is transferred in the forgiveness of a debt, it is no longer covered under the policy and the insurance company is not liable for any loss. For example, the Second Circuit case of *Zurich American Insurance Co. v. Felipe Grimberg Fine Art*[285] addressed the issue of whether, in such circumstances, the insured was entitled to compensation for the loss of a certain painting by Fernando Botero entitled *Tablao Flamenco.* In May of 2000, Zurich American Insurance Company (Zurich) renewed an earlier insurance policy issued to Felipe Grimberg Fine Art, owner of the Botero. The policy covered

> antiques and object [*sic*] of art of every nature and description usual to the conduct of the Insured's business, being the property of the Insured; or held by them in trust; or on memorandum; or on consignment; or sold but not delivered; or owned on joint account with others; or belonging to others and for which the Insured may be liable; or for which the Insured has assumed liability prior to loss.[286]

In July of 2000, art dealer Michel Cohen, with whom Felipe Grimberg had been doing business since the 1980s, contacted Grimberg regarding his interest in possibly purchasing the Botero. With the intention of selling the Botero to Cohen for $785,000, Grimberg traveled to Italy in August 2000 to buy it from an Italian dealer for $720,000 and then, in keeping with business dealings between him

and Cohen over the previous decade, he arranged to have the Botero delivered to Cohen's warehouse in New York in September 2000. Cohen never paid Grimberg the agreed-upon price of $785,000. Instead, Grimberg and Cohen agreed that Grimberg would forgive the $785,000 debt for the Botero and pay Cohen an additional $885,000 in exchange for two Marc Chagall paintings, *La Visite* and *Scene Biblique*. Grimberg wired the additional monies to Cohen and twice saw the Chagall paintings in Cohen's apartment in New York, but he was dissuaded from taking possession of them, as Cohen believed he had a potential buyer for them and had advised Grimberg he would pay him when the paintings were sold. In January 2001, Grimberg heard for the first time that Sotheby's was bringing suit against Cohen for a $10 million debt. Grimberg repeatedly tried to contact Cohen, but the latter ultimately disappeared and Grimberg was never paid any of the proceeds from the sales of the two Chagall paintings.

In June 2001, Grimberg filed a claim with Zurich American's U.S. broker for the alleged loss of the Botero. However, in a prior judicial proceeding, Grimberg more than once conceded that he had sold the Botero to Cohen in August 2000 and that he had bought the two Chagall paintings by giving a $785,000 credit to Cohen on a debt owed to him by Cohen, plus payment to Cohen of an additional $885,000.[287] Accordingly, the New York federal district court, affirmed by the Second Circuit, held that Grimberg was judicially estopped in the instant proceeding from asserting that he did not sell the Botero to Cohen in the fall of 2000 and that accordingly, there was no issue of material fact as to whether the Botero was insured under Grimberg's Zurich American policy at the time of the reported loss: that is, "no reasonable jury"[288] could find that the Botero was entitled to coverage under Grimberg's insurance policy after it was delivered to Cohen.

Grimberg argued that as the Botero was stolen from him by Cohen as either a trick or larceny, consideration was lacking and title never passed from Grimberg to Cohen. Both the federal district court and the Second Circuit disagreed, noting that under U.C.C. section 2-401(2),

> [u]nless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place….

Accordingly, the courts found that Grimberg's title in the Botero was transferred to Cohen in September 2000. As to Grimberg's argument that because delivery was procured by fraud or theft, this case fell into the exception to the general rule, once again the courts disagreed. As the district court noted, Grimberg—not his insurer—assumed risks in doing business with Cohen devoid of written contracts or any transferences of certificates of ownership. Moreover, at the time of delivery of the Botero to Cohen, the latter was a "bona fide customer" and "delivery was complete although payment was deferred."[289]

Finally, Grimberg argued that he retained an insurable interest in the Botero

and that such an interest was covered under his insurance policy. As the federal district court noted,

> [a]n insurable interest in property depends on whether the person has a title to, lien upon, or possession of the property, and whether "by the existence of the property he will gain an advantage, or by the destruction of which he will suffer a loss." [290]

Again, both courts disagreed. The federal district court, observing that the insured bears the burden of proving an insurable interest, noted that because Grimberg was estopped from asserting that he did not sell the Botero to Cohen in the fall of 2000, he could not proffer evidence enabling a finder of fact to determine that his burden had been met.[291] The Second Circuit observed that even if Grimberg retained some right to challenge Cohen's title to the Botero, he was unable to demonstrate that the interest is one that fell within the insurance policy's coverage.[292]

It should be noted, however, that unlike the facts set forth in *Zurich American Insurance*, if delivery of the insured property to a third party is procured by fraud or theft (for example, property taken from a messenger by a thief posing as a customer) so that the property, in fact, was still in transit and never delivered to the customer, such circumstances may well constitute an insurable loss under the policy.[293]

Coverage in Transit

It is only prudent practice for an art gallery, in the business of staging art exhibitions in furtherance of art sales, to secure exhibition insurance coverage against theft or physical damage to the art either at the exhibition venue or during the process of packing, shipping, and transport. The gallery is then made whole and is no longer involved in the issue of which insurer bears the ultimate cost of loss or damage. In, for example, *Hermitage Insurance Co. v. Art Crating, Inc.*,[294] a Brice Marden painting entitled *AuCentre* was allegedly damaged in October 2008 while in transit from Moscow to New York. Gagosian Gallery International filed a claim with AXA Art Insurance and was compensated. Then AXA, by way of subrogation to Gagosian,[295] alleged that as a result of negligence on the part of Art Courier, Air Crating, Inc., and various others, AXA suffered damages in the amount of $3 million. In November 2008, Air Crating was notified of AXA's loss and a month later replied that it was not involved in the packing or handling of the painting and "will not accept any responsibility for this loss."[296] In June 2009, AXA commenced a suit against Air Crating and other defendants (the underlying action). Hermitage, the insurer of Air Crating, received notice of the underlying action and the loss in July 2009 and, following its investigation, disclaimed any coverage of the claim based on Art Crating's failure to provide timely notice of the loss. Hermitage subsequently brought this suit against Air Crating, seeking a declaration that it did not have a duty to defend or indemnify Air Crating in connection with the underlying action. The New York state supreme court agreed,

noting that where, as here, "a liability insurance policy requires that notice of an occurrence be given 'as soon as practicable,' such notice must be provided to the carrier within a reasonable period of time."[297] In the instant case, the court noted that the painting was damaged in October 2008 that and Air Crating, which was made aware of this in November 2008 and was put on notice by AXA to notify its insurance carrier, waited until July 2009 before notifying Hermitage. The court found that as a matter of law that was an unreasonable delay. As the court explained, prompt notice to an insurer of an occurrence that might result in a claim enables the insurer to conduct a timely investigation and capture a possible opportunity to resolve or dispose of a claim in its early stages. Here, the court found that because Art Crating breached its contractual duty to provide timely notice to its insurer of a possible claim, Hermitage established a prima facie case that it had no duty to defend or indemnify Art Crating in the underlying action.

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,[298] as well as proof of the forged or counterfeit nature of the work.[299] 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 years[300] to payment of a small fine.[301]

In addition, a number of states have enacted what are generally known as criminal-simulation statutes.[302] 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."[303] As with forgery, the criminal-simulation statutes require proof of criminal intent to defraud or injure,[304] as well as proof of the altered or counterfeit nature of the work.[305] 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.[306]

Warranties of Authenticity

To date, New York, Florida, Iowa, and Michigan have enacted art legislation[307]

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 received.[308]

However, such a warranty made in bad faith may entitle the buyer to consequential damages, rather than the mere return of the purchase price.[309]

Those statutes clarify the express warranty provision of the U.C.C.[310] 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.*[311]—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 antique 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.[312]

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*[313] 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,[314] 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.[315]

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.[316] 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."[317] 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.[318]

The judge's instructions to the jury followed *Dawson*. At trial, on May 7, 1997, the plaintiff Pritzker was awarded $1.7 million.[319]

Rogath v. Siebenmann[320]—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 buyer who purchases a work of doubtful authenticity and who does not preserve her rights under warranties. 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.

However, on appeal, the Second Circuit reversed and vacated the district court's partial grant of summary judgment, finding that issues of fact existed as to whether Rogath knew from the defendant of the doubtful authenticity of the painting. The court emphasized that "what the buyer knew and, most importantly, whether he got that knowledge from the seller are the critical questions."[321] On the one hand, Rogath claimed he knew nothing of the doubt surrounding the painting prior to the sale, and provided indisputable evidence that the defendant knew of the "cloud that hung over the painting's authenticity"[322] prior to the sale of the painting. The defendant admitted that he was informed of Marlborough Gallery's belief that the oddities of the painting—the

shininess of the black paint used (Francis Bacon's other works used matte black) and the presence of pink paint (not generally part of Bacon's color palette)—raised doubt as to the painting's authenticity. On the other hand, the defendant stated in his deposition that he had informed Rogath on the phone of the claims of inauthenticity by the Marlborough Gallery. While the defendant also produced other evidence from a Bacon expert claiming he had informed Rogath of the doubt surrounding the painting, the court determined that only information of challenges to the painting's authenticity from the seller relayed to the buyer was determinative as to whether Rogath had waived his claims for breach of warranty contained in the bill of sale.

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 seller had never informed him 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 Act[323] 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.[324] 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.[325] 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.[326]

In the *Vom Lehn* case[327] (see page 112), 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.[328]

More recently, in *Pritzker* (see page 147), 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.[329] 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.[330] 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 Act[331] 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 $5, the seller must adhere to the Federal Trade Commission (FTC) rules relating to the disclosure of warranty terms.[332]
2. The seller must clearly and conspicuously designate the written warranty as either a "full warranty" or a "limited warranty."[333] A full warranty must conform to certain federal minimum standards.[334] A limited warranty need not meet those standards but must be clearly and conspicuously labeled as a limited warranty.[335] Not subject to those designation provisions are general statements of policy concerning consumer satisfaction,[336] 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.[337]

The rules and regulations under the act are promulgated by the FTC.[338] 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.[339]
2. The seller must have issued a written warranty in connection with the subject of the sale.[340] (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.[341] 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 Act[342] 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.[343] Civil liability may also be incurred for failure to comply with certain provisions of the act.[344]

Federal Trade Commission Act

The Federal Trade Commission Act prohibits unfair or deceptive acts or practices in commerce.[345] 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 282–285), the FTC has brought at least three actions[346] 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,[347] which dates back to 1971, has 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 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. Galleries threatened court challenges,[348] and now most galleries seem to ignore the requirement to post prices, but almost all will have a price list at the front desk readily available to anyone who asks to see it.

Antitrust Claims and Restrictions on Sales—Right of First Refusal

Chapter 7 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.[349] 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*,[350] 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.[351]

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.[352]

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 propertyNew York State's Donnelly Act,[353] 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.[354] 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.[355]

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 collector 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.[356]

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,[357] 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.[358]

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.[359]

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;[360] 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.[361]

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.[362]

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),[363] 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),[364] 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.[365]

Accordingly, consignments have been deleted from article 2 of the U.CC. 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"[366] or a "sale on approval."[367] 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.[368] 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,[369] while it is in the dealer's possession, unless the consignor-collector perfects a security interest under article 9 of the U.C.C.[370]

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.[371] In that case, such a sale does not render the work subject to the claims of the buyer's creditors until the buyer accepts it.[372] 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 creditors[373] unless the consignor perfects a security interest under article 9.[374]

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.[375] 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.[376] 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*.[377] 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 ben-

efit 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.[378]

The lesson is clear.[379] 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 page 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.*[380] 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 pages 125–127, 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).[381] 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.[382] 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.[383] 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."[384] 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.[385]

The Berry-Hill and Salander Bankruptcies

We exhort the collector who consigns artwork to a gallery to perfect his security interests in his art, that is, to file a UCC-1 financing statement to provide public notice of his ownership interest in his art. Otherwise, in the wake of the financial collapse of apparently successful art galleries, such as Berry-Hill, a New York gallery specializing in American paintings, which filed for bankruptcy in December 2005, and Salander-O'Reilly, another premier New York gallery which filed for bankruptcy in November 2007, the hapless collector will lose priority access to portions of the bankruptcy estate.[386] Under section 9-319 of the U.C.C., if the collector-consignor's security interest in his art is unperfected, then, in a gallery's subsequent bankruptcy proceeding, third-party creditors of the gallery may attach that artwork; that is, the collector-consignor's artwork is deemed property of the bankruptcy estate. If, however, the collector-consignor has a perfected security interest in his art, he would then take priority over all third-party creditors of the bankrupt gallery.

Under bankruptcy law, those creditors of an insolvent art gallery who receive access to portions of the gallery's bankruptcy estate are determined by a priority system: First priority goes to secured creditors with perfected security interests. Article 9 of the U.C.C. automatically accords consignors a purchase-money security interest in inventory,[387] and courts would likely deem works of art to be inventory.[388] Accordingly, if the consignor of art files a UCC-1 financing statement, that consignor would have first priority in a claim for the consigned artwork against all other claimants in bankruptcy. Under Article 9 of the U.C.C., a collector-consignor who fails to file a UCC-1 would be deemed a creditor with an unperfected security interest in a bankruptcy action[389] and in bankruptcy law

may be deemed a general unsecured creditor,[390] joining a pool of lower-priority creditors with unperfected security interests.

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 5–41 and the contract forms in Appendixes 1-1, 1-2, 1-3 and 1-4 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.[391] 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.[392]

Arts and Consumer Legislation

The express warranty of authenticity of authorship, as set forth by statute in Florida, New York, Iowa, and Michigan,[393] 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 17, on museums.)

It is useful to compare two such statutes briefly. The federal immunity statute[394] permits a grant of immunity from judicial seizure to cultural objects im-

ported 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 statute[395] 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 finances 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 secured 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 consigned 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.[396] 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,[397] and it is limited by the extent of the rights of the debtor in the collat-

eral.[398] 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, (2) is perfected, and (3) has the priority it is supposed to have.[399]

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.).[400] There are three requirements for attachment:

- The debtor must enter into 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.[401]

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.[402]

Collateral is grouped into three major categories:[403]

- 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:[404]

- 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,[405] and the proper classification of collateral hinges on its principal use or intended principal use by the debtor.[406] 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.[407]

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. With respect to works of art, 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).[408]

The most common method of perfection is filing,[409] and a brief financing statement may be filed in the appropriate state office[410] in lieu of the actual security agreement.[411] Filing is deemed to occur at the time of presentation to the filing officer[412] and may be made before the security interest attaches and even before the security agreement is executed.[413] 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.[414] 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 a third party on the secured party's behalf.[415] Perfection here occurs when the secured party takes possession of the collateral or when the collateral is in the hands of the third party and the third party acknowledges that it holds possession of the collateral for the secured party's benefit.[416] According to the U.C.C., the secured party must use "reasonable care in the custody and preservation of collateral" in her possession.[417]

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.[418] A gallery should never deliver possession of a painting until the gallery has been paid in full, or it risks being only an unsecured creditor of the purchaser. 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.[419]

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.[420] The secured party can file a financing statement without the debtor's signature only if authorized by the debtor to make the filing.[421] If there is a security agreement, the authorization to file the UCC-1 financing statement without a signature is automatic.[422]

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.[423] 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 interests[424] in which a secured party who files within twenty days[425] 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:[426]

1. When neither security interest is perfected, the first to attach prevails.[427]
2. When one security interest is perfected and the other is not, the perfected interest prevails.[428]
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.[429]

4. When both security interests are perfected by filing, the first party to file or perfect, whichever occurs earlier, prevails.[430]
5. When the collateral is other than inventory, a purchase-money security interest prevails over conflicting claims[431] if it is perfected within twenty days[432] after the debtor takes possession of the collateral. Moreover, the interest holder automatically has a security interest in the proceeds of that collateral.[433] When the collateral is inventory, a purchase-money security interest prevails over conflicting claims in the same inventory and in identifiable cash proceeds received 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 at the time of delivery of collateral to the buyer receive written notice of that interest.[434]

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,"[435] 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.[436]
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.[437]
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.[438]

Creditor's Rights on Default

Once a default has occurred, the secured creditor may proceed under the U.C.C. against the collateral.[439] In addition, since the options are not mutually exclusive,[440] the creditor may proceed outside the U.C.C. by bringing suit on the debt.[441] 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.[442] Virtually all security agreements contain an acceleration clause, requiring immediate payment under prescribed conditions of the entire remainder of the loan.[443] 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.[444]

Realizing on Tangible Collateral: Right to Repossession

On default, 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.[445] 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.[446]

Retention of Collateral in Satisfaction of the Debt

The secured party may, under the U.C.C.[447] 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.[448] Strict foreclosure is feasible in practice 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.[449] within ninety days after taking possession or within any longer period to which the debtor has agreed in an agreement entered into post-default, or risk exposure in a suit for conversion or other liabilities under the U.C.C.[450]

Sale or Other Disposition of Collateral

By far the most common method of realization on tangible collateral is by its sale or other disposition.[451] The disposition, which must be in compliance with the U.C.C.'s notice provisions,[452] can occur by auction, by private sale, or by contract,[453] so long as all aspects of the disposition are commercially reasonable[454] as to method, time, manner, place, and terms.[455] 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.[456] Any surplus is turned over to the debtor.[457] 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.[458]

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.[459]

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.[460] A second remedy, if an improper disposition has already occurred, is a right of recovery of money damages by the debtor or other creditors against the secured party.[461] 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.