Spencer's Art Law Journal

Edited by Ronald D. Spencer

Editor's Note

This is Volume 5, Issue No. 3 of *Spencer's Art Law Journal*. This Spring/Summer issue contains three essays, which will become available on Artnet, August 2015.

The first essay: *(Authenticating Caravaggio (Or Not))* discusses the process by which old master paintings are authenticated in the context of a claim that an autograph Caravaggio replica had been overlooked by a major auction house.

The second essay: (*Safety in Numbers ….)* examines dealer exposure and buyer legal protections for works of art in multiples.

The third essay: *(Valuing Fractional Interests ….)* A recent court decision valuing fractional interests in art may help keep your collection in the family.

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

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AUTHENTICATING CARAVAGGIO (OR NOT)

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Ronald D. Spencer

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This essay addresses the process by which experts determine an old master painting to be an autograph work or a copy by another hand. Odd to say, this process is described here, not by an art historian, but by an English judge who felt herself called to combine legal analysis with her impressive level of art history understanding. Her opinion is a model for judicial writing about art. — RDS

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In 2015 a High Court Justice in London wrote a fifty page decision, brilliantly and densely reasoned, articulating the process by which connoisseurs arrive at an opinion about the authenticity of a work of art. In coming to her decision Justice Rose was obliged, in effect, to become the deciding expert, utilizing expert testimony from connoisseurs provided at trial, but finally, having to articulate her informed visual perception (not a usual exercise for a judge). The result is an all too rare in-depth view of authentication process – a process which often leaves many art owners confused and unhappy.

Art historian, Bendor Grosvenor, writing in *The Art Newspaper* describing this important court decision, asked, "How much does it cost to prove that a painting is not by Caravaggio? Answer: £6m (at least)" – the legal fees for Sotheby's and the owner of the putative Caravaggio – perhaps the "most expensive Old Master trial ever . . ." [1]

Authenticating a work of art is often difficult, and more difficult when the art is four or five hundred years old, and at least one tool for the expert, to wit, provenance, is often limited or non-existent. And, science (materials analysis) does not get us very far since many of the problems for old masters come right out of the artist's studio (think Rembrandt). Thus, for old masters at least, the expert is left to rely almost entirely on expert opinion concerning the quality of the art, that is to say, is the quality of the art being examined of the quality expected of a painting by the artist – in this case, Caravaggio.

And then, when the experts have come to their conclusion, and that conclusion is challenged in court, (as opposed to the marketplace or in critical writing), a judge must decide that the experts were right or wrong. As in all civil trials (as opposed to criminal trials, requiring proof beyond reasonable doubt) the standard of proof to be met is "more likely than not" or, with the same meaning, "balance of the probabilities" – a fairly low bar. In the English court decision described below concerning the auction gallery, Sotheby's, and a painting said by a leading Caravaggio expert to be created by Caravaggio, Justice Rose had to decide whether, on the balance of the probabilities, Sotheby's was negligent in refusing to catalog and sell the painting as an autograph work by Caravaggio.

Most English and American judges are reluctant to decide questions of art authenticity, in large part, because it is an unfamiliar area for judges and, in no small part, because scholarly practice, and certainly the art market, apply standards closer to beyond-a-reasonable-doubt. (No one would pay full price for art that was more-likely-than-not or, on-the-balance-of-probabilities, created by Picasso).

But the question presented to Justice Rose was whether Sotheby's had been negligent in its decision that the art was a later copy of Caravaggio's art by another hand, and therefore, had breached its consignment contract with the claimant, its consignor. Since deciding negligence is a usual task for judges, Justice Rose, in effect, found herself making an authenticity decision usually made by art historians, other experts, the art market, or all three. Her decision, while relying on expert testimony is not simply an automatic weighing of the experts' opinions,

rather she actually looked carefully at the Painting, guided by experts, used her visual ability, and drew conclusions supported by her own reasoning and what she saw. The result is a brilliant description of the authentication process while cutting through the competing claims of technical analysis.[2] And of course, there was no real provenance at all to be considered, whether for or against the painting.

The High Court Decision

Since 1987, the Kimbell Art Museum in Fort Worth, Texas has owned a painting called *The Cardsharps* by Caravaggio, depicting three men around a table, playing cards. In 2006, Sotheby's sold at London public auction another painting (the "Painting") of the same scene for £42,000 to a lifelong Caravaggio scholar of great renown, Sir Denis Mahon. The next year, Sir Denis announced, after extensive investigations, cleaning and restoration that the Painting was an "autograph replica" (that is to say, intended, and painted *by Caravaggio himself*, to be virtually identical to his earlier, or first, original version) of the Kimbell *Cardsharps*. (Such replicas, or copies, made by painters of their own works were not uncommon, but the majority of scholars do not believe that Caravaggio painted replicas of his works.) Then, the auction seller sued Sotheby's for negligence and breach of contract, alleging that Sotheby's failed adequately research the Painting and so failed to realize that the Painting might be by Caravaggio and so could have been sold for many millions.

Justice Rose began her analysis with a review of the history of the *Cardsharps*, and its many period copies by other hands:

> There is no doubt, . . . that the instant popularity of the composition of the *Cardsharps* led to the making of high quality copies by other hands shortly after Caravaggio completed the work and over the centuries thereafter. There are several dozen copies known to exist. Sotheby's annexed to its Defence a print out from Artnet which records paintings sold at auction worldwide. About 30 versions of this composition other than the Painting are listed as having been offered for auction between 1988 and 2012, over half of them by either Christie's or Sotheby's. They appear of varying quality and sold for a wide range of prices. Indeed during the first week of the trial of this action, two copies of *The Cardsharps* were sold at auction in London, one at Bonhams for £1,250 and one sold at Christie's as 'After' Caravaggio' for £10,000 (over an estimate of £2,000 - £3,000).[3]

Based on its own expert pre-auction assessment, Sotheby's attributed the work to a "follower" of Caravaggio, painted "after" the Kimball original. As described by Justice Rose:

> Sotheby's prepared a catalogue entry for the auction. The catalogue defines the term 'follower' as meaning a work by a painter working in the artist's style, contemporary or nearly contemporary, but not necessarily his pupil. The catalogue included a double page spread for the Painting with a colour illustration on one side and a description of the Painting on the other. The catalogue described the Painting as FOLLOWER OF MICHAELANGELO MERISI DA CARAVAGGIO THE CARDSHARPS. The entry says that it is a 17th century copy after the Kimbell original and again describes the card game being played. It contains an addition note about the provenance of the Painting:
>
> 'Surgeon Captain W.G. Thwaytes was a very keen and important collector of compositions by Caravaggio, and indeed sold Caravaggio's original of *The Musicians* to the Metropolitan Museum of Art, New York.
>
> Provenance
>
> Surgeon Captain W.G. Thwaytes, . . . and thence by descent.'[4]

In describing the Painting as by a "FOLLOWER", Sotheby's intended to convey its opinion that the Painting was a work by a painter working in Caravaggio's style painted within about 50 years of the Kimbell, *Cardsharps*. So as to contextualize Sotheby's opinion, Justice Rose described Sotheby's auction sale catalogue texts which indicate Sotheby's varying degrees of certainty of artist attribution, as follows:

> For every auction sale a catalogue is produced describing each painting to be sold. Every entry indicates the certainty with which Sotheby's is prepared to attribute it to a particular artist. The catalogue entry may describe a painting in the following ways:
>
> i) Simply putting the name of the artist, for example 'Giovanni Bellini' means that in Sotheby's opinion, the work is by Bellini.
>
> ii) *Attributed* to Giovanni Bellini means that in Sotheby's opinion this is probably a work by Bellini but there is less certainty expressed as to authorship than in the preceding category.
>
> iii) *Studio of* Giovanni Bellini means that in their opinion this is work by an unknown hand in the studio of Bellini and it may or may not have been executed under his direction.
>
> iv) *Circle of* Giovanni Bellini means that in their opinion it is a work by an as yet unidentified but distinct hand, closely associated with Bellini but not necessarily his pupil.
>
> v) *Style/Follower of* Giovanni Bellini means that in their opinion, this is a work by a painter working in Bellini's style, contemporary or nearly contemporary, but not necessarily his pupil. 'Contemporary or nearly contemporary' means that it was painted within about 50 years of Bellini's work.
>
> vi) *Manner of* Giovanni Bellini means that in their opinion, this is a work in the style of Bellini and of a later date.
>
> vii) *After* Giovanni Bellini means that in their opinion, this is a copy of a known work of Bellini. [5]

Key Issue for Determination of Authenticity of Old Master Paintings is Quality. And Determination of Quality is Made by Application of Connoisseurship

Justice Rose recognized that connoisseurship determined the issue of quality and set about describing this process, while quoting (below) Sotheby's Alexander Bell:

> Sotheby's accept that the specialists who examined the Painting . . . assessed the Painting by applying their connoisseurs' eye to a consideration of its quality. A number of the witnesses tried to describe what is meant by the connoisseurs' eye. Mr. Bell said:
>
> > "Our main consideration in assessing a painting is quality. In the case of a painting suggested to be a copy of a work by a known artist, we will consider whether the painting being viewed is of the quality expected of a painting by that artist. The ability to determine quality is gained by experience in the profession, from looking at all sorts of pictures from the low quality end of the spectrum right up to works by the greatest artists. From that, one develops an 'eye" for quality. It is not something that I can reduce to words easily and, if I were to do so, it would be misleading as it would then appear to be a mechanical exercise of looking at various aspects of a painting, which is definitely not the case. On the contrary, it is necessary to take into account all aspects of a painting together to determine whether overall it is painted with the skill, finesse and energy that might be expected of the particular artist under consideration. In the case of an artist like Caravaggio, this will involve consideration of, for instance, the anatomy of the figures and whether this is convincingly rendered or looks awkward in any way, how the figures relate to each other spatially and how convincing the artist's use of light and shade is in creating a powerful image."[6]

Justice Rose continued her analysis of the connoisseur's determination of the quality of the Painting by addressing the Claimant's contention that *quality* is a *subjective standard* by which to judge authenticity:

> . . . [Mr. Bell of Sotheby's] recognized that [although] Caravaggio's technical ability might be variable, this did not detract from the impact of Caravaggio's early work. Various accepted works by Caravaggio were then put to Mr. Bell as illustrating infelicities, in particular the lack of accurate perspective in some instances. One was the comb on the table in the Detroit *Magdalene* which I consider later. Another was the shoulder of the Borghese *Ailing Bacchus*. Mr. Bell did not accept that there was anything wrong with this shoulder but rather thought that it was beautifully modeled giving a sense of its volume and form. Both Mr. Bell and Professor [Richard] Spear accepted that assessment of quality is subjective and that scholars of Caravaggio differed in their views of the quality of some works. But they did not accept that this devalued the usefulness of quality as a means of assessing the Caravaggio potential of a work. Mr. Bell's evidence, with which I agree, is that any technical shortcomings in Caravaggio's work in no way diminish the overwhelming impression that one is looking at a masterpiece of composition and craftsmanship when one looks at Caravaggio's paintings of this period. A good example is one that was put to Mr. Bell, namely the fact that the hands of the figure with outstretched arms on the right side of the *Supper At Emmaus* in the National Gallery are out of perspective and that the foreshortening is not correctly done. Mr. Bell's response was that that did not affect the visual impact of the painting which he described as 'absolutely stunning' and 'extraordinary'. He said that a passage in a painting, such as a hand, can be very convincing and powerful even if it is not anatomically correct or in perfect perspective. The same point was made by Professor Spear when he was asked about the variable quality of Caravaggio's accepted works. He [Professor Spear] accepted that there were anatomical mistakes in his early work but went on to refer to Caravaggio's "… uncanny ability to represent natural forms in light and the glistening surface or the nature of fruit, the what I think of as the thingness of things, he doesn't slip, and that's where the connoisseur sees the difference."[7]:

Notwithstanding many controversial Caravaggio attributions and a well-known dispute among scholars as to whether Caravaggio ever painted any replicas of his work, Justice Rose accepted that Caravaggio was no more difficult to attribute than many other old masters:

> [Claimant's] chief reason why Sotheby's should not have tackled the assessment of the Painting themselves is that Caravaggio raises particular problems as regards attribution. Mr. Sainty's [Claimant's expert on auction house practice] report described how there have been many disagreements in the past about whether a particular work was by Caravaggio or not; that eminent scholars have disagreed with each other and that scholars have changed their minds about a particular painting over time. Ms. Kaminsky [Sotheby's expert on auction house practice] accepted that there are many Caravaggio attributions that are controversial and that an auction house specialist would be expected to know this – Mr. Bell's evidence was that he was aware of this. Allied with this aspect of Caravaggio scholarship is the fact that the question whether Caravaggio ever painted replicas of his own works is also hotly debated. A minority of scholars adhere to the view that he did paint more than one version of the identical composition. But there are some scholars who do not accept that any of the proposed replicas are really autograph. Mr. Bell's evidence was that he was aware of these academic controversies but that he did not regard Caravaggio as more difficult to attribute than other artists such as Velasquez, Rubens, van Dyck or Titian. Professor Spear also said that Caravaggio was not particularly difficult. He referred to another Baroque artist Guido Reni who is difficult because he ran a studio where pupils painted copies of his works, some of which were retouched by the master. Caravaggio did not have a studio so there is no problem with these different degrees of autograph status.[8]

Justice Rose continued her analysis of connoisseurship as applied to the Painting, by addressing the difficulty of identifying a particular painting technique typical of Caravaggio:

> As regards Caravaggio features, of course when one is considering whether a copy of a well-known work is by Caravaggio or not, there is no point relying on features of the composition of the image as being typical of Caravaggio; that is what the copyist has tried to reproduce. So Caravaggio features here are features to do with the construction of the Painting and the techniques used. The difficulty however with identifying a particular technique with being characteristic of Caravaggio – at least as regards a period copy – is that it is accepted that there is very little research into copies that enables one to say that Caravaggio produced his paintings in a particular way which none of his contemporaries used.

Auction House Catalogue Practice

Justice Rose described the experts' evidence presented to her at trial concerning auction house cataloging practice. Of course an auction house will wish to be very careful in its catalogue description since it is giving the auction buyer a contractual warranty of its opinion:

> The evidence also established the following facts as regards consultation of outside experts. Sotheby's tend to rely on the view taken by their own specialists rather than deferring to the outside experts who are consulted. If Sotheby's are confident that a painting is right then they will catalogue the painting accordingly though they will refer to contrary views expressed by others. Similarly if they are convinced that a painting is not right they will not catalogue it more optimistically unless the positive views they receive cause them to change their minds. Mr. Bell was also clear that Sotheby's will take however long is necessary to build academic support for a painting if they think it is right. He referred to a painting by Vermeer that they were convinced was right but it took 11 years for them to gain sufficient support to move the cataloguing from 'attributed to Vermeer' to 'by Vermeer'.[9]

The Justice Examines and Rejects Allegations Against Sotheby's of Negligence *(that is, a breach of its contract obligation to its consignor)*

Justice Rose agreed with Sotheby's approach to assessing the authenticity of the Painting; to wit, applying a connoisseur's eye to a consideration of the Painting's *quality*. The question for Justice Rose: "Was Sotheby's assessment of the poor quality of the Painting unreasonable?, that is, negligent. [10]

> Sotheby's defense to this action is and always has been that the quality of the Painting is obviously inferior to anything that Caravaggio would have produced.[11]

The Justice viewed her task as having to decide whether Sotheby's was negligent in that "no reasonable leading auction house would have concluded on the basis of quality that the Painting could not be by Caravaggio." She bore in mind a warning by another English court about "substituting my own assessment of quality for that of experts. However, it seems to me that the task is inescapable here, given the issues in this case."[12]

Based on Expert Testimony at Trial from Connoisseurs, the Justice Sees for Herself, a Lack of Painting Quality Expected of Caravaggio's Art

Using very direct language, based on *her own informed visual perceptions*, Justice Rose described various images rendered in the Picture such as: "The feather in the young sharp's hat, the clothing and the lace cuffs":

> . . . if one is looking at whether the depiction of the feather in the Painting is as convincing a representation of the softness and fluffiness of an ostrich plume as the feather in the Kimbell *Cardsharps,* then it is clear to me that it is not. The feather in the Painting has a shininess that is inappropriate because it suggested a waxiness that ostrich feathers do not have. The artist of the Painting has not captured the barbs of the feather extending over the hat. I accept Professor Spear's assessment that the depiction of the feather in the Kimbell *Cardsharps* is greatly superior to that in the Painting.[13]
>
> "The clothing":

> . . . Professor Spear . . . pointed out that the artist of the Painting had not taken the same pains to convey the nature of the fabric as Caravaggio had done in the Kimbell *Cardsharps*.
>
> . . . I accept Mr. Bell's and Professor Spear's assessment of the realism of the muslin folds that protrude through the slits in the sleeves of the young sharp's doublet. They are much more convincing of the softness of the cloth in the Kimbell *Cardsharps* than they are in the Painting.[14]
>
> "The handling of light":
>
> . . . The most testing passage for conveying light and shadow is in the lace cuffs of the dupe's sleeves. This is very well done in the Kimbell *Cardsharps* whereas the lace in the Painting is schematic and stiff looking.
>
> There were many other passages in the Painting that were criticized by Mr. Bell and Professor Spear – the dupe's right ear, the weave of the carpet covering the table, the inside edge of the pewter plate and the gold stripes on the young sharp's breeches. Having considered all these in comparison with the passages in the Painting that are particularly praised by [the plaintiff's experts] I am firmly of the view that Sotheby's was were entitled to come to the view that the quality of the Painting was not sufficiently high to merit further investigation.[15]
>
> In my judgment there is nothing disclosed on visual examination which should have counteracted Sotheby's view that the Painting was of poorer quality than the Kimbell *Cardsharps* and did not therefore have Caravaggio potential.[16]

The Justice Rejects the Significance of So-Called Scientific Evidence of Creative Alterations (Pentimenti) in the Painting

At the trial evidence was presented about so-called "non-copy" features of the Painting, chief among these being changes or alterations by the creator of the Painting, called *pentimenti*. As the Justice stated:

> *Pentimenti* suggest that the painter refined and altered the composition as they worked, and, for this reason, they are often cited as evidence that a painting is an original composition (i.e. not a copy after a known composition). If the artist has simply copied an image, one would not expect to see major pentimento, for example with one of the figures facing in a different direction or an arm bent instead of straight.[17]

But Justice Rose dismissed, as unimportant, the experts' evidence of various pentimento, such as a change in the length of the ribbon dangling from the young sharp's left elbow.

> It is entirely consistent with a copyist initially painting the ribbon too short, then later realizing that the image in the original image was longer and so he extended the ribbon in the Painting to make it look more like the ribbon in the Kimbell *Cardsharps*. I do not consider this pentimento should have alerted Sotheby's to the existence of some creative mind at work in the composition of the Painting.[18]

Counterfactual Analysis of Justice Rose (In the event her decision should be wrong)

The Justice decided on the basis of the above analysis, that Sotheby's was *not* negligent in refusing to consult outside experts about the authenticity of the Picture. But she went on to describe what would follow if her no-negligence conclusion were *incorrect*, that is, (1) which experts Sotheby's would have consulted, (2) how the auction catalog would describe conflicting opinions about the Painting, and (3) how much the painting might have brought at auction if conflicting expert opinions had been stated in the auction catalog description. On these three points the following paragraphs by Justice Rose are well worth quoting extensively for what it tells us about the role of experts in the authentication process, about which experts are consulted and under what circumstances:

> The key question so far as this part of the case is concerned is which experts Sotheby's would have consulted. Would they have gone to Sir Denis Mahon and Professor Gregori for their

> opinions and hence found out before the sale that those two experts thought that the Painting was an autograph replica?[19]
>
> It appears to be common ground that the decision which experts to consult would be taken by Mr. Bell. It is also common ground that there is no single ultimate authoritative voice on the attribution of Caravaggio as there is with some artists. Ms. Kaminsky's evidence was that that the ability to navigate the difficult waters of seeking scholarly views on attribution is an important skill for an auction house senior specialist to have.[20]
>
> The evidence also established the following facts as regards consultation of outside experts. Sotheby's tend to rely on the view taken by their own specialists rather than deferring to the outside experts who are consulted. If Sotheby's are confident that a painting is right then they will catalogue the painting accordingly though they will refer to contrary views expressed by others. Similarly if they are convinced that a painting is not right they will not catalogue it more optimistically unless the positive views they receive cause them to change their minds. Mr. Bell was also clear that Sotheby's will take however long is necessary to build academic support for a painting if they think it is right.
>
> It was put to Mr. Bell that he would have gone to Sir Denis and Professor Gregori first for their views because they had a reputation for taking an 'expansionist' view of Caravaggio's oeuvre (that is of being more willing than some other scholars to accept that proposed works are by Caravaggio). It was suggested that once one reputable scholar has supported the attribution, it might be easier to get other scholars on board and that was a good reason to seek the views of an expansionist scholar first. Mr. Bell denied this.[21]
>
> As to whether he would have consulted Sir Denis, Mr. Bell's evidence was very firm that he would not. As I have said, Mr. Bell – and all the other witnesses in the case – expressed the highest regard and respect for Sir Denis's lifelong devotion to studying and promoting the arts. But Mr. Bell said that in 2006 Sir Denis was already 96 years old and in his opinion and in the opinion of many in the art world, Sir Denis's 'eye' was no longer reliable so far as attribution of Caravaggio was concerned.[22]
>
> On this point, I find on the balance of probabilities that Sotheby's would have consulted Sir Denis Mahon if they had considered that the Painting had Caravaggio potential. Not only was he available in London to look at the Painting first hand but he also had a strong connection with this work because of his publication of both the Kimbell *Cardsharps* and of the *Musicians* from the same collection. That is just the kind of connection which in other instances caused Sotheby's to consult him.[23]
>
> It is likely, since he would have given his honest opinion, that Sir Denis would have given the same positive opinion of the Painting if consulted then as he did once he had bought it. I therefore find that Sotheby's would have had at least one positive attribution for the Painting if they had consulted outside scholars.[24]
>
> My further finding is that if Sotheby's had received a positive opinion from Sir Denis they would have sought to garner support from other experts on Caravaggio but they would have been disappointed. I am satisfied that they would also have consulted Dr. Christiansen and that he would have given a firm contrary view that the Painting was a copy and not a very good quality copy.[25]

Justice Rose finds that, had Sotheby's consulted outside experts, there would be more *negative* than *positive* expert opinion about the Painting's authenticity:

> Similarly if Sotheby's had gone further in seeking views of other experts, I find that they would have received many more negative views than positive. I reject the suggestion that the

> negative views expressed by various Caravaggio scholars for the purposes of these proceedings were the result of some arm twisting by Professor Spear. From what I have seen in this case of art historianship, the scholars do not hesitate to disagree with each other in forthright terms without generating any apparent ill feeling. I regard the opinions given by the experts who have expressed a view on the Painting as their genuinely held views based on the application of their skilled connoisseurship to consideration of the Painting. I find that the counterfactual world is therefore one where Sotheby's:
>
> i) would have had a positive attribution from Sir Denis asserting that the Painting was by Caravaggio;
>
> ii) would also have received a number of negative views of other eminent Caravaggio scholars saying it was a copy;
>
> iii) would have maintained their own very strong doubts about the autograph status of the Painting. [26]
>
> I also find that this state of affairs, given the evidence of the Sotheby's witnesses, would not have been enough for Sotheby's to be prepared to catalogue the Painting as being "by Caravaggio" or even as being "attributed to Caravaggio". They would still have proposed to Mr. Thwaytes that the Painting be auctioned as by a Follower of Caravaggio, albeit that the catalogue entry may have mentioned the positive view expressed by Sir Denis.[27]

Justice Rose describes Claimant's counterfactual claim for *damages* if the sale catalogue entry had set forth *competing opinions* of various experts:

> Mr. Thwaytes's . . . pleaded case is that if he had been in that counterfactual world, the Painting would have been sold either by auction at Sotheby's or by private treaty with the benefit of a description that reflected the scope of the academic support that existed for the Painting. He then pleads that the quantum of his loss is the difference between the value of the Painting being sold at auction or by private treaty with that description and the amount that the Painting in fact realized at auction. The question now is how to arrive at the value of the Painting with the endorsement of Sir Denis. Any attempt at arriving at a valuation is necessarily speculative.[28]
>
> Mr. Sainty's [Claimant's expert on auction house practice] evidence gave a number of examples of paintings that were of doubtful status but all sold with catalogue entries which set out the conflicting views of scholars. Most if not all of these instances were where a painting had been sold as 'attributed to' the artist rather than as by a follower of the artist. He said that the prices achieved by those paintings reflected their controversial status because they would have been sold for substantially more if their attribution had been more generally accepted. . . . His evidence is that the Kimbell *Cardsharps* is worth about £55 million and that although there would have to be a substantial discount for the negative views, he considers that £11 million is a realistic estimate of what the Painting would have fetched if it had been sold with the opinion of all those scholars who currently accept the work fully detailed in a well-prepared catalogue.[29]
>
> Ms. Kaminsky's [Sotheby's expert on auction house practice] evidence was that sometimes even the attribution by a well-respected scholar can be rebuffed by the market.

As to counterfactual *damages*, if the Sotheby's sale catalogue had included both negative and positive expert opinions, Justice Rose stated forthrightly her view as to the small difference this would have made in the price obtained at auction:

> On balance my conclusion is that the Painting probably would have made slightly more at auction or by private treaty if it had been sold with a catalogue entry detailing the positive and

> negative attributions of respectable scholars but not a great deal more. I find that the views of those scholars who have expressed a negative view of the Painting would have carried much more weight in 2006 than the views of Sir Denis Mahon and Professor Gregori.[30]

This counterfactual analysis by the Justice is both brilliantly articulated and interesting for what tells us about authenticating old masters and (by extension) much other art, both at auction and in private sale. The analysis tells us how and why experts are consulted. It also tells us how auction sale catalogue entries are created when there is conflicting expert opinion. And, for the art market, there is useful analysis of expected auction sale prices in the context of conflicting scholarly opinion.

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NOTES

[1] Bendor Grosvenor, "'Caravaggio' lawsuit dismissed by high court," The Art Newspaper, March 1, 2015, sec. 2, p. 9.

[2] *Id.*

[3] Thwaytes v. Sotheby's, Inc. [2015] EWHC 36 (Ch) at [8].

[4] *Id.* at [47].

[5] *Id.* at [11].

[6] *Id.* at [81].

[7] *Id.* at [87].

[8] *Id.* at [90].

[9] *Id.* at [171].

[10] *Id.* at IV(b).

[11] *Id.* at [97].

[12] *Id.* at [99].

[13] *Id.* at [102].

[14] *Id.* at [103-104].

[15] *Id.* at [105-106].

[16] *Id.* at [130].

[17] *Id.* at [15].

[18] *Id.* at [144].

[19] *Id.* at [168].

[20] *Id.* at [169].

[21] *Id.* at [170-72].

[22] *Id.* at [173].

[23] *Id.* at [176].

[24] *Id.* at [177].

[25] *Id.* at [179].

[26] *Id.* at [181].

[27] *Id.* at [182].

[28] *Id.* at [183].

[29] *Id.* at [184].

[30] *Id.* at [187].

SAFETY IN NUMBERS: DEALER CAVEATS AND PURCHASER PROTECTIONS FOR PRINTS, EDITIONED SCULPTURE, AND OTHER ART IN MULTIPLES

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Judith Wallace

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This essay addresses issues presented in buying and selling art created in multiples (as opposed to unique pieces) – prints, photographs, and editioned sculpture. New York and a few other states have legislation that targets art in multiples. It would be wise for dealers and buyers to be aware of these rules. --- RDS

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An important aspect of New York's law governing art transactions is that purchasers of prints, photographs and editioned sculpture (multiples) have more extensive consumer protections than purchasers of (unique) multi-million dollar paintings whose sales make headlines, and, moreover, can seek attorneys' fees and other costs for warranty claims.

New York Arts and Cultural Affairs Law Includes Protections for Multiples

New York's Arts and Cultural Affairs Law is in part a consumer protection statute. Chief among its protections is the "express warranty" provision stating that when an art merchant (*i.e.*, dealer or auction house) provides a certificate of authenticity to a non-merchant (*i.e.*, collector) buyer, it creates an express warranty by the merchant for the facts stated in the certificate (such as the identity of the artist who created the work).[1]

But for art "multiples," New York law also adds further warranties and disclosure requirements. Multiples are defined as works "produced in more than one copy." New York created requirements for print and photographic multiples in 1981, and in 1990 added sculpture.[2] Only about ten other states have statutes applying to prints and photographs, and only California and Iowa also include sculptures.[3]

Significance of Choice of State Law

Thus, it is important to agree what law governs the sale. Without an explicit statement (as in an invoice), this can be an issue if there is a refund demand. Dealers who are purchasing for re-sale in New York should be sure they have recourse against their predecessors, especially if they are purchasing art in a transaction that might be governed by another state's law. For example, an out-of-New York state dealer who bought on an "as is" basis, and sold through a New York auction house to a collector, was left exposed to a New York warranty claim for the total purchase price.

Required Disclosures

The New York "multiples" law requires dealers to disclose information about the size of the edition and how, when, and by whom the master and multiples were created. These disclosure requirements vary by type of work and date of creation, with much less required for works created before 1949. The seller warrants the accuracy of these statements.

Thus for example, if there is a significant difference in value between a lifetime and posthumous cast (as is sometimes the case), the buyer should be sure there is a specific written representation of lifetime creation. The same holds true for edition size and the number of editions. There is a misconception that there is a legal limit of

12 sculptures in an edition, which is probably due to confusion with American import regulations, which treat the first 12 works in an edition of up to 50 sculptures as "original" works exempt from duty (if there are more than 50, none are exempt). In one case, years after a sale, the purchaser was astounded to discover that the dealer had failed to tell her there were two editions with a total of more than 100 casts of the bronze sculpture she had purchased for a six-figure purchase price.

Ability to Recover Attorneys' Fees

The multiple buyer's strongest protection for warranty claims is that the buyer can seek attorneys' fees, expert witness fees, and nine percent interest, and – if the seller knowingly provided *false* information – up to triple that amount in damages.[4] Quite obviously, this provides an incentive for buyers to seek to enforce their rights and an incentive for sellers to settle claims.

Dealers Are Better Off When They Purchase, Worse Off When They Sell

The multiples warranty also applies to dealers as well as non-dealers,[5] and to *all* seller representations. Dealers are also liable on consignments. The multiples law explicitly states that art merchants who sell consigned works are liable for the warranty[6] – whether or not the dealer can recover from the consignors. This is different from the usual rule that agents are themselves liable only if they do not disclose the names of their consignors, and provides additional incentive for dealers to ensure that the information they have from their consignor is reliable.

Different Warranty Standard for Multiples

The warranty standard also differs for multiples. For the generally applicable "express warranty" of the Arts and Cultural Affairs Law (for unique pieces), courts have held that if a seller had a "reasonable basis in fact" for its representations *at the time of the sale*, it has not breached its warranty.[7] As a result, under this standard, if a dealer does the appropriate due diligence and, for example, the attribution of the artwork is supported by the leading expert or a consensus of scholars, the dealer would not be liable for breach of warranty even if the work can (well after the sale) be shown to be a forgery. But what if the dealer relied on a 10-year-old opinion from the leading expert, knowing that she had been researching a catalogue raisonné in the interim? Consider that the process of systematically collecting information can reveal facts that cause the expert to re-examine previous assumptions and subject the works (or even the artist's entire oeuvre) to heightened scrutiny.

In contrast, the "multiples" provisions expressly state that a dealer's "reasonable basis in fact" is not a defense to a warranty claim.[8] Thus, a warranty claim brought under the multiples provisions of the Arts and Cultural Affairs law is whether the artwork *is or is not* as it was warranted, based on the experts testifying at the time of the trial. This means that a multiple buyer could assert a warranty claim based on post-sale scientific testing (even if it would not have been customary for a seller to perform such testing), new information about the history of the work, or a change in scholarly opinion. This can seem harsh, especially if the testing uses a new technology that would not have been available to the seller at the sale date.

Recurring Issues in Multiple Warranty Disputes

However, it can be challenging to prove that a multiple is not authentic. This is especially true for early twentieth century bronze sculptures, which were sometimes produced in unnumbered editions, on an "as needed" basis. For example, there are cases in which a dealer (for example, the Parisian dealer Ambroise Vollard in the 1920s and 30s) had a single cast in his gallery, and was authorized by the artist to order the fabrication of additional (unnumbered) casts when an interested buyer turned up. Because these might be produced by different foundries over a period of decades, each foundry using proprietary bronze alloys of varying composition, with different patinas, by foundry workers using different casting and finishing techniques, casts could vary considerably, making comparison to casts with verified provenance inconclusive.

In addition, sculptures do not necessarily bear any indication of the artist's approval after fabrication is complete. Prints and photographs are signed and numbered by the artist after they are fabricated, but an artist's signature cast in a sculpture is no proof of the artist's authorization for the number of casts in the edition, the artist's approval of the quality of the completed work, or fabrication during the artist's lifetime. An "authorized" bronze

might have no greater connection to the hand of the artist than an extra cast created by a foundry, and it can be quite challenging to prove whether a cast was authorized by a long-dead artist, if gallery and foundry records are missing. Thus some artists' estates were apoplectic in 1988 when a New York foundry owner auctioned off hundreds of the plaster models used in bronze casting, since those plasters could be used to create unauthorized bronzes that would be indistinguishable from authorized ones. Alternatively, in some cases, posthumous casts are less problematic, as when an artist began a planned edition, but ran out of funds, and the estate completed the edition after the artist's death.

Another recurring issue that is addressed by the Arts and Cultural Affairs Law only for sculptures, but not for multiples on paper, is the *number* of editions that will be created in the future. A buyer may offer a certain price for a work that is one of an edition of ten, and can be harmed when the artist produces later editions of the same work with slight variations in material, color or dimensions, diluting the market value of the first edition.

Conclusion

Warranty disputes over multiples often raise art-historical questions about authenticity, what it requires by way of involvement by the artist, and why it should matter if a particular multiple was approved by the artist if there is no meaningful physical distinction in the work itself. (Indeed, an unauthorized cast might even be of superior quality.) However, these facts about creation and the edition as a whole are usually relevant to a collector's decision about whether to purchase, and what price to pay. Therefore, the Arts and Cultural Affairs Law recognizes the buyer's right to have these facts disclosed, and to obtain a refund if the multiple is not what it was represented to be.

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NOTES

[1] NYACAL § 13.01.

[2] NYACAL § 11.01 (20)

[3] See, *e.g.*, Cal. Civ. Code §§ 1740 and Iowa Code Ann. § 715B .

[4] NYACAL §§ 15.13(4), 15.15.

[5] NYACAL §§ 13.05, 14.06, 15.11.

[6] NYACAL § 15.15.

[7] *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461, 467 (S.D.N.Y. 1978).

[8] NYACAL § 13.05.

VALUING FRACTIONAL INTERESTS: MAYBE YOUR KIDS CAN AFFORD TO KEEP YOUR ART COLLECTION AFTER ALL

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Marjorie W. Hornaday
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This essay is about fractional interests in visual art. For a long time the Internal Revenue Service position has been that fractional interests in tangible personal property such as visual art (ownership in, say, a painting, divided between several people, often family members) are not entitled to reduced gift or estate tax valuations. Recently, the U.S. Tax Court and the Fifth Circuit Court of Appeals decided that the IRS position was wrong and a fractional ownership interest in visual art is, indeed, entitled to a reduced valuation. This opens interesting planning options for art owners who can bring themselves to give up part ownership of their art. — RDS

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For many years, the Internal Revenue Service has resisted estate and gift tax valuation discounts for fractional undivided interests in works of art. But in 2013/14 the U.S. Tax Court and Fifth Circuit Court of Appeals decided that the IRS no-discount position was wrong.[1]

Fractional Interests in Visual Art and Restrictions on Sale and Use

The decedent, Elkins, owned undivided fractional interests in 64 works of contemporary art. The remaining interests in such works were owned by Elkins' children. Before Elkins' death, he entered into a "Cotenants' Agreement" with his children as to 61 of the works, which provided in paragraph 7 that "An item of Property [any of the 61 works of art subject to such agreement] may only be sold with the unanimous consent of all of the Cotenants."

The Tax Court Reasoning

The Tax Court examined two issues: first, whether the paragraph 7 restriction on sales was a restriction on the right to sell or use property within the meaning of Internal Revenue Code Section 2703(a)(2) and, second, the amount of the discount to be applied to decedent's fractional interests in the art. On the first issue, the Tax Court decided that IRC Section 2703 applied:

> With exceptions not here relevant, section 2703(a)(2) instructs that "the value of any property shall be determined without regard to *** any restriction on the right to sell or use such property." Whether paragraph 7 of the cotenants' agreement is a restriction on decedent's right to sell the cotenant art or is a restriction on his right to use the cotenant art is not important. It is clear that, pursuant to paragraph 7 of the cotenants' agreement, decedent, in effect, waived his right to institute a partition action, and, in so doing, he relinquished an important use of his fractional interests in the cotenant art. While, as we shall explain, it makes little or no difference to our conclusion as to the value of the art, we shall, in determining the value of each of the items of cotenant art, disregard any restriction on decedent's right to partition.[2]

The Tax Court allowed a 10 percent valuation discount – rejecting the Estate's 45% discount as unrealistically high – reasoning as follows:

> Petitioners [the Estate] argue that the Elkins children would spend whatever was necessary to retain their minority (or 50%) interests in the art. It is much more likely, however, that, given their undisputed financial resources to do so, they would be willing to spend even more to acquire decedent's fractional interests therein and thereby preserve for themselves 100% ownership and possession of the art. The question is how much more.
>
> We believe that a hypothetical willing buyer and seller of decedent's interests in the art would agree upon a price at or fairly close to the pro rata fair market value of those interests. Because the hypothetical seller and buyer could not be certain, however, regarding the Elkins children's intentions, i.e., because they could not be certain that the Elkins children would seek to purchase the hypothetical buyer's interests in the art rather than be content with their existing fractional interests, and because they could not be certain that, if the Elkins children did seek to repurchase decedent's interests in the art, they would agree to pay the full pro rata fair market value for those interests, we conclude that a nominal discount from full pro rata fair market value is appropriate.
>
> We hold that, in order to account for the foregoing uncertainties, a hypothetical buyer and seller of all or a portion of decedent's interests in the art would agree to a 10% discount from pro rata fair market value in arriving at a purchase price for those interests. We believe that a 10% discount would enable a hypothetical buyer to assure himself or herself of a reasonable profit on a resale of those interests to the Elkins children.[3]

The Fifth Circuit Agrees that the IRS Position on Valuing Fractional Interests is Wrong

On appeal the Fifth Circuit Court of Appeals described the Tax Court decision as follows:

> The Tax Court rejected the Commissioner's zero-discount position, but also rejected the quantums of the various fractional-ownership discounts adduced by the Estate through the reports, exhibits, and testimony of its three expert witnesses – the only substantive evidence of discount quantum presented to the court. Instead, the Tax Court concluded that a "nominal" fractional-ownership discount of 10 percent should apply across the board to Decedent's ratable share of the stipulated FMV of each of the works of art; this despite the absence of any record evidence whatsoever on which to base the quantum of its self-labeled nominal discount.
>
> We agree in large part with the Tax Court's underlying analysis and discrete factual determinations, including its rejection of the Commissioner's zero-discount position (which holding we affirm). We disagree, however, with the ultimate step in the [Tax] court's analysis that led it not only to reject the quantums of the Estate's proffered fractional-ownership discounts but also to adopt and apply one of its own without any supporting evidence.[4]

For the Fifth Circuit, "This entire appeal thus begins and ends with the question of taxable value of Decedent's fractional interests in those 64 items of non-business, tangible personal property [the visual art] that were jointly owned in varying percentages by Decedent and his three children …". The Fifth Circuit went on to describe the following restrictions decedent and his children placed on the art by means of the Cotenant's Agreement – including each co-owner's right of possession for specified number of days during a 12 month period. And, "More pertinent to this appeal, that agreement prohibited the sale of an interest in any work by a co-owner without the prior consent of all."[5] The Fifth Circuit did not address consent-to-sale and other restrictions beyond saying they were "pertinent." It is therefore difficult to know how important these restrictions would be, as opposed to discounts inherent in fractional ownership itself, such as those for lack of marketability, lack of control, and the cost and inconvenience of partition.

The estate's expert witnesses testified in the Tax Court that any hypothetical willing buyer would demand significant fractional ownership discounts in the face of becoming a co-owner with the Elkins children, given their financial strength and sophistication, their legal restraints on alienation and partition, and their determination never to sell their interests in the art. By contrast, the IRS produced no expert testimony as to the amount of discount that should be allowed for a fractional interest, other than an expert who testified that there was no "recognized market" for partial interests works of modern art. Indeed, the Fifth Circuit quite reasonably noted that the IRS expert's testimony that there is no recognized or established market for fractional interests in art, lends support, not for a zero discount (as the IRS argued), but for a *greater* discount.[6]

IRC Section 2703 Requires that Value of Any Property Be Determined Without Regard to … Any Restriction on the right to Sell or Use such Property … Unless Terms Are Comparable to Similar Arrangements Entered into … in Arms' Length Transaction.

As noted above, the Tax Court decided that IRC Section 2703(a)(2) required it to disregard, for purposes of valuation, the no-partition restriction contained in the Cotenants' Agreement. In spite of stressing in its opinion that the no-sale restriction was "… pertinent to this appeal…",[7] the Fifth Circuit did not address Section 2703 at all.

Fifth Circuit Appears to Consider Express Restrictions on Sale and Use, But its Reasoning Addresses Only the Affect of Fractional Interests on Value.

We are then left to conclude from the Tax Court opinion, which addressed the IRC 2703 no sale/partition and the Fifth Circuit opinion which did not, that IRC 2703 *may* apply to require a court to disregard such restrictions but, in any case, that art value for estate and gift tax purposes will *chiefly* be affected by discounts inherent in holding a fractional, as opposed to a whole, interest in the decedent's art.

Where the law will settle on the appropriate percentage, or range of percentages, of the valuation discount for fractional interests in art remains to be seen. But, art owners who are willing to relinquish, to children or grandchildren, partial ownership (and, perhaps, in addition, some control of sales and possession) have the possibility of obtaining substantial estate tax savings.

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NOTES

[1] *Estate of Elkins v. C.I.R.*, 140 T.C. 86, 121 (2013), *aff'd in part, rev'd in par*t, 767 F.3d 443, 449 (5th Cir. 2014).

[2] 140 T.C. 86, 116.

[3] *Id.*, at 135

[4] 767 F.3d 443, 445 (5th Cir. 2014).

[5] *Id.*, at 447.

[6] *Id.*, at 452.

[7] *Id.*, at 447.

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