

Spencer's Art Law Journal

Edited by Ronald D. Spencer

Editor's Note

This is the first issue of Spencer's Art Law Journal which will appear three times a year on ARTNET.

It's been said that art market custom and practice remain much as they were in the 19th century. The legal structure we call art law (an amalgam of personal property law, contract, estate, tax and intellectual property law) supporting the acquisition, retention and disposition of fine art, often fits uneasily with archaic custom and practice. The result is that 21st century art market participants are frequently unsure of their legal rights and obligations.

This Journal proposes to promote discussion of art law legal issues for lawyers and non-lawyers alike, with the goal of providing greater transparency, stability and predictability.

The four essays published below deal with two core issues for the ownership of visual art - authenticity and title - who created it and who owns it? The first essay addresses a typical but often overlooked provision of an auction house consignment agreement allowing the auction house to rescind a sale over authenticity concerns. The second essay deals with ownership disputes with insurance companies over art stolen and recovered years later. A third essay raises the fraught question of changes in the attribution of visual art. The final essay of this issue of the Journal addresses the process of determining who owns art stolen between 1933 and 1945.

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Three times a year future issues of the Journal will address legal issues of practical significance to collectors, dealers, scholars and the general art-minded public, such as (1) appropriate due diligence on the part of the buyer when provenance is incomplete or unclear, (2) the relevance of catalogues raisonnés for due diligence, and (3) what to do if one suspects a piece in a collection of visual art is incorrectly attributed, or, indeed, an outright forgery.

--- RDS

YOUR ART SOLD AT CHRISTIE'S OR SOTHEBY'S AUCTION. CAN THE AUCTIONEER UNDO YOUR SALE YEARS LATER? PROBABLY, YES.

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Judith Wallace

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This essay concerns the under-appreciated contractual right of major auction houses to force their seller/consignor to rescind an auction sale (seller returns money against return of art) many years later over concerns about the authenticity of the work sold. – RDS

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Every consignor to a major auction house should be aware of the potentially devastating consequences of rescission clauses – an often overlooked feature of the standard consignment agreements of the major auction houses. Because rescission clauses are rarely included in contracts with private art dealers, the extraordinary reach of these clauses can take consignors unawares. This essay describes the risks for consignors and offers suggestions for consignors wishing to minimize their exposure to a rescission demand.

The Standard Rescission Clause

Rescission clauses give an auction house broad discretion to undo an art sale transaction years after the sale. The standard text in one auction house's contract provides:

Rescission of Sale. [Auction House], as Consignor's agent, is authorized to accept the return and rescind the sale of any lot of Property at any time if [Auction House] in our sole judgment determines that the offering for sale of any Property has subjected or may subject [Auction House] and/or Consignor to any liability, including liability under warranty of authenticity or title. In such event, [Auction House] is further authorized to refund or credit to the buyer the purchase price of such returned Property. If [Auction House] has already remitted to Consignor any proceeds of the rescinded sale, Consignor forthwith shall pay [Auction House] upon request an amount equal to the remitted proceeds.

In other words, the auction house can rescind with its auction buyer, years after the original sale, based on its own determination that there is a *possibility* of liability, and then demand a refund of the sale proceeds from the consignor, even if the consignor acted in good faith based on all information available at the time of the sale and there is a strong argument that the artwork is correct in every way.¹

Distinguishing Contractual Rescission from Other Remedies

The critical difference between the rescission clauses in consignment agreements and a breach of warranty claim or a rescission claim under common law is that without a contractual rescission clause the auction house would need to actually *prove* its claim (such as that a work is not authentic) by a preponderance of the evidence, rather than citing its own determination that there is a *risk* of liability.

In contract disputes, including disputes arising from art sales, the remedy for a breach of contract, such as a breach of warranty of authenticity, is typically an award of money damages. Alternatively, under the common law of contracts, one party can seek rescission by proving a mistake of fact by both parties at the time of the contract so profound that a "meeting of the minds" did not take place. Rescission restores the

pre-contract status quo, meaning that the buyer returns the work and the seller returns the purchase price.

When the claim is that artwork is not authentic, the difference between a refund on the ground of a breach of warranty or the return of the purchase price through common-law rescission may seem academic. In either case, the buyer must prove to a preponderance of evidence standard (*i.e.*, that it more likely than not) that the work is not authentic. The distinctions are fairly subtle: proving a mutual mistake of fact may be more difficult, as one New York court has held that sophisticated art dealers are always aware of the inherent risk regarding authenticity;² however, the statute of limitations for mutual mistake is longer than for warranty claims (in New York, six years as opposed to four).

In contrast, there is a vast difference between either breach of warranty or common-law rescission claims and the standard contractual rescission clause in auction house consignment contracts, which requires only that the auction house show that it determined that it “may” be subject to liability.

Allowing rescission based on the *possibility* of liability is particularly risky with respect to authenticity. Art sale contracts contain warranties relating to condition, title, and authenticity. Discrepancies in a work’s condition would be apparent as soon as the buyer takes possession. Title disputes involve comparatively straightforward legal issues. Questions about authenticity, however, can arise months or years after the sale, whenever new information comes to light, when experts (perhaps even the same experts who initially supported an attribution) change their assessment of the work, or when new forensic tools are developed.

Auction house rescission clauses also allow for rescission and return of a work that may very well be authentic. Nevertheless, the fact that the auction house has raised questions about authenticity and invoked its rescission clause can then render the work much less marketable. Even if the challenge did not play out in public, the consignor would probably need to disclose the authenticity challenge to any new buyer. And even if there is litigation over the rescission clause, the issue of whether the work is in fact authentic can remain unresolved. A court will be reluctant to weigh expert testimony and determine the work’s authenticity when all that the contract requires is a showing that the auction house “may” be liable.

Recommendations for Consignors

When it is impossible to simply delete a rescission clause, the following steps can minimize its impact:

1. Shorten Deadline.

The standard auction house rescission clause contains no deadline, authorizing rescission “at any time.” A consignor could argue that the statute of limitations period for contract claims, which in New York is six years, is the deadline. Still, this is longer than the statute of limitations for claims for torts such as negligent misrepresentation or fraud (three years) or statutory warranty claims (four years). Consignors should limit the deadline for claims under the rescission clause to one year from the date of sale. This will allow sufficient time for buyers to perform a thorough investigation of the artwork. There is no reason that consignors should be liable for a longer period for changes in attribution -- which are an inherent risk that any art collector should anticipate -- than they are for wrongdoing.

2. Limit Rescission to Representations in the Consignment Contract.

A rescission clause that allows rescission for “any liability” can create obligations beyond the specific representations and warranties that the consignor makes in the contract. For example, an out-of-state consignor that warrants that it has “no reason to believe that a work is not authentic” might not be aware of a New York statute that, in some circumstances, deems a certificate of authenticity from a third party expert to constitute an express warranty by the consignor that the work is authentic.³ (The consignor might not even know what state or national law governs the auction house’s sale.) The consignor might also be unaware of an auction house’s additional warranties, representations, or promises to buyers, especially if the work is sold in a private sale subject to separately negotiated terms of sale. Thus, consignors should limit any rescission right to the representations in the consignment contract and explicitly authorized to be passed along to the ultimate buyer, and should disclaim warranties *not* explicit in that contract.⁴

3. Require Immediate Notice and Opportunity for Consignor to Cure.

Rescission does not truly return consignors to the pre-contract status quo because the reputation of the work can be destroyed in the course of the investigation or rescission. Therefore, consignors should require immediate notice when questions about authenticity are raised. This will give the consignor the opportunity to obtain appropriate expert opinions, or even to reacquire the work, before the work is irreparably devalued by a buyer or auction house building a case for rescission.

4. Require Independent Determination of Fact.

The standard clause allows rescission at the auction house's "sole discretion" that it "may" be liable. The only limitation on the auction house's sole discretion is that the determination must be made in good faith.⁵ Consignors should require both an independent arbiter agreed upon by the parties and an actual determination by that arbiter that the work is not (or probably not) as described by the consignor. This will reduce the risk that a consignor will be asked to take back an authentic, but thereafter a much less marketable, work.

5. Obtain Parallel Rights Against Predecessor in Interest.

Consignors should ensure that any rescission rights they grant to an auction house are paralleled in the consignor's own contracts with their predecessors in interest (usually the person from whom consignor purchased). Consignors should be aware that auction houses auction works with a five-year warranty of good title and authenticity, and thus will remain liable for claims from auction buyers during that period.

Conclusion

Broad rescission clauses (even those requiring the auction house to act "reasonably") provide auction houses with tremendous leverage to unwind art transactions, even when it is likely that the work conforms in every way to the description in the contract and the consignor has not misrepresented any information. Consignors of artwork should therefore understand the risks inherent in the rescission clauses in standard auction house contracts and either limit that rescission right or plan ahead and seek parallel protections from their predecessors in interest to reduce their exposure.

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¹ The author represented one defendant in litigation of a rescission clause in *Christie's Inc. v. SWCA*, 867 N.Y.S.2d 650 (N.Y. Sup. Ct. N.Y. County 2008). (granting partial summary judgment).

² Compare *Findley v. Zaplin-Lampert Gallery, Inc.*, No. 603118/01 (Sup. Ct. N.Y. County, Dec. 19, 2001) (no mutual mistake because sophisticated art dealers understood the inherent risks regarding authenticity) with *Uptown Gallery, Inc. v. Doniger*, No. 17133/90 (Sup. Ct. N.Y. County, Mar. 9, 1993) (allowing rescission because both parties mistakenly assumed that a work was authentic); *Richard L. Feigen & Co. v. Weil*, No. 13935/90 (Sup. Ct. N.Y. County Feb. 18, 1992) (same).

³ See New York Arts & Cultural Affairs Law § 13.01.

⁴ See, e.g., *T.T. Exclusive Cars Inc. v. Christie's, Inc.*, No. 96-Civ-1650, 1996 WL 737204, at *6 (S.D.N.Y. 1996).

⁵ See, e.g., *Kobler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1187 (7th Cir. 1996); *Mickle v. Christie's Inc.*, 207 F. Supp.2d 237, 247-48 (S.D.N.Y. 2002); *Greenwood v. Koven*, 880 F. Supp. 186, 197 (S.D.N.Y. 1995).

INSURED V. INSURER: WHEN STOLEN ART IS RECOVERED, WHO OWNS IT?

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Kenneth S. Levine

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This essay is about the word “subrogation,” which frequently appears in insurance policies. An insured painting is stolen, and the insurance company pays the owner’s claim for the value of the painting. Many years later, when the painting is recovered, its value is many times what it was when the insurance claim was paid. The insurance company takes the position that it owns the painting, while the owner says I own the painting, less the value of the insurance proceeds received. The resolution of this dispute depends on the meaning of the word “subrogation” in the insurance policy. - RDS

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A thief breaks into a home and makes off with a beautiful and valuable painting. Duly insured, the owner submits a claim to the insurance company and receives an insurance claim payment, based on the most recent appraised value for the piece. The owner also reports the painting to the Art Loss Register, hoping for a recovery some day and for the culprit to be caught. While the owner is happy to have the insurance payment, the painting probably would have sold for more, and the painting had sentimental value.

Thirty years later, the owner has passed away, and the painting is recovered in good condition, and is now worth an estimated \$1 million. The owners’ heirs are thrilled with this windfall, and excitedly consult with auction houses about when to sell it off, and how much they can expect. But the insurance company has other plans: “When we paid your father the insurance proceeds, we obtained full rights to the piece if it were ever to be recovered. Therefore, the painting and any proceeds from its sale belong to the insurer,” it tells the heirs.

Who has the rights to the painting, the insurer or the insured? The answer requires an analysis of the legal concept, common in the insurance world, known as “subrogation.”

Insurance Companies and Subrogation

The doctrine of “subrogation” allows insurance companies to stand in the place of the insured once it has paid proceeds to the insured.¹ Subrogation arises most often in the run-of-the-mill insurance cases, such as when an insured’s car is damaged in an accident due to the negligent driving of the other driver. Once the insurance company fully pays the insured for the car repairs, the insured has no incentive to sue the wrongdoer—she is happy to have her car back in working order and to move on with her life (assuming there are no injuries). But the insurance company, now out of pocket the costs of car repairs, has the incentive to sue the negligent driver, and can do so as the assignee of the insured’s rights (often, literally, although it would seem, technically improperly, bringing a suit in the insured’s actual name).² As “subrogee,” the insurance company retains all of the rights to which the insured “subrogor” is entitled.³ Insurance agreements usually include specific clauses setting forth the subrogation rights of the insurance company after paying proceeds to the insured.

The doctrine of subrogation can also limit the insured’s recovery, since the insured cannot double-recover from both the insurance company and the wrongdoer. If the insured is not fully compensated for his loss from the insurance company, he can sue the wrongdoer, but can recover no more than he has lost, including the insurance proceeds he received. If, for example, the automobile repairs from the collision cost \$10,000, and after a deductible insurance company only paid the insured \$6,000 in proceeds, then the

insured could sue the wrongdoer for the full \$10,000, but could only keep \$4,000. The remaining \$6,000 would go back to the insurer.

The two competing principles—that the insurance company is entitled to “stand in the place” of the insured upon payment of proceeds to the insured, and the insured is entitled to be made “whole” but cannot double recover—can clash when stolen art is recovered after a long period of time. Both insured and insurer keenly want to claim the art itself, since it has appreciated in value far beyond what was paid in insurance proceeds years earlier.

Any specific dispute between insured and insurer would involve a close examination of the actual insurance agreement in question, as well as an analysis of the applicable state law. But generally, in the case of recovered art, the insurer would argue that the insured was “made whole” at the time of the theft when the insurance proceeds were paid, and that the insured agreed to release interest in the piece and allow the insurer to step into its shoes once it received those proceeds. The insured, in turn, would argue that the insurance proceeds did not fully compensate for the loss of the painting either then or now, and, in fact, no amount of money could ever replace the unique painting. The insured therefore seeks the painting itself as the only way to be “made whole,” and will happily pay back the insurance company the proceeds received years ago to the extent the insured is double recovering.

Because of the high potential for profit, insurance companies follow the reports from the Art Loss Register, looking for recovery of pieces upon which they paid insurance claims in the distant past, and surely hoping that the insureds cannot also be found.⁴

The clash between insured and insurer arose squarely in two recent New England cases. In both cases, the insured prevailed.

Two Cases Favor the Insured

In *Apthorp v. OneBeacon Ins. Co.*,⁵ a painting was stolen from a home in 1976, and the insurance company paid the owner \$25,000 for his loss, based on a recent appraisal of the painting. On receipt of the insurance proceeds, the insured signed a subrogation agreement with the insurer, which stated: “[i]n consideration of the payment to be made hereunder, the [insured] does hereby subrogate to said insurer the right, title and interest in and to the property for which claim is being made hereunder ...”. In March 2007, the painting was recovered, and estimated to be worth between \$400,000 and \$800,000. OneBeacon Insurance Company, the successor in interest to the original insurance company, and the executors of the estate of the insured, both claimed right to the painting. The court ruled that the executors of the estate, and not the insurance company, were entitled to the painting, and the executors were required to repay the insurer the \$25,000 in proceeds (without interest), reasoning that to do otherwise would grant the insurance company an unfair “windfall” profit. The court also noted that “subrogating” one’s right to property is not the same thing as transferring title, since subrogation only allows the insurer to step into the shoes of the insured for the limited purpose of a suit against the wrongdoer, and does not amount to a transfer of title to the insurer.

OneBeacon also raised a similar claim in Rhode Island last year.⁶ In this case, three paintings were stolen from the owner’s home and the insurance company paid the owner \$45,000. Thirty years later, the paintings were discovered when an alleged innocent purchaser of the pieces offered them as collateral for a loan, and the lender requested an art dealer to authenticate them. The dealer checked the Art Loss Register and discovered that the works were stolen, and alerted the FBI. The recovered paintings were worth far more than the \$45,000 in the insurance proceeds paid to the now deceased owner, and the estate of the owner, the insurer, and the person who currently held the works all claimed title to the works. In the end, the parties reached a settlement, agreeing that the “true and rightful owner” of the paintings was the estate of the original owner from whom the works were stolen.

Subrogation Under New York Law

Under New York law, it also appears that the insured would have the right to recover the art, although no reported cases have addressed the issue directly. While the insurer, upon payment to the insured, has

subrogation rights and can sue a third party to recover an amount up to its payment of proceeds,⁷ the insured, as a matter of law, also maintains independent legal rights to pursue a recovery for his or her loss and to be “made whole.”⁸ Since a work of art is unique, money could never fully compensate for the painting itself. In these situations, the only way to make the owner of such a work “whole” is to return the art to the owner.

Upon recovery of the stolen art work, the insured would be obligated to repay the insurance company the insurance proceeds received, minus whatever expenses were incurred in the recovery of the art, so that the insured has not “double recovered.”⁹ If the restoration of title proceedings cause the insured to undertake considerable expense to recover the work, it is possible that the insurance company is not entitled to any payment, since the insured would be entitled to re-imbursement of expenses incurred recovering the lost art.

Because so much art has been stolen over the years, and because art often appreciates over time, we expect to see more clashes between insured and insurance companies in the coming years.

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¹ See COUCH ON INSURANCE, §222:5 (“Accordingly, on paying a loss, an insurer is subrogated in a corresponding amount to the insured’s right of action against any other person responsible for the loss, such that the insurer is entitled to bring an action against this third party whose negligent or other tortious or wrongful conduct caused the loss, regardless of whether the insurer would have been entitled to bring such an action in its own right.”).

² Thereby exposing the insured to counterclaims and the jurisdiction of the court in which the insurer has chosen to sue.

³ *Id.* (“Subrogation’ is the substitution of another person in place of the creditor to whose rights he or she succeeds in relation to the debt, and gives to the substitute all the rights, priorities, remedies, liens, and securities of the person for whom he or she is substituted.”).

⁴ See <https://www.artloss.com/content/services>.

⁵ 2009 WL 874539 (Mass. Super. Jan. 13, 2009). The appeal of the decision is pending.

⁶ *United States v. OneBeacon Ins. Grp.*, C.A. No. 08-58ML (D. R.I. 2008).

⁷ See COUCH ON INSURANCE §223:85 (“A subrogated insurer cannot recover from a wrongdoer... amounts the insurer did not pay to the insured.”).

⁸ See *Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 650 N.E. 2d 841, 626 N.Y.S.2d 994 (1995) (“The claims of the insurer for amounts paid by it and the insured’s claim for uninsured losses are divisible and independent, and [p]ermitting the insurer to sue as equitable subrogee does not affect the insured’s right to sue for the amount of the loss remaining unreimbursed.”) (citations omitted).

⁹ See, e.g., *Fasso v. Doerr*, 12 N.Y.3d 80, 87 (2009) (“The injured party should not recover twice for the same harm—once from its insurer and again from the wrong doer.”); COUCH ON INSURANCE §223:152 (“[W]ith some exceptions, subrogation against an insured is allowed if the insured has been made whole and has been fully compensated, which compensation includes costs and attorneys’ fees.”).

WHEN EXPERTS AND ART SCHOLARS CHANGE THEIR MINDS

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Ronald D. Spencer

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This essay is concerned with changing attributions of visual art, over time, as a result of new opinions by experts -- usually based on art historical research having produced new factual information about the artist or the work of art. The legal effects of these changes in attribution can have important legal consequences for sellers and buyers and donors. When an art dealer sells a work of art, the dealer almost always gives the buyer a warranty of authenticity. Subsequently, if new facts emerge or experts change opinions after (perhaps long after) the sale, what does the buyer have to prove to enforce his warranty against the dealer? Stated another way, what does it mean to warrant authenticity today and into the future, when expert opinion can, and does change? - RDS

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Attributions of a work of visual art to a particular artist, usually result from a consensus of opinion among art scholars and experts. But it is not uncommon to encounter a work that had been attributed by consensus opinion to an artist, and then, over time, see that consensus change. While, all opinion (expert and otherwise) is subject to change over time as new facts emerge and the cast of experts alters, this is particularly so in the field of visual arts.

There are many examples of this phenomenon. The Rembrandt Research Project, begun in 1968, has reattributed Rembrandt paintings that the Project itself previously deattributed.¹ In January, 2009, Madrid's Prado Museum publicly announced its decision to remove Francisco Goya's name from the painting, *The Colossus*, heretofore considered one of Goya's most dramatic and famous pictures, and now said to be painted by one of his assistants. And Goya's "Black Paintings," removed from the walls of his home and also displayed in the Prado museum for many years, may not have been painted by him at all, according to an art historian hired to write on a book on the paintings.² The Metropolitan Museum of Art has owned a painting *Portrait of a Man* for sixty years. Since 1917 the painting has been attributed to Velázquez and then deattributed. But now the Museum, again, considers it to be by Velázquez ("How does a picture transform itself from a dubious Van Dyck to an indubitable Velázquez, from a Velázquez to a workshop piece back to a Velázquez?") and exhibited it in 2009 as such.³ A sunflower painting attributed to Vincent van Gogh that broke auction records by selling for nearly \$40 million in 1987 is now considered by some experts to be a forgery, while others are certain of its authenticity.⁴ These are but a few of the artworks that have fallen into a cyclical pattern of attribution, deattribution, and (sometimes) reattribution.

The oft-changing nature of attributions can have profound legal effects. A buyer may wish to rescind his purchase of artwork, or the Internal Revenue Service might want the new attribution to be reflected in altered income tax liability for the donor. In resolving these conflicts, the consensus of art scholars and experts at a *specific point in time* is crucial.⁵

Art dealers most often warrant the authenticity of the work they sell. Both Sotheby's and Christie's warrant to their buyer for five years after the date of sale that the work is by the author identified in their auction catalogue. When enforcing these kinds of warranties of authenticity, a rule has developed in the field of art law that a court will look to whether the seller had a *reasonable basis in fact*, for making such a warranty *at the time the warrant was made*, that is, at the date of sale.

Dawson v. Malina and the Establishment of the Timing Rule in Breach of Warranty Cases.

The rule of looking to the consensus of art scholars and experts at the time of sale, and not, for example, when an expert reattribution is made or at the time suit is brought, was first articulated in 1978 in a New York federal court case, *Dawson v. Malina*,⁶ involving Chinese ceramics and jade sculptures, sold by a New York gallery. The seller furnished descriptions of these objects in letters, invoices, and the bill of sale, unequivocally attributing each work to a specific period of Chinese antiquity, such as the Chien Lung period and the Sung Dynasty. Soon after the sale, the purchaser inquired into their authenticity with several experts, all of whom expressed doubt that these works were from the periods warranted by the seller. When the seller only agreed to accept the return of four of the works, the buyer brought suit alleging breach of warranty for the five remaining works. At trial, the experts retained by the parties expressed conflicting views as to the correct attribution of these works, but agreed that attributing a work to a particular era of Chinese antiquity is “by its very nature an inexact science.”⁷

***Dawson* Establishes Reasonable-Basis-in-Fact Standard for Warranty of Authenticity.**

On the issue of whether there had then been a breach of warranty, the *Dawson* court held that the proper standard for determining breach of warranty should be whether representations by the seller to the buyer 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.”⁸ Thus, a plaintiff buyer must show “by a fair preponderance of the evidence that the representations made by [the seller] were without a reasonable basis in fact at the time these representations were made.”⁹

Turning to each piece and the representations made, the *Dawson* court found that for many of the works the seller had not had a reasonable basis in fact for making these warranties. Particularly troubling to the court was that the seller’s language was often “unequivocal” and “unqualified,”¹⁰ even though the nature of these artworks meant that it would be nearly impossible for any determination to be made with the level of certainty exhibited by the seller. For example, in discussing a jade peach tree carving, the court noted:

Considering the expert testimony with respect to this carving as a whole, it is clear that Malina’s unqualified attribution of this piece to the Chien Lung period is not supported by a reasonable basis in fact and that any attribution with respect to this carving should have been qualified at the very least as being ‘probably’ or ‘possibly’ Chien Lung.¹¹

The court found that the buyer was entitled to rescind the sale of three of the works at issue because the seller had not undertaken investigation sufficient to have had a reasonable basis in fact for the warranty.

Dawson v. Malina has been adopted as the standard for breach of warranty claims in art cases in the following four court decisions:

- *Balog v. Center Art Gallery-Hawaii* (1990)² (forged Salvador Dali prints warranted as authentic).
- *Levin v. Gallery 63 Antiques* (2006)¹³ (late 19th century Italian sculptures warranted as “original”, rather than workshop copies).
- *Levin v. Dalva Bros.*, (2006)¹⁴ (vases warranted as 19th century Russian were of French origin; grandfather clock warranted as 18th century French, an amalgam of late 18th & 19th century parts and pieces; and commodes warranted as 18th century French - most probably 19th/20th century).
- *Christie’s, Inc. v. SWCA* (2008)¹⁵ (Picasso sculpture warranted to be Vollard edition).

Problems Arising under the “Reasonable-Basis-In-Fact” Standard.

Both Christie’s and Sotheby’s limit their warranty of authenticity if their catalogue description corresponded to the generally accepted opinion of scholars and experts at the date of sale, or fairly indicated there was a conflict of opinion among scholars and experts. The warranty is further limited if authenticity can only be demonstrated by means of, either a scientific process not generally available or accepted for use

at the time of sale, or a process that was unreasonably expensive or impractical or likely to have caused damage to the art.

Clearly, under the *Dawson* standard, and Christie's and Sotheby's contractual limits on their warranties of authenticity, a change in the consensus of expert opinion after the date of sale would not allow an unhappy buyer to recover on the auction house warranty. But suppose the buyer obtained expert opinion several years after his purchase, identifying paint in the picture which would not have been available to the artist at the presumed date of creation. And assume, further, that such scientific testing for that particular paint was feasible at the date of sale but was not performed by seller, nor requested by buyer. Thus, the question for the court would be, when all the experts at the date of sale thought the art was authentic and no one had suggested paint testing, could the buyer (several years later but still within the warranty period) rely on paint testing to prove that the seller had breached his warranty. Probably, yes.

Authenticity Qualified by “Probably” or Possibly”.

As we have seen, Dawson states that “Malina’s unqualified attribution of this piece to the Chien Lung period is not supported by a reasonable basis in fact and ... any attribution with respect to this carving should have been qualified at the very least as being ‘probably’ or ‘possibly’ Chien Lung.

In 2005 the English Court of Appeal in *Taylor Thomson v. Christie Manson & Woods* had before it the question of whether Christie’s “should have qualified their catalog entry” about a pair of Louis XV vases which had been bought by Thomson for nearly £ 2 million, by stating that the urns were “*probably*” 18th century (as opposed to 19th century, much less valuable, imitations).¹⁶ Christie’s had accepted that, if there were “material doubts” as to the description or dating in its auction catalogue description, that doubt should have been articulated in terms of “probably Louis XV”.¹⁷ Thomson’s contention was that the well-known existence of 19th century imitations should have caused Christie’s to doubt its “certain and definite opinion” expressed in its catalogue, which opinion was based (only) on careful visual inspection by experts.¹⁸ The English court was of the opinion that the evidence at trial established the 18th century date with at least a “70% probability and perhaps higher”.¹⁹ The Court held that Christie’s was “entitled to hold the certain and definite opinion that the Houghten vases were 18th century ...” and, if it had no “real, rather than fanciful doubts”, it did not have to qualify its opinion, by stating in its auction catalogue, “*probably*” 18th century.²⁰

Timing of the Attribution for Charitable Contributions.

Issues of how to value artwork when the consensus of art scholars and experts on the piece changes also arise when the owner of a work makes a charitable contribution. In order to determine the value which may reduce the donor’s income tax liability, the Internal Revenue Service measures the fair market value of the artwork on the *date of contribution*.²¹ The IRS explicitly disallows looking to future events when making this valuation, advising the taxpayer that:

You may not consider unexpected events happening after your donation of property in making the valuation. You may consider only the facts known at the time of the gift, and those that could be reasonably expected at the time of the gift.²²

This issue was highlighted in the recent controversy around art dealer, Gerald Peters’ donation of several works from the so-called “Canyon Suite” to the Kemper Museum of Contemporary Art in Kansas City. “Canyon Suite” was comprised of 28 paintings that, at the time of donation, had been attributed by art scholars and the expert community to Georgia O’Keeffe, and for which Peters had claimed a \$1.1 million tax deduction. Three years later, when the O’Keeffe catalogue raisonné was published, the works were deemed by experts to be inauthentic and the IRS thereupon disallowed the deduction. Peters brought suit, demanding a refund of taxes and penalties he paid to the IRS, arguing that “his deductions were reasonable at the time of the donations, three years before the experts concluded they were forgeries. The case was

settled in 2006, without a court opinion, presumably because Peters' position seemed to be expressly supported by the IRS's stated methodology for determining charitable deductions, i.e. value at the time of donation, could not consider *unexpected* future events.

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NOTES

¹ See Ronald Spencer, *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* (New York, Oxford University Press, 2004) p. xi; See also John Gash, *Rembrandt or Not?- Rembrandt Research Project. Attempts to Authenticate Certain Works*, ART IN AMERICA (Jan. 1993).

² Arthur Lubow, *The Secret of the Black Paintings*, N.Y. TIMES, July 23, 2003.

³ Keith Christiansen, *Introduction, Velázquez Rediscovered*, Metropolitan Museum of Art (New York, 2009) p.6; Karen Roseberg *Revealing the Hand of Velázquez*, N.Y. TIMES, December 2, 2009.

⁴ Sylvia Hochfield, *Timothy Ryback Made Sense of the Heated Debates Over van Gogh Forgeries*, ARTNEWS, Nov. 2007.

⁵ Indeed, both Christie's and Sotheby's limit their warranties of authenticity, stating that they do not apply if the catalogue description was in accordance with the opinions of art scholars and experts at the date of the sale, or if the catalogue noted that there was a conflict of opinions among art experts.

⁶ *Dawson v. Malina*, 463 F.Supp. 461 (S.D.N.Y. 1978).

⁷ *Dawson*, 463 F.Supp. at 467. The court continued, "As the testimony of all of the experts makes clear, a determination as to the proper attribution for any of these pieces is to a substantial extent a subjective judgment based upon whether an expert finds a given piece to be aesthetically consistent with the other works of the period on the basis of such elusive characteristics as the quality, character, for or 'feel' of the piece."

⁸ *Id.* at 467.

⁹ *Id.* at 467.

¹⁰ *Id.* at 468.

¹¹ *Id.* at 469.

¹² *Balog v. Center Art Gallery-Hawaii*, 745 F.Supp. 1556 (D.Haw. 1990).

¹³ *Levin v. Gallery 63 Assoc.*, Docket No. 04-CV-1504, 2006 U.S. Dist. LEXIS 70184 (S.D.N.Y. Sept. 28, 2006).

¹⁴ *Levin v. Dalva Bros.*, 459 F.3d 68 (1st Cir. 2006).

¹⁵ *Christie's Inc. v. SWCA*, 867 N.Y.S.2d 650 (N.Y. Sup. Ct. N.Y. County 2008).

¹⁶ *Thomson v. Christie Manson & Woods Ltd*, [2005] EWCA Civ. 555, Court of Appeal (Civil Division), Case No. A2/2004/146 & 1470 (appeal taken from Q.B.), at ¶ 7.

¹⁷ *Thomson* at ¶ 78-99.

¹⁸ *Id.* at ¶ 84.

¹⁹ *Id.* at ¶ 122, 152.

²⁰ *Id.* at ¶ 157.

²¹ 26 U.S.C. § 170 (2008) (Charitable, Etc., Contributions and Gifts).

²² Internal Revenue Service, Publication 561 ("Determining the Value of Donated Property") (Apr. 2007).

STOLEN ART: WHO OWNS IT OFTEN DEPENDS ON WHOSE LAW APPLIES

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Arabella Yip

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It has been estimated that between 1933 and 1945 the Nazis looted more than 600,000 works of art from their European (mainly Jewish) owners. Despite great effort many stolen works have not been recovered. Since many looted works remain in public and private ownership, these owners remain at risk for claims against their art. When such a claim is made, how do courts decide ownership.

Under Anglo-American law and the law of some (but not all) European countries, a thief cannot pass good title (no matter how many subsequent owners buy in good faith). Relying on this well-settled principle of Anglo-American law, American courts have invariably ordered the return of Nazi-looted art to the heirs of former Jewish owners. But what if the painting were never stolen, confiscated or looted by the Nazis? What if instead, the Jewish owner sold his painting to protect it from impending seizure by the Nazis or to generate income for his family because the Nazis stripped him of his livelihood? Is this a "forced sale" amounting to theft? The answer may well depend on which country's law applies to the "sale" -- the country where it took place 75 years ago, the current residence of the heirs or the residence of the original owners. - RDS

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In February 2009, the Museum of Modern Art (MoMA) in New York settled a lawsuit involving one of its most valuable paintings, *Boy Leading a Horse* (1905-1906) by Pablo Picasso.¹ Under the terms of the settlement, the museum was allowed to keep the painting in exchange for paying an undisclosed sum of money to a German art historian, whose Jewish ancestor allegedly sold the painting under Nazi duress. The settlement, announced in open court the morning the jury trial was set to begin, came as a surprise to many in the art world. Just a little more than a year earlier, the museum had taken preemptive measures against the claimant, asking a New York federal court to declare it the rightful owner of the painting. MoMA had sought a swift victory in partial reliance on an oft-applied principle of choice-of-law, which, if successful, would have cleared its title to *Boy* and saved it the expense of an unavoidably costly litigation.

Facts of Museum of Modern Art Claim to Picasso Painting

Here are the facts, in brief: *Boy* was owned by a prominent Jewish art collector, Paul von Mendelssohn-Bartholdy, who lived in Berlin during the Nazis' ascendancy. In 1935, it was sold to a Jewish art dealer, Justin K. Thannhauser, and transported to the Swiss gallery of Siegfried Rosengart (partner of Thannhauser). A year later, while on a trip in Switzerland, William Paley, former MoMA chairman and CBS founder, purchased it. Paley donated *Boy* to MoMA in 1964 upon his death. At that time, *Boy* was estimated to be worth at least \$100 million. More than four decades later, Julius Schoeps, great nephew of von Mendelssohn-Bartholdy, demanded that MoMA return the painting. In his claims for ownership of *Boy*, Julius Schoeps alleged that Nazi-coercion drove Mendelssohn-Bartholdy to sell the painting to Thannhauser, that Paley purchased *Boy* knowing that Thannhauser had acquired defective title to the painting, and that MoMA had accepted Paley's gift of *Boy* with knowledge of his complicity.

Since the painting had passed through so many hands, and had traveled across many borders, the case was beset with choice-of-law issues. One such issue, in particular, became a focal point of the battle between Schoeps and MoMA – the legal validity of the sale of *Boy* from Thannhauser to Paley in 1936. MoMA had argued that Swiss law governed the transaction since that is where the sale took place, while Schoeps had countered with New York law, asserting that New York had a greater interest than Switzerland in the outcome of the case. Since each jurisdiction has its own statute of limitations that determines the time in which an action for recovery of personal property must be brought, the substantive difference between the respective laws was paramount to the survival of Schoeps' claims.

Swiss Law

Under Swiss law, a good faith purchaser of stolen property acquires title superior to that of the original owner. Moreover, all purchasers of property, stolen or not, are presumed to act in good faith, and, a claimant seeking to reclaim such property bears the burden of establishing otherwise. The claimant must prove that suspicious circumstances surrounding the transaction should have caused the purchaser to doubt the seller's authority to sell the property and to inquire about the property's origins; more crucially, the claimant must institute action for return of the property from a good faith purchaser within five years. With respect to the sale from Thannhauser to Paley, if Swiss law had governed, the law's presumption of Paley's good faith would have, essentially, immunized the transaction from any taint after five years, "even if the transfer from [von Mendelssohn-Bartholdy] was infected with duress." This immunization would have extended to subsequent owners in the painting's chain of title, such as MoMA, and would mean that Schoeps' claims have been barred for more than sixty years.

New York Law

While Swiss law may perhaps be the most favorable law for good faith purchasers, New York law is on the opposite end of the spectrum. New York has a policy of fiercely protecting the right of original owners from whom property had been stolen to recover that property, even if it is in the possession of a good-faith purchaser. The rule in New York is that the original owner may seek to reclaim stolen property until three years after he makes a demand for its return and the good faith purchaser refuses. This rule relieves the original owner of the burden to track down the whereabouts of his stolen property and sue for its recovery within a limited window of time, but strips the good faith purchaser of any protection for having purchased and held the property innocent of any knowledge that the property had been stolen. Hence, in contrast to Swiss law, New York law would have afforded Schoeps wide latitude to pursue his claims against MoMA.

When initiating its declaratory judgment action, MoMA had pinned its hopes for an early defeat of Schoeps' claims – thereby averting an expensive trial – on the expectation that the New York district court would declare Schoeps' claims to *Boy* barred by Switzerland's five-year statute of limitations for recovery of stolen property. But, at a series of hearings in early January, the judge presiding over the case, U.S. District Judge Jed Rakoff, denied MoMA a potentially swift victory, holding that New York law "governed the validity and legal effect of the sale of *Boy* to Paley in 1936."²

Egon Schiele Painting in New York Court

And yet, less than a year earlier, another New York federal court, also in the Southern District, ruled that the application of Swiss law was appropriate to a Jewish owner's 1956 sale of a Egon Schiele drawing known as *Seated Woman with Bent Left Leg* to an art dealer in Switzerland. The choice of Swiss law, ultimately, led to judgment for the current possessor of the drawing, philanthropist and art collector David Bakalar. Like MoMA, Bakalar had initiated the lawsuit against the claimants by seeking a declaratory judgment to establish his rightful ownership of the drawing. In their counterclaims, the claimants asserted ownership of

the drawing as the legal heirs of Fritz Grunbaum, the original Austrian owner who died in the Holocaust, by alleging that the Nazis had looted the painting from Grunbaum's wife when they arrested her, or, alternatively, that she had been driven by Nazi-persecution to transfer the drawing to her sister. Two decades later, in 1956, Grunbaum's sister-in-law, who had escaped the Austrian Anschluss, sold the drawing to an art dealer in Bern, Switzerland. As with Schoeps and MoMA's suit, the parties in *Bakalar v. Vavra* intensely disputed the law that governed the Swiss transaction because the Grunbaum heirs' claims to the drawing "hinged on the propriety of [the Swiss dealer's] initial acquisition of the drawing in Bern,"³ in other words, on the dealer's good faith. The choice of law was between Swiss and Austrian law (in Austria, a good faith purchaser of property cannot acquire title to stolen property), which, similar to the conflict between Swiss and New York law, would have dictated very different outcomes. The judge, relying on legal precedent from an earlier New York Southern District court decision, *Greek Orthodox Patriarchate of Jerusalem v. Christie's*, applied the general principle of choice-of-law, called the *lex loci delicti commissi* rule. Under this rule, a forum court, when faced with a conflict of laws, applies the law of the jurisdiction where the property is located at the time of its sale. For instance, in *Greek Orthodox Patriarchate of Jerusalem v. Christie's*, the court had to determine the appropriate law governing a French woman's receipt from her father of a tenth-century manuscript that had been stolen from a monastery of the Greek Orthodox Patriarchate of Jerusalem several decades earlier. Applying the *lex loci* rule, the court held that French law governed the transfer from father to daughter because France was the *situs* of the transfer.⁴

Swiss Law Held Not to Govern Claim

Contrary to MoMA's expectations, Judge Rakoff did not apply the "traditional" *lex loci* rule. Instead, he applied interest analysis, another choice-of-law principle and a modification of the *lex loci* rule. Under interest analysis, the law of the jurisdiction with materially greater interest in the outcome of the case is applied over the law of the jurisdiction in which the disputed transaction occurred. As Judge Rakoff points out: "In disputes over transfers of personal property, interest analysis will often lead to the conclusion that the law of the forum where the transfer took place applies, the same result that would have been reached under the traditional *lex loci delicti* rule. But such a result is not inevitable..."⁵ In other words, Judge Rakoff seems to advocate a choice-of-law process whereby the *lex loci* rule is applied only if there is no other jurisdiction with interests greater than the place where the transaction occurred. Applying interest analysis, Judge Rakoff concluded that New York had more at stake in the issue of *Boy's* ownership and applied New York law to Paley's 1936 purchase of *Boy* in Switzerland.

New York Courts and Choice of Law Rules

But was the application of interest analysis inevitable? After all, the judge chose not to rely on precedent set by art restitution cases decided in his own federal district that had applied the *lex loci* rule, e.g., *Bakalar v. Vavra* and *Greek Orthodox Patriarchate of Jerusalem v. Christie's*, and revealed his own sentiments on the potential significance of this case when he railed against the parties following their refusal to make the terms of the settlement public:

At the heart of this action are issues of considerable public import....The Court finds the confidentiality provision of the settlement agreement and the plaintiffs' objection to disclosure to be against the public interest and a troubling reversal of the parties' previously stated positions on this issue. From the outset, the parties on both sides portrayed this lawsuit as of considerable public interest because of the importance of establishing the truth concerning the sensitive issues involved. The Museum[...]ha[s] characterized the plaintiffs' [aka Schoeps] claims as entirely baseless and, essentially, extortionate. The plaintiffs, for their part, have claimed loudly throughout that they were vindicating a historical injustice....

Plaintiffs, however, for reasons wholly unexplained and seemingly no more compelling than concealing the amount of money going into their pockets, remain opposed [to disclosing the settlement]. ...[T]he fact that the plaintiffs, who repeatedly sought to clothe themselves as effectively representatives of victims of one of the most criminal political regimes in history, should believe that there is any public interest in maintaining the secrecy of their settlement baffles the mind and troubles the conscience.⁶

With respect the judge's choice-of-law determination, the choice of New York law was indeed correct because both the facts and public policy considerations command it. *Boy* was housed in a Swiss gallery for merely a year before being purchased by Paley, a resident of New York, and shipped to New York. Paley's check to Thannhauser was made out to a New York bank. In addition, none of *Boy's* owners, not even Thannhauser, was a Swiss resident or citizen at the time, nor is Schoeps, who resides in Germany. "And *Boy* has been in New York over 70 years and is now the property of a major New York cultural institution that is also a party to this action."⁷

In contrast, if we look at the facts of *Bakalar v. Vavra* and *Greek Orthodox Patriarchate of Jerusalem v. Christie's*, the result of applying either the *lex loci* rule or interest analysis would have been the same:

In *Bakalar v. Vavra*, where the choice was between Austrian law and Swiss law, there were no significant contacts to Austria concerning the 1956 sale of the Egon Schiele drawing in Switzerland. Neither party to the transaction resided in Austria at the time. Rather, Grunbaum's sister-in-law, who had been a resident of Belgium for close to twenty years, had been selling artwork to a Swiss gallery for the five years preceding her sale of the Egon Schiele drawing to that same gallery in Switzerland, where the drawing was published and exhibited before being sold to a New York gallery. Moreover, none of the parties to the lawsuit were Austrian residents or citizens. The two Grunbaum heirs are, respectively, a citizen of the Czech Republic and a New York resident, while Bakalar is a Massachusetts resident.

In *Greek Orthodox Patriarchate of Jerusalem v. Christie's*, the claimant had argued New York law governed instead of French law, but the case had no relationship to New York other than being where the suit was brought and where the medieval manuscript had been consigned for auction. On the other hand, the manuscript had been in France, in the possession of a French family, which was a defendant in the lawsuit, for close to 80 years.

Hence, if interest analysis had been applied to both these cases, instead of the *lex loci* rule, the analysis also would have lead to the application of Swiss (*Bakalar*) and French (*Greek Orthodox*) law.

There is no doubt that public policy considerations played a vital role in Judge Rakoff's choice to apply interest analysis since the application of the *lex loci* rule would have extinguished Schoeps' claims and thereby precluded an occasion to "vindicat[e] a historical injustice." More particularly, New York is unique with respect to its powerful protection of the rights of original owners of stolen artwork. As discussed earlier, New York has even established a rule whereby original owners can virtually never be barred from suing based on statute of limitations. In that seminal decision establishing New York's demand-and-refusal rule, the New York Court of Appeals declared:

[O]ur decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art...In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.⁸

At the time, the Governor of New York weighed in with his concern that New York would become "a haven for cultural property stolen abroad [if] objects [would] be immune from recovery under [] limited time periods..."⁹ which, not coincidentally, is precisely the effect of Switzerland's five-year statute of limitations on stolen property.

Due to the international character of Holocaust art restitution cases, questions of choice-of-law are, with some frequency, vigorously contested between the parties, since the application of one jurisdiction's law over another may very well bring about different, and even antithetical, outcomes. In no other jurisdiction have we seen more of these disputes than in New York, which "enjoys a worldwide reputation as a preeminent cultural center." As a result, New York courts are time and again confronted with the Solomonic task of balancing the interests of original Jewish owners with those of good faith purchasers and called upon to decide between the laws of two jurisdictions, which, as we have seen in the fight over Pablo Picasso's *Boy Leading a Horse*, means the vindication of one legitimate owner's interests at the expense of the other.

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NOTES

- ¹ *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673, 674 (S.D.N.Y. 2009).
- ² *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 463 (S.D.N.Y. 2009).
- ³ *Bakalar v. Vavra*, No. 05-Civ-3037, 2008 U.S. Dist. LEXIS 66689, at *17 (S.D.N.Y. 2008).
- ⁴ *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98-Civ-7664, 1999 U.S. Dist. LEXIS 13257, at *14 (S.D.N.Y. 1999).
- ⁵ *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d at 468.
- ⁶ *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d at 674-77.
- ⁷ *Schoeps*, 594 F. Supp. 2d at 468.
- ⁸ *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 320 (N.Y. 1991).
- ⁹ *Id.* at 319.

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