Editor’s Note

This is Volume 4, Issue No. 2 of Spencer’s Art Law Journal. This Fall issue contains three essays, which will become available by posting on Artnet starting November 2013.

This first essay (A Seller Should Have Reasonable Grounds for His Unqualified Authenticity Opinion….) discusses whether a seller’s opinion based on “mixed” (positive and negative) facts needs to be qualified as “probably”, and whether the negative facts must be disclosed.

The second essay (Consigning Art Under New York’s Amended Arts and Cultural Affairs Law…) examines the new law on art consignment for artists and their estates, and, as well, raises issues for owners and collectors consigning art for sale.

The third essay (Lien Searches May Not Always Tell You Much …) addresses the use of lien searches to discover claims against art and the inherent limitations of these searches.

Three times a year, issues of this Journal address legal issues of practical significance for institutions, collectors, scholars, dealers and the general art-minded public — RDS.

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A SELLER SHOULD HAVE REASONABLE GROUNDS FOR HIS UNQUALIFIED AUTHENTICITY OPINION. BUT HOW TO WEIGH NEGATIVE FACTS? AND MUST THESE NEGATIVE FACTS BE DISCLOSED IF THEY ARE UNKNOWN TO BUYER?

Ronald D. Spencer

This essay examines whether a seller has reasonable grounds for his authenticity opinion – given that relevant factual grounds do not always point in one direction and, indeed, some may be strongly negative. Of course, in arriving at his opinion, the seller must balance these positive and negative facts while lending more or less weight to each. But does an opinion based on such “mixed” facts need to be formally qualified as “probably” or “likely”. And, having reasonably arrived at an unqualified opinion, must the seller disclose the negative facts he considered (and, on balance, presumably found unconvincing). — RDS

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An English Court Decides That A Seller Had Reasonable Grounds For Its Authenticity Opinion

In 2005 an English Court of Appeal decided Taylor Lynne Thomson v. Christie’s, involving a 1994 London auction sale to Thomson, for almost £2 million, of a pair of Louis XV porphyry and gilt-bronze two handled vases. In 1998 some art dealers suggested to her that the vases might not be Louis XV, but high quality imitations (not forgeries) made in the mid-19th century worth no more than £25,000. Thomson brought an action against Christie’s on the ground that the vases were made in the 19th century, claiming that Christie’s owed her a duty of care which they had broken in not warning her of a risk that Christie’s judgment that the vases were made in the 18th century might be questionable or wrong. Thomson said that Christie’s should have qualified their sale catalogue for the vases to describe them as “probably Louis XV” or a similar qualification because, at the 1994 sale date, there were facts known to Christie’s which should have led Christie’s to be cautious about their dating of the vases. Thus, in addition to the existence of the 19th century imitations, (Thomson testified that she would not have bought the vases had Christie’s told her of the existence of the 19th imitations) there was an absence of any provenance prior to a 1921 purchase by the grandmother of the seller, Lord Cholmondeley. As well, Christie’s had relied for its opinion that the vases were made in the 18th century upon the exercise of their judgment, based on only a visual inspection, that is, without any physical analysis of the materials utilized in the vases.

The Court of Appeal noted:

. . . Christie’s do[es] accept that, if there is material doubt as to the description or dating of a work of art offered for sale at auction, good auctioneering practice requires the auctioneer to articulate the doubt in suitable terms, for example, “probably Louis XV”.2

. . . It is difficult to define the degree of certainty which an auctioneer should have before he ascribes a date without qualification, and it is probably unnecessary for me to try to do so. It may be whether, having reviewed all factors, he finds he has sufficient positive basis for the view he has formed combined with the absence of matters which raise real rather than fanciful doubt by pointing the other way.3
The trial judge had found “on the strong balance of probability” that the vases (sometimes referred to as the Houghton urns) were made in the 18th century, and the Court of Appeal upheld the trial judge’s decision.

The Court of Appeal seemed to accept Christie’s submissions that:

1. The existence of a 19th century revivalist fashion was a reason for caution, but not a reason for doubt.
2. It is obvious to any buyer, whether expert or not, that attributions as to date are matters of opinion and judgment.
3. Christie’s could only have a duty to disclose matters which Christie’s knew or should have known and which would have materially affected their confidence in their own opinion.

The Thomson trial court judge was quoted with approval in a subsequent case, Avrora Fine Arts v. Christie’s, which neatly summed up the Thomson core issue:

The representation is not simply that the urns were Louis XV because that is a matter of opinion. The representation is that was Christie’s opinion and that Christie’s had reasonable grounds for that opinion.

The Court of Appeal thus decided that Christie’s had reasonable grounds for its opinion that the vases were made in the 18th century (about 1765) and therefore Christie’s was correct to describe them in its sale catalogue without any qualification such as “probably 18th century”.

I cannot be certain that the Houghton urns were made around 1760 to 1765, but I think it likely. The evidence establishes the position somewhere between certainty and more likely than not. If a figure must be placed on it, I would put it in the region of 70%.

And further, said the Court of Appeal:

... Christie’s at the time of the sale ... were reasonably entitled to hold, the certain and definite opinion that the Houghton vases were 18th century and correctly described without qualification as “Louis XV”; that there were no real rather than fanciful doubts pointing the other way, and that Ms. Thomson’s eleven reasons did not raise any real doubts.

Degree Of Certainty Required For An Unqualified Authenticity Opinion

Thomson is one of the few court decisions to examine in depth the degree of certainty required of experts before they render an unqualified opinion on authenticity. Thomson expressed this in terms lack of “material doubt” concerning the description of a work of art, reviewing “all factors” and finding a “sufficient positive basis... combined with the absence of matters which raise real rather than fanciful doubt by pointing the other way.” Of course, this is rather a common sense and familiar way of arriving at opinions on most issues. And, in Thomson, a 70% to 80% likelihood allowed Christie’s to avoid the qualifier, “probably”. But, of course, a 20% to 30% chance of being wrong is a significant risk for a buyer, and, in effect, allows for the existence of a fair number and weight of factors which would not support or, indeed, be contrary to, a positive expert opinion.

These kinds of odds of being wrong (say, one chance in four or five) bring to mind the New York case, Dawson v. Malina, in which a federal district court in New York considered the standard to be applied in determining whether a seller’s warranty of Chinese ceramics as being from a certain historical period had been breached by the seller. The buyer plaintiff argued for a standard that would require the seller to establish by a preponderance of the evidence (the usual evidentiary rule in civil matters) the art was unqualifiedly of the period to which they were attributed by the seller. The seller argued for a standard that would require the buyer to conclusively establish, by a preponderance of the evidence, the art was not of the period. The Dawson court thought it would be “unjust for the Court to adopt the strict standard proposed by the buyer. Instead, the court adopted a “middle ground”, to wit,

Whether plaintiff Dawson has established by a fair preponderance of the evidence that the representations made by [seller] Malina were without a reasonable basis in fact at the time the representations were made.
This **Dawson** formulation of the standard required to prove a breach of warranty of authenticity is similar to the **Thomson** analysis because both formulations allow for an *unqualified* opinion about, or representation of, authenticity even though all of the factual elements upon which the opinion is based do not necessarily support the expert’s opinion/representation, and, indeed, some might be contrary to the opinion.

**Duty To Disclose Doubts Or Negative Information**

An additional, and quite interesting, aspect of **Thomson** is Christie’s duty to disclose facts which it knew or should have known and which would have materially affected Christie’s confidence in their own opinion. Thomson’s main argument advanced at trial was that the vases were 19th century, although “it shaded off on occasions towards a case that there were material doubts whether the vases were truly 18th century” so that even if Thomson could not establish that the vases were made in the 19th century, there were numerous features about the vases which raised doubts about their true origin, history and age, such that Christie’s had a *duty to disclose these doubts*. In effect, even though Christie’s was not obliged to qualify its sales catalogue description by the use of the word, “probably”, Christie’s nevertheless had a legal duty to disclose facts that did not support its opinion or raised doubts about the grounds for its opinion.

These doubts, as noted above, were chiefly the following three:

1. There existed no provenance prior to the 1921 purchase in France by the grandmother of Christie’s auction seller, Lord Cholmondeley,
2. Christie’s was relying very largely upon the exercise of its judgment following (only a) visual inspection, and
3. The existence of 19th century imitations.

With respect to provenance, the Court of Appeal noted that the Getty Museum had a similar pair of urns with little or no provenance information, but a Getty Curator of Decorative Arts with an excellent reputation had described the Getty urns as circa 1765-1770. The Court of Appeal stated:

> Absence of provenance before 1921 was a reason for caution. It was surprising that there was no secure earlier record of any of the 6 [similar] vases in either the 18th or 19th century, if they were indeed 18th century. But there was evidence of securely dated 18th century pieces which had no real provenance – it applied to 117 of the 214 French decorative objects in the Getty Summary Catalogue of 1993.9

With respect the “doubt” arising about the visual inspection by Christie’s, that is, without any material analysis such as metallurgical evidence of the bronze lion-head mounts and their gilding, or the porphyry stone, the Court stated that Christie’s reliance upon visual inspection “was well understood and there was “no evidence or probability that Ms. Thomson was so naïve that she needed to have this commonplace point made to her.”10 And, finally, the Court states:

> The [trial] judge’s findings as to the date when the vases were made took account of extensive metallurgical and other scientific evidence put together for the purpose of these proceedings. Ms. Thomson does not suggest that Christie’s should have acquired information of this kind before the auction. It is not relevant to any question whether Christie’s were in breach of duty.11

With respect to the existence of 19th century copies or imitations as a result of a 19th century reviverist fashion, the Court agreed with Christie’s that:

> the possible existence of 19th century imitations was a reason for care, but did not in the case of the Houghton vases raise a real, rather than fanciful doubt. Christie’s was not obliged to express fanciful doubts to Ms. Thomson.12

The **Thomson** Court standard for (negative) factual information that the seller had a duty to disclose was that “real”, as opposed to “fanciful” doubts had to be disclosed. Fanciful doubts suggested only a need for “caution”
on Christie’s part in describing the urns, but did not require Christie’s to disclose such fanciful doubts. The above-noted three items of (negative) factual information (imitations, visual inspection and provenance) contributing to “doubt” are information which reasonable due diligence by the buyer could or should have discovered and therefore, did not have to be disclosed by Christie’s.

Thus, Thomson stands for the somewhat surprising proposition that, even if a seller’s authenticity representation is properly made, any material negative information known to seller, which buyer’s due diligence could not reasonably have discovered, must be disclosed as well.

Can The Seller Remain Silent? That Is, Must All Relevant Negative Facts Be Disclosed?

Many court decisions and tort treatises state that there is “no affirmative duty of disclosure between parties dealing at arm’s length.” Silence, as such, i.e., mere nondisclosure, does not constitute a breach of duty. The harshness of this rule has been mitigated by limitations and exceptions that have gone a long way toward swallowing up the rule – but not yet all the way. One important exception (the so-called “special facts” doctrine) to this rule is where the seller has superior information, not reasonably available to the buyer.

It may be helpful in this regard not to generalize about the vendor-purchaser relation. There would seem to be a distinction between the relationship, on the one hand, of two experienced business men, consummating a sale and purchase and the relationship, on the other, of salesman and customer in a large retail store. To the former, the description “arm’s length” seems to be appropriate, and there is little ground for reliance, except to the extent of warranties and of unequivocal representations of fact. But in the latter, it may be doubted whether it is ever possible for the parties to achieve equality of knowledge. And while the customer may be held to act at his peril in relying on statements which he should recognize to be customary “sales talk,” it can be argued that he relies, and justifiably so, on the sales person not to remain silent as to material facts of which he knows the purchaser is ignorant.

An important point is the degree of “difficulty”, shading sometimes toward impossibility, of the buyer’s discovering the negative information for himself. That is to say, should the duty of discovery be placed on the buyer who could presumably learn of the defect or negative information if he were more diligent or commissioned a thorough expert investigation. An art dealer (an “art merchant” in Uniform Commercial Code terms) selling to a non-dealer collector will usually, but not always, have more general art-related knowledge than the collector and almost always more knowledge about the specific piece being sold. On the other hand, collectors contemplating the purchase of high end art often retain expert art advisors to assist in purchasing from the art merchant in an effort to narrow this dealer-collector knowledge gap.

Another important point concerning the rule of non-liability for “mere nondisclosure” is the nature and importance of the undisclosed negative information.

The second Restatement of Torts has tried to formulate a rule embodying this trend [mandating more disclosure] by requiring one party to a business transaction to disclose to the other, before the transaction is consummated, “facts basic to the transaction” if the former knows that the other is about to act under a mistake as to such facts “and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.” Facts “basic to the transaction” are those that go to its essence (for example, the character of the thing sold), and the concept is narrower than materiality, which covers also facts that are important only as “inducements to enter into” the transaction.

In the context of the sale of a painting or sculpture, one might well doubt, for example, that seller’s failure to disclose a lack of a listing in a catalogue raisonné or a lack of a complete and accurate provenance of the piece would qualify as “basic to the transaction”, as opposed to being material facts, important only as “inducements to enter into” the transaction.
A Dealer Meeting His Contractual Warranty Standard – Having A Reasonable Basis In Fact – Should Not Have A Duty To Meet A Higher Tort Standard – Disclosing All Material Negative Facts

The Dawson decision described above establishes the standard an art buyer must meet in order to rescind his purchase based on the claimed breach of the dealer warranty of authenticity – that is, at the time of sale, the dealer did not have a reasonable basis in fact, for the dealer’s representation. By way of example, a “reasonable basis in fact” might consist of ten factual elements, eight of which support authenticity more or less strongly, while two factual elements are negative. Dawson suggests that, so long as seller has been reasonable in taking into account the nature and weight of the two negative elements, the seller has not breached his representation of authenticity.

By contrast with this contractual obligation under a warranty, if the dealer also has a tort law duty to disclose the two negative elements and does not do so, the dealer’s mere non-disclosure or silence would be a tort, and entitle the buyer to rescission or damages for misrepresentation. But to hold the dealer liable in tort would undermine the Dawson contractual warranty standard the dealer was able to meet. In short, requiring disclosure of negative material facts which are not “basic to the transaction” would allow rescission of the sale where the dealer had met his burden under his contractual warranty. This does not appear to be a sensible result.

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NOTES

1 2005 EWCA Civ. 555; Case no. A2/2004/146 & 1470.
2 Court of Appeal, para. 73.
3 Court of Appeal, para. 74.
4 2012 WL 2923015 at page 22.
5 Court of Appeal, para. 71, quoting the trial judge approvingly.
6 Para. 78 Court of Appeal.
8 Para. 93 Court of Appeal.
9 Court of Appeal, para. 46.
10 Court of Appeal, para. 16.
11 Court of Appeal, para. 8.
12 Court of Appeal, para. 85.
14 Harper, James & Gray, page 556.
15 Under the “special facts” doctrine, a duty to disclose arises ‘where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair’. Beneficial Commercial Corp. v. Glick Datsun, 601 F. Supp. 773
(S.D.N.Y. 1985); But see Chiarella v. U.S., 445 U.S. 222, 248 (1980) (stating “This Court has never so held.”). It is curious that, while some courts have applied the special facts doctrine to impose a duty of disclosure on the seller, no corresponding duty is usually placed on the buyer where the buyer has knowledge of facts, not reasonably discoverable by the seller, which render the property much more valuable than the price being asked.

16 Goldfarb, Fraud and Nondisclosure in the Vendor-Purchaser Relation, 8 W. Res. L. Rev. 5, 43-44 (1956).

17 Goldfarb, page 19.

18 Restatement (Second) of Torts §551, Comment j (1977). The Reporter stated that the advisers were unanimous in wishing to limit [§551(2)(e)] to (facts ‘basic to the transaction’) and concluded, [t]he law may be moving in the direction of requiring disclosure of (‘material’ facts) but it is not yet sufficiently clear to justify more than ‘basic.’ Restatement (Second) of Torts §551, at 166-167 (Tent. Draft No. 10, 1964).

CONSIGNING ART UNDER NEW YORK’S AMENDED ARTS AND CULTURAL AFFAIRS LAW: LESSONS FOR ARTISTS, THEIR ESTATES, AND COLLECTORS

Judith Wallace

The New York law governing relations between artists and their art galleries has recently been amended to give more protection to artists and their estates. This should give collectors and other owners some ideas when they consign their artwork to their dealers. — RDS

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For more than 45 years, Article 12 of the New York Arts and Cultural Affairs Law (NYACAL) has – at least on paper – protected artists (and their estates and heirs) in their dealings with art merchants (dealers). Under the New York statute, art merchants have trust responsibilities and a host of specific obligations when they take art on consignment from an artist. The law was further strengthened last year in response to the spectacular collapse of the Salander O’Reilly Gallery. But these provisions are of little practical assistance if artists do not know enough to insist on their rights, and if dealers are not aware that there are legal obligations that are not subject to negotiation. Time and time again this statute comes as a surprise to both the artist and the dealer long after their relationship begins. They tend to learn of it when a dispute arises, after the parties have already exhausted efforts to resolve their differences and one finally contacts an attorney who happens to be familiar with the law.

This lack of awareness of the trust provisions of the Arts and Cultural Affairs Law is particularly unfortunate because the New York Arts and Cultural Affairs Law does much more than prohibit blatant misappropriation art or sales proceeds from artists from the small minority of art merchants who are dishonest. Article 12 provides generally applicable requirements that govern the ordinary course of business between artists and dealers, which cannot be overridden, even by a written agreement. The result is that the terms of a consignment may be different than both parties believe them to be.

The New York Legislature Recognizes the Need to Protect Artists

Since 1966, New York, has required art merchants to treat artists as fiduciaries. The New York legislature explained this was intended to recognize that the arts are a vital and significant state resource, and “to give a long overdue measure of protection to the artist in his relationships with the dealer who sells his work” and safeguard against misappropriation of art and sale proceeds. (There are other provisions of the law that protect art purchasers, as well.)

Key Terms that Distinguish Artists from Other Consignors

The most important feature of Article 12 the NYACAL is that it creates a trust (that is, fiduciary) relationship between artists and art merchants. This gives rise to a heightened duty of loyalty and care by the art merchant to the artist--it is not an arms-length business relationship.

The law sets basic contract terms that govern the relationship, even if the parties never enter into any oral or written agreement. Art delivered by an artist to an art merchant for exhibit or sale is deemed to be on consignment. The gallery is deemed to be the artist’s agent. Both the art and any proceeds from its sale are trust
funds for the benefit of the artists. The legislative history stated that the proceeds should be segregated in a trust account and the artist is entitled to payment of her portion of the sale price on demand.

Artists are also entitled to an accounting of sales of their art, including backing documentation, the actual sale price, and the name and address of the purchaser.1 In contrast, an art merchant selling work for non-artist consignors might expect to be able to keep his or her client names and prices confidential as the gallery’s stock in trade, but artists can insist on complete transparency, due to the fiduciary relationship. Demanding and obtaining regular accountings can also keep galleries from falling behind on paying the artist. Unfortunately, in one recent dispute the gallery would not open its books to its artist without a lawsuit, and did not compile its unorganized records into a report until a court order required it to do so. This delay can be costly to the artist.

This statute trumps any other applicable law or agreement to the contrary between the parties.2 In fact, contract terms that are at odds with the law are void and are not enforceable.3 The only portion of the law that the parties may waive (by a written and signed contract) is the requirement for the art merchant to treat sale proceeds as trust property.4 Yet even this waiver cannot be used for artwork that the gallery purchases for its own account, and the artist will always be given preference over other of the dealer’s creditors.

**Criminal Penalties and Attorneys’ Fees**

The 2012 amendments to Section 12.01 of the NYACAL strengthen these protections, and creates *criminal penalties* for art merchants failing to meet these requirements.

Perhaps of greatest lasting importance is that it allows artists and estates to recover *attorneys’ fees* in a lawsuit to enforce the law’s requirements, and extends the statute’s obligation to artists’ estates. Some of these additional terms would have been fair to conclude from generally applicable fiduciary principles and from the 1966 legislative history, but the 2012 revisions remove all doubt.

The newly added right for artists to recover attorneys’ fees, in addition to amounts owed, may also help to promote awareness and enforcement of the NYACAL. When parties bear their own attorneys’ fees (the norm), they tend not to hire attorneys to recover smaller amounts. The result is that there is are surprisingly few judicial decisions enforcing the NYACAL’s terms and promoting awareness of its requirements for those earn a modest living from their art and who need the law’s protections the most.

The revised law more explicitly requires art merchants to deposit the proceeds of sales on behalf of an artist directly into an artists’ trust account, and incorporate the requirements that apply to other fiduciaries in the New York Estate Powers and Trust Law. A gallery may not accept payment and deposit the proceeds in its own general account (possibly making the proceeds available to the dealer’s creditors) and then forward the artist’s share. Even if the gallery deposits a check in its general account and immediately turns over an artist’s portion, it would technically be in violation of the law.5

For dealers, it is important to be aware of the expanded requirements of the law. Even dealers who treat funds responsibly may commit technical violations of the law. Prosecutors will (and do) certainly exercise discretion in asserting criminal violations. In one recent case, prosecutors were reluctant to step in and viewed an artist’s claim as essentially a private contract dispute, since the public was not being defrauded, even though that particular gallery had a history of nonpayment to artists that was documented in judicial decisions. A greater risk to dealers is be the exposure to attorneys’ fees for violations, which can have outsized significance if there is a contract dispute.

**Cautionary Tales**

These provisions of the Arts and Cultural Affairs Law apply only to artists and their estates when they consign the artist’s own work, to art merchants, under New York law.6 Therefore, the dealer cannot claim to own the art based on his investments in gallery shows, promotion of the artist, or even loans of money to the artist. However, the law does not protect an artist who may have come to expect these terms based on the NYACAL, and then
consigns works by other artists that the artist happens to own. Artists dealing with Salander O’Reilly found this out the hard way.

The NYACAL does not specify how frequently an art merchant must provide an accounting or pay artists’ proceeds. To monitor and ensure that the merchant is in compliance, the artist should (preferably by contract) require that payments for the sale of art be made promptly (ideally within days), and that regular accountings are required and provided. Without an accounting (at least once a year), we have seen that an artist might not find out a work has been sold until the artist hears of the sale by word of mouth. In one recent dispute, the artist did not begin to learn the scope of the problem until buyers contacted her when – in addition to not paying the artist – the gallery began failing to even deliver the purchased art to the buyers. Unfortunately, the dearth of case law means that judges sometimes do not feel comfortable bringing down the hammer on stonewalling galleries early in a lawsuit. Artists should also be sure to specify by contract that the accounting must tell the artist if some of the art has been reconsigned by the dealer to another dealer.

The statutory provision for attorneys’ fees in an action by an artist to enforce rights under the NYACAL also has practical limits. A judgment for attorneys’ fees is a hollow victory if the gallery has raided the artists’ proceeds and has no resources to pay a judgment. The NYACAL is no substitute for due diligence in selecting a gallery that is trustworthy and transparent. An artist is unlikely to learn that funds have not been kept in segregated accounts until they are dissipated, and a claim for attorneys’ fees is little help if the art merchant has dissipated the artist’s proceeds and has no other assets. Insurance covers only physical loss, not financial loss due to an art merchant’s bankruptcy.

Because the NYACAL is a New York state law, artists need to be sure that New York law governs the relationship. This might seem obvious when the gallery has a physical location in New York and the artist is a resident of New York. Even so, it is best to state that both New York and the NYACAL apply.

Lessons and Options for Collectors

How can collectors obtain some of these protections? Art transactions are notable for their relative informality, compared to other transactions for the sale of assets comparable value. It is not unheard of for a transaction for millions of dollars in art to change hands with only by a simple invoice, and for works to be consigned without a contract or the degree of due diligence common in corporate transactions. Fewer dealers than one would think will provide a simple and clear written agreement. In other cases the owner will hand over the artwork and discuss a target price.

Fortunately, collectors who consign works for sale can learn from the statutory protections for artists and employ similar contract terms to ensure the security of art. The Salander bankruptcy serves as a reminder that a contractual right to make a Uniform Commercial Code (UCC) filing is needed, so that the owner can put potential creditors of the dealer on notice that the dealer does not own the consignor’s art. Failing to do so can risk having consigned art treated as an asset of the merchant in bankruptcy to be allocated among competing creditors.

Collectors can limit the art dealer’s ability to hand over artwork to other galleries or send works out on approval to potential buyers, require the dealer to inform the owner when it does so, and make the gallery responsible for full payment if the buyer does not pay. A few years ago, an owner was forced to track down an artwork and found it had been handed over to someone located in Lichtenstein, a country that is unfriendly if not hostile to the U.S. legal process, and was only able to recover his art because the possessor had a related U.S. business that was motivated to comply with American law. In another recent case, the collector was exceedingly lucky and the European gallery the work was consigned to acted responsibly (in fact, more responsibly than the U.S. dealer) and returned the work to the collector without incident.

Collectors should also be aware that artists have preference (by virtue of the NYACAL) over other creditors. Therefore, if a gallery has commingled funds and falls behind, collectors will be in line behind the artists – and possibly other creditors who have a higher priority. To minimize this problem, collectors can require prompt handover of sale proceeds and can also require (at least annual) accountings when they are turning over art to a dealer.
If a collector would like transparency, he will need to negotiate that with the dealer. A dealer may justifiably guard this information, especially if he or she feels at risk of being circumvented on future deals between the collector and the buyer. Others will have a more relaxed attitude, especially in the context of a longstanding client relationship with a collector.

Finally, there is no substitute for clarification of the specific terms in advance to ensure that the two parties have the same understanding of the relationship. In order to have any measure of protection, collectors will need to overcome any sense that there is something insulting or unsophisticated about insisting on the protections of a simple written agreement when turning over valuable artwork for sale.

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NOTES


2 NYACAL § 12.01 (emphasis supplied).


4 See NYACAL § 12.01(1)(a)(v) (except for the first $2,500 per year).

5 EPTL 11-1.6

6 Other provisions of the Arts and Cultural Affairs Law are applicable to non-merchants for the terms of warranties for their purchases from art merchants.
LIEN SEARCHES MAY NOT ALWAYS TELL YOU MUCH — BUT DO THEM ANYWAY

Aaron R. Cahn

This essay addresses the procedure of lien searches, which buyers doing their due diligence need to utilize in order to fairly assure themselves that they obtain title, free of liens. We will see that there are inherent limits to the protection lien searches afford. — RDS

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When an owner sells a work of art, the buyer will necessarily have concerns that go beyond such standard items as price, authenticity, or similar terms of the sale. A buyer must also be concerned whether or not a sale will convey clear title to the work.

The first task should be to document, insofar as is possible, that the seller is in fact the owner of the work or at least has the legal right to sell or consign it. But confirming the bona fides of the seller is only the first step; the buyer also needs to be on the lookout for any liens that may exist on the work that would not be extinguished by a sale to him as a good-faith buyer for value. For example, when a work is sold by a dealer, a sale to a good-faith buyer for value will be free and clear of any liens that the dealer has granted that would otherwise cloud title to the work, but any liens created by a prior owner existing on the work at the time it was consigned or sold to the dealer would not be extinguished in the course of a sale through the dealer (and if a work is not purchased through a dealer, the sale would not be free and clear of liens granted by the seller). Thus, if the parties do not take pains to ensure that there are no liens on the work or that any liens that do exist are paid off with the proceeds of sale, a buyer could run the risk of suddenly being faced with a demand by a lienholder to either pay off the lien (despite having previously paid fair value to the seller) or deliver the work to the lienholder.

The question then becomes: how to determine whether liens exist on the work?

Step One is to ask the seller. But if you ask and then decide that you are not satisfied with the answer, you may want to search further. The best, but by no means foolproof, way to do that is to conduct a Uniform Commercial Code lien search. Here are some basics.

Where do you search? Every state maintains a database of filings made pursuant to the Uniform Commercial Code (adopted in all 50 states); these filings are required to “perfect” a lien; that is, extend the effectiveness of the lien to parties other than those whose contract created the lien. In order to be effective against third parties, the filings must be made in the state where the person granting the lien is “located”. An individual is deemed to be located in the state of the individual’s primary residence (although if the individual has more than one residence and the determination becomes a complicated factual inquiry, prudence would dictate searching the most likely candidates). For a corporation and other “registered organizations,” such as an LLC, the search should be performed in the state where the company was organized. The search is quick (it can be done electronically) and relatively inexpensive. Most state’s databases allow a search to reference either the name of the lien grantor or the holder of the lien.

Whom do you search? The current owner should always be searched. If the work has been owned by the seller less than five years (the duration of a Commercial Code lien) prior owners should be searched as well.
What do you search for? A financing statement (form UCC-1) filed against the party to be searched, which lists as collateral either specific works of art, categories which include the word “art” or any synonyms, or generic categories such as “all assets.”

However, there are many reasons why a lien search may fail to disclose the existence of a lien. Examples:

- The true owner of the work may not be made known to the buyer, either due to fraud or simple negligence, or the work may have been subject to a lien placed on it by a previous owner and the existence of the lien may not have been made known to the current owner.
- The lien may be a “secret lien;” for example, the work may be the subject of a pledged gift to a museum, which wouldn’t be reflected by any sort of public filing.
- The seller may be located outside the United States; if the country where the seller is located has a publicly-available lien registration scheme similar to that of the Commercial Code, then the records of that country should be searched; if it does not have such a scheme, to be effective in the US, the lien should be filed (and thus searched) in the District of Columbia (a sound tactic is to always search the District of Columbia when the seller is international; many lienholders will choose to file there out of either caution or confusion).
- The buyer may not get accurate information as to the seller’s location, so he may not search the jurisdiction where a properly-filed lien may be found.
- Filed financing statements are not required to (and so might not) describe the particular piece at issue, so it may be difficult to determine whether the work is subject to a lien on property described only as “art”. At the very least, further inquiry may be needed in such a circumstance.

Some of the examples given above may be unlikely, but the lesson to be drawn is that the lien search process is necessarily imperfect, subject to human error, incomplete information or misinformation. Ultimately, how much time, effort and money to expend on such an inquiry will necessarily be a function of the buyer’s business judgment. However, unless the buyer is completely confident in the information that accompanies the consignment or sale of the work (and perhaps even then), at least some level of inquiry should be undertaken.

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