

April 1988

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Patty Gerstenblith

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Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 Wm. & Mary L. Rev. 501 (1988), <https://scholarship.law.wm.edu/wmlr/vol29/iss3/3>

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PICTURE IMPERFECT: ATTEMPTED REGULATION OF THE ART MARKET

PATTY GERSTENBLITH*

I. INTRODUCTION

In June 1984, the leading auction house of Sotheby Parke-Bernet sold a collection of 59 valuable and rare Jewish books and manuscripts. The state of New York subsequently prosecuted Sotheby's for misrepresentation and fraud in the conduct of this sale, claiming that the true ownership of the collection was in doubt and that Sotheby's had not revealed the questionable state of the title to prospective purchasers.¹ A year later the parties settled this suit by rescinding the sales and redistributing the auctioned items without any finding of liability or fault.²

At about the same time that the suit against Sotheby's was settled, it was revealed that the chairman of another leading auction house, Christie's, had falsely reported the sale of two Impressionist paintings at an auction held in 1981.³ As a result of this revelation and in keeping with a settlement reached with the New York De-

* Assistant Professor of Law, DePaul University College of Law; A.B., Bryn Mawr College, 1971; Ph.D., Harvard University, 1977; J.D., Northwestern University School of Law, 1983. I want to express my appreciation to Professor Marshall Shapo of Northwestern University School of Law and Professor Wayne Lewis of DePaul University College of Law for their helpful criticisms and suggestions and to acknowledge the support of the DePaul University College of Law Summer Research Grant program. I also want to thank Joyce Klouda for her assistance in preparing this article.

1. *Abrams v. Sotheby Parke-Bernet, Inc.*, No. 42255-84, slip op. at 2-5 (N.Y. Sup. Ct. Aug. 24, 1984) (granting motion for preliminary injunction). The Attorney General for the state of New York obtained an order requiring Sotheby's to retain the proceeds of the auction to the credit of the lawsuit and to retain any portions of the collection not already turned over to the purchasers. *Id.*, slip op. at 10.

2. Stipulation and Order of Settlement, *Abrams v. Sotheby Parke-Bernet, Inc.*, No. 42255-84 (N.Y. Sup. Ct. July 16, 1985); McGill, *Sotheby's To Recall Hebrew Books It Sold*, N.Y. Times, July 17, 1985, at C17, col. 1 (late ed.). See *infra* notes 121-26 and accompanying text.

3. *Cristallina S.A. v. Christie, Manson & Woods Int'l*, 117 A.D.2d 284, 502 N.Y.S.2d 165 (1986); McGill, *Sweeping Reassessment in the Auction Trade*, N.Y. Times, July 31, 1985, at A1, col. 4 (late ed.) [hereinafter McGill, *Reassessment*]; *Christie's Chairman Quits London Posts Over Lies on Sales*, Wall St. J., July 22, 1985, at 2, col. 5; McGill, *Christie's Chairman*

partment of Consumer Affairs, the chairman of Christie's New York and London operations resigned his position and surrendered his auction license for two years. The Department of Consumer Affairs fined Christie's \$80,000 and suspended the auction license of the president of the New York branch for four months because he had known of and perhaps assisted in the misrepresentation.⁴ Finally, these and other recent controversies prompted the Department to undertake a thorough review of auction house practices with the goal of revising and strengthening the city's regulation of the art market.⁵

These cases are but two recent examples that demonstrate that the art world is far from immune to the problems of deception and misrepresentation that characterize many commercial transactions in our society today.⁶ These practices range from the artist who intentionally misrepresents a modern work as that of an old master⁷ to the dealer who, either intentionally or unintentionally,

Quits in False Sale Case, N.Y. Times, July 20, 1985, at 1, col. 1 (late ed.) [hereinafter McGill, *False Sale Case*]. See *infra* notes 148-73 and accompanying text.

4. *Cristallina S.A.*, 117 A.D.2d at 295-96, 502 N.Y.S.2d at 173; *Christie's Chairman Quits London Posts Over Lies on Sales*, *supra* note 3.

5. McGill, *Reassessment*, *supra* note 3. As a result of this review, in April 1987 the New York City Department of Consumer Affairs announced new regulations primarily concerning auction house practices with respect to setting and implementing reserve prices and identifying auction items in which the dealer has an interest. CITY OF NEW YORK ADMIN. CODE tit. 20, ch. 2, sub ch. 13 (1987). Burnham, *As the Stakes in the Art World Rise, So Do Laws and Lawsuits*, N.Y. Times, Feb. 15, 1987, § 2 (Arts and Leisure), at 1, col. 2 (late ed.).

6. A discussion of the importance, even to the financial world, of the art market, which boomed during the 1970s, may be found in 2 J. MERRYMAN & A. ELSER, LAW, ETHICS AND THE VISUAL ARTS 478-83 (2d ed. 1987). Although the art market slumped during the early 1980s, it has soared again since 1984, spurred by the bull market on Wall Street and investors seeking new investments for their profits. Purchasers reportedly have paid at least double the highest pre-auction estimates, and both Sotheby's and Christie's posted record sales and profits in the 1984-1985 auction season. Benway, *Full of Bull? When Wall Street Prospers, Art Thrives*, Barron's, June 23, 1986, at 8, col. 1. In the 1985-1986 season, Sotheby's reported worldwide sales of nearly \$700 million, and Christie's sales for the same year were \$536.8 million. At the same time, income from others involved in the art market was estimated at \$6 billion to \$7 billion. Burnham, *supra* note 5, at 28, col. 3. Whether the art market will suffer as a result of the 1987 stock market crash remains to be seen. If this happens, however, such a decline likely will cause even more lawsuits by investors disappointed because their art works did not retain their value.

7. The practice of copying old works or attempting to recreate the style of an older period and then passing these off as originals goes back even to ancient times. See S. ARNAU, THE ART OF THE FAKER: THREE THOUSAND YEARS OF DECEPTION (1961); J. MERRYMAN & A. ELSER, *supra* note 6, at 551-62; S. SCHULLER, FORGERIES, DEALERS, EXPERTS (1960);

misattributes a work and thereby concludes a more profitable sale.⁸ The owner of an art work who attempts to sell through an intermediary, as well as the prospective purchaser of such a work, is placed in a market industry that operates under a set of highly technical and somewhat arcane rules, and which is largely untouched by governmental interference or regulation. This Article explores whether such owners and purchasers receive adequate legal protection and, if not, whether a unifying legal theory can be proposed to provide better protection for both owners and purchasers of art works.

Examples of possibly abusive practices and the scientific, stylistic, and analytical techniques by which such abuses are detected

T. WURTENBURGER, ASPECTS OF ART FORGERY (1962); Hodes, *"Fake" Art and the Law*, 27 FED. B.J. 73 (1967).

8. Such misattribution presents a complicated legal issue because correct attribution is often virtually impossible if the artist is no longer living and so cannot verify the work in person. The older the work of art, the more technical and less certain the process of identification often becomes.

When dealing with antiquities, two particular additional problems arise. First, an object may be genuinely "ancient" and yet be misdated by several hundred years. To what extent does this constitute a misattribution, and does this standard vary depending on the purchaser's sophistication and status as an expert? For example, pottery of the Near East is often misattributed to the Iron Age (ca. 1000-600 B.C.) when it is in fact Roman or early Byzantine (ca. 100-600 A.D.). To the lay collector, this discrepancy may make little difference, but to the expert it can be very significant. On the other hand, the expert should be aware of the likelihood of misattribution and therefore may not have reasonably relied on the dealer's representation. This problem is further exacerbated by the frequent inability of experts and scholars to agree on the authenticity and sometimes the date of ancient objects, as exemplified by the controversy surrounding the authenticity of a kouros (statue of a naked youth) attributed to the sixth century B.C. and acquired by the J. Paul Getty Museum for a reported \$7 million. Russell, *Disputed Greek Statue To Go on Exhibition*, N.Y. Times, Aug. 12, 1986, at A1, col. 2 (late ed.). The Metropolitan Museum of Art had to remove from exhibition an Egyptian sculpture of a cat, which had been on display for nearly 25 years, because it may be a forgery. McGill, *Met Says Its Popular Cat Is Probably Fake*, N.Y. Times, Apr. 30, 1987, at A1, col. 4 (late ed.). See also Hahn v. Duveen, 133 Misc. 871, 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929) (plaintiff's suit for slander of title against expert who stated that plaintiff's painting was not an original Leonardo da Vinci was properly submitted to the jury when other experts testified to the painting's authenticity).

Second, many archaeological objects, particularly those on the market in the United States or Europe, have been removed from their country of origin illegally. Although these objects often can enter the United States legally, the original illegality may present an ethical concern to the purchaser or, in some instances, may lead to considerable international pressure on the purchaser to return the object to its country of origin. See *infra* note 119 and accompanying text. The "pedigree" (consisting of the attribution, authentication, and provenance) the seller gives the object can be crucial in establishing both its legality and the state of its title. To what extent should the seller then be liable for an incorrect pedigree?

are too many to enumerate and have been dealt with extensively in recent legal literature.⁹ This study therefore is limited to a consideration of current practices in the art market and the resulting liabilities of auction houses and art dealers to both the purchaser and the owner of works of art. The process of identification and authentication of works of art may result in liability to the purchaser under various legal theories if this identification later proves to be incorrect. This Article first considers the liability of an art merchant to the buyer for the sale of an incorrectly identified work of art and for the sale of a work of art to which the owner did not have good title under common law tort and contract theories, under statutory schemes, and under a system of voluntary self regulation. Second, the duties and potential liabilities of the art merchant to the owner or creator of the work of art are examined. Finally, this Article focuses on whether these various legal theories provide adequate protection for the consumer (both buyer and owner) and on the effect of providing additional protection through different theoretical models to be proposed.

II. DUTIES TO THE PURCHASER

A. *Misrepresentation and Warranty Theories*

1. *Common Law Remedies*

Sprinkled through American and English case histories are a few decisions that confront the issues of the liability of a broker, auctioneer, or dealer¹⁰ who sells an incorrectly attributed work of art.

9. See, e.g., DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 *HASTINGS L.J.* 973, 974-97 (1976); Wurttenberger, *Criminal Damage to Art—A Criminological Study*, 14 *DEPAUL L. REV.* 83 (1964); Comment, *Art Forgery: The Art Market and Legal Considerations*, 7 *NOVA L.J.* 315, 319-27 (1983) [hereinafter Comment, *Art Forgery*]; Comment, *The Uniform Commercial Code Warranty Provisions and the Theory of Strict Liability in Tort as Solutions to Art Counterfeiting in Painting: A Critical Analysis*, 20 *ST. LOUIS U.L.J.* 531, 533-36 (1976) [hereinafter Comment, *U.C.C. Warranty Provisions*]; Comment, *Current Practices and Problems in Combatting Illegality in the Art Market*, 12 *SETON HALL L. REV.* 506, 507-18 (1982) [hereinafter Comment, *Current Practices*]; Comment, *Legal Control of the Fabrication and Marketing of Fake Paintings*, 24 *STAN. L. REV.* 930, 930-37 (1972).

10. Brokers, dealers, and auctioneers are distinguished in the law, although common usage of these terms often makes them synonymous. *Black's Law Dictionary* defines an auctioneer as "[a] person authorized or licensed by law to sell lands or goods of other persons at public auction . . . for another on commission, or for a recompense." *BLACK'S LAW DICTION-*

The legal theory underlying these suits is a mixture of tort and contract law. The disappointed buyer usually sues the seller either on the grounds of fraud and misrepresentation¹¹ or for breach of the "warranty"¹² that the seller gives to the purchaser. These dif-

ARY 119 (5th ed. 1979). As between auctioneers and brokers, the former is entitled only to sell whereas the latter may both buy and sell. *Id.* A dealer is defined as "one who buys to sell; not one who buys to keep, or makes to sell." *Id.* at 359. Finally, a broker is defined as "[a]n agent employed to make bargains and contracts for a compensation." *Id.* at 174. Auctioneers and brokers are subject to the laws of agency. The RESTATEMENT OF AGENCY states that agency is "the fiduciary relation which results from the manifestation of consent by one person [principal] to another [agent] that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1 (1957). See *Brown & Zortman Machinery Co. v. City of Pittsburgh*, 375 Pa. 250, 100 A.2d 98 (1953) for a discussion of brokers contrasted with dealers. For further discussion of auctioneers, brokers, and dealers, see *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 432 N.E.2d 849 (1982) and cases cited therein. See also *Knudson v. Weeks*, 394 F. Supp. 963 (W.D. Okla. 1975) (detailing a broker's special agency relationship to the principal in a real estate transaction); *Randall v. Lautenberger*, 16 R.I. 158, 13 A. 100 (1888) (discussing an auctioneer's fiduciary duty not to bid against the principal). In an attempt to avoid confusion, the term "seller" is used in this Article to denote generically "dealer," "auctioneer," and "broker." Owner, artist, or consignee is used, as appropriate, to refer to the person on whose behalf the seller has undertaken to sell the particular item.

11. A common law cause of action for fraud generally requires proof of several elements, which have been variously stated in different judicial opinions. These elements include: (1) a representation regarding a material fact; (2) a false representation; (3) the speaker's belief that the representation was not true; (4) the speaker's intent that the false representation be acted upon (intent is also known as scienter); (5) the plaintiff's justifiable reliance on the representation to his or her detriment; and (6) the plaintiff's lack of awareness that the representation was false and reasonable belief that it was true. *Gee v. CBS, Inc.*, 471 F. Supp. 600, 622 (E.D. Pa. 1979). See L. Loss, *SECURITIES REGULATION* 1431 (2d ed. 1961). Misrepresentation is an element of fraud; however, depending on the court, this term is often used interchangeably with fraud as the name for the cause of action. See *Shores v. Sklar*, 647 F.2d 462, 468 (5th Cir. 1981).

12. The word "warranty" is used cautiously here because the principle issue litigated is usually whether the seller in fact gave the buyer a warranty or merely an expression of opinion. See *infra* notes 13-26 and accompanying text. A warranty may be defined in a commercial setting as "[a] promise or agreement by seller that [an] article sold has certain qualities or that seller has good title thereto." BLACK'S LAW DICTIONARY 1423 (5th ed. 1979). One court has stated that "a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue. . . . [I]t is intended precisely to relieve the promisee of any duty to ascertain the facts for himself." *Dale Constr. Co. v. United States*, 168 Ct. Cl. 692, 699 (1964). Specific statutory law covering warranties can be found in the U.C.C. §§ 2-312 to -318 (1978). See *infra* notes 50-81, 110-13 and accompanying text for a discussion of the U.C.C.'s applicability and relative ineffectiveness in the art market. A discussion of warranties applicable during an auction, especially the warranty of title, can be found in *Gould v. Hiram Walker & Sons*, 142 F.2d 544 (7th Cir. 1944). This decision sets out the duty of a purchaser at auction to investigate the title when warranties are disclaimed. *Id.* at 547.

ferent doctrinal bases, rooted in both tort and contract notions, are seldom clearly distinguished by the courts.

The decision in *Jendwine v. Slade*,¹³ perhaps the oldest reported case on this subject, established the traditional approach to this issue. The defendant sold the plaintiff two paintings as originals, but they were actually copies. The plaintiff sued for fraud, and the court addressed the question whether the appearance of the artist's name in a catalog constituted a warranty or merely a description and opinion on which the buyer was not intended to rely. The court held that the catalog did not constitute a warranty because the artist had lived so long ago it was not possible to ascertain whether the paintings were originals. The catalog indicated only the seller's opinion that the works were originals, and the buyer was to exercise independent judgment. The court concluded that "if the seller only represents what he himself believes, he can be guilty of no fraud."¹⁴ *Jendwine* thus focused on whether the seller had made an express warranty to the buyer or had merely represented an opinion. The court held that if the representation was one of opinion, then the seller committed no fraud as long as the seller actually believed in the truth of the statement.¹⁵

In two later decisions, *Lomi v. Tucker*¹⁶ and *De Sewhanberg v. Buchanan*,¹⁷ the courts held that if the seller's representations formed an express warranty, then the buyer could either rescind the sale or keep the painting and pay the seller only what the jury thought the copies were worth.¹⁸ In *Pennell v. Woodburn*,¹⁹ when the seller warranted a painting to the purchaser and the purchaser resold it to a subsequent buyer, the second purchaser sued the first on the warranty and recovered costs. The first purchaser was then

13. 170 Eng. Rep. 459 (1797).

14. *Id.* at 460.

15. *Id.*

16. 172 Eng. Rep. 586 (1829).

17. 172 Eng. Rep. 1004 (1832).

18. *Lomi*, 172 Eng. Rep. at 586-87; *De Sewhanberg*, 172 Eng. Rep. at 1005. One would expect that the buyer generally would be satisfied with rescission of the sale. However, in *Menzel v. List*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969), which involved breach of the warranty of title, the buyer sought and received the benefit of the bargain. See *infra* notes 114-20 and accompanying text.

19. 173 Eng. Rep. 52 (1835).

allowed to recover from the seller all the costs of this action by the second purchaser.²⁰

Finally, in *Power v. Barham*,²¹ the court held that the decision whether a statement constituted a warranty or expression of opinion was correctly left to the jury. In this case, at the time of sale the seller gave the buyer a receipt stating: "Four pictures, Views in Venice, Canaletto, 1601."²² The jury found that the buyer had contracted for paintings by Canaletto and that this receipt was therefore a warranty, not a mere description or statement of opinion. The buyer's evidence of a written receipt constituted an express warranty although given to the buyer only at the conclusion of the sale.²³ This result differs from that in *Jendwine*, in which a catalog, which the buyer studies *before* a sale, was held not to constitute a warranty.²⁴

The court in *Power* distinguished the result in *Jendwine* because in *Power* the artist had died relatively recently, so that the seller should have been able to ascertain the paintings' origin.²⁵ In *Jendwine*, however, the greater amount of time since the artist's death made this impossible.²⁶ Thus, in order to recover under the common law, a disappointed purchaser must establish that the seller's statement constituted an express warranty, rather than a mere expression of opinion, and that the seller knew at the time of sale that the statement was false. These early English decisions summarize the dependence of the common law approach on the distinction between opinion and warranty.

2. Statutory Regulation

New York is the recognized capital of the art market in the Western Hemisphere and the home of many of the largest, most prestigious auction houses. Largely in response to revelations con-

20. *Id.* at 52.

21. 111 Eng. Rep. 865 (1836).

22. *Id.* at 865.

23. *Id.* at 866.

24. *Id.* *Jendwine v. Slade*, 170 Eng. Rep. 459, 459-60 (1797).

25. *Power*, 111 Eng. Rep. at 866.

26. *Jendwine*, 170 Eng. Rep. at 459. The difference in time from the artists' deaths to the time of suit, however, was not that great: in *Jendwine*, a little over 100 years; in *Power*, 68 years.

cerning various art auction house and dealer practices and the apparent inadequacy of common law contract and tort theories, New York has attempted to police these practices through various regulatory schemes. The state now has a comprehensive statutory scheme that attempts to regulate several facets of the art market.²⁷

Perhaps the first statute to be utilized in regulating the art market was the New York Sales Act.²⁸ In *Weisz v. Parke-Bernet Galleries, Inc.*,²⁹ the court considered a claim regarding an express warranty as to the authenticity of two paintings. Mr. Weisz and Mrs. Schwartz purchased paintings in 1961 and 1964, respectively. The paintings were listed in the Parke-Bernet catalog as works of Raoul Dufy. Several years later the District Attorney's office discovered that they were fakes and informed the purchasers. The purchasers sued Parke-Bernet, claiming that the catalog listing constituted an express warranty as defined by the Sales Act.³⁰ Parke-Bernet defended on the grounds that the conditions of sale in the catalog included a disclaimer of warranty as to genuineness and authorship.³¹ Two issues were presented: whether the plaintiffs knew or should have known of the disclaimer, and if so, whether the disclaimer was effective.³²

The trial court concluded that Mr. Weisz had had no knowledge of the disclaimer and that he could not be charged legally with such knowledge.³³ In contrast, the court found that Mrs. Schwartz did have actual knowledge,³⁴ but that the disclaimer was ineffec-

27. See *infra* notes 82-92 and accompanying text.

28. New York Sales Act, N.Y. PERS. PROP. LAW §§ 82-158 (McKinney 1962).

29. 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term 1974).

30. *Weisz*, 67 Misc. 2d at 1078, 325 N.Y.S.2d at 578. The New York Sales Act defined an express warranty as follows:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

N.Y. PERS. PROP. LAW § 93 (McKinney 1962).

31. *Weisz*, 67 Misc. 2d at 1079, 325 N.Y.S.2d at 578-79.

32. *Id.* at 1079, 325 N.Y.S.2d at 579.

33. *Id.* at 1080, 325 N.Y.S.2d at 580.

34. *Id.* at 1081, 325 N.Y.S.2d at 581.

tive³⁵ because Parke-Bernet had intended the plaintiffs to rely on its superior knowledge and experience and the catalog had been designed to encourage such reliance and belief in the works' authenticity.³⁶ The court found that Parke-Bernet had failed to announce and emphasize the disclaimer sufficiently, particularly because the auctioneer had not singled out the specific disclaimer at the beginning of the auction.³⁷ The court said it was attempting to act "consistently with a whole body of law that reflects an increasing sensitivity to the requirements of fair dealing where there is a relationship between parties in which there is a basic inequality of knowledge, expertness, or economic power."³⁸ The trial court imposed an almost absolute liability on the auction house, requiring it to compensate the purchaser simply because it was *theoretically* in a position of superior knowledge to ascertain the authenticity of a work of art and the purchaser had relied on that expertise. This absolute liability was imposed even though, at the time of sale, Parke-Bernet had believed that the paintings were genuine.³⁹

The appellate court, in reversing this decision, relied on three factors. First, at the time of sale, neither the common law nor the Sales Act in effect at the time of the auctions recognized that the stated opinion of the seller gave rise to an express warranty of authenticity or authorship. Second, Parke-Bernet had clearly and unequivocally disclaimed any express or implied warranty or representation of the paintings' authenticity as products of the ascribed artist. Third, the court found no fraud or misrepresentation because Parke-Bernet had not wilfully intended to deceive; rather the purchasers had assumed the risk that the identifications might be wrong.⁴⁰ The court concluded that the purchasers "will not now be heard to complain that, in failing to act with the caution of one in circumstances abounding with signals of *caveat emptor*, they

35. *Id.* at 1082, 325 N.Y.S.2d at 582.

36. *Id.* at 1081-82, 325 N.Y.S.2d at 581.

37. *Id.* The court stated: "Where one party in a contractual relationship occupies a position of superior knowledge and experience, and where that superior knowledge is relied upon and intended to be relied upon by the other, surely more is required for an effective disclaimer than appears here." *Id.* at 1082, 325 N.Y.S.2d at 581.

38. *Id.* at 1082, 325 N.Y.S.2d at 582.

39. *Id.* at 1079, 325 N.Y.S.2d at 578.

40. *Weisz v. Parke-Bernet*, 77 Misc. 2d 80, 81, 351 N.Y.S.2d 911, 912 (N.Y. App. Term 1974).

made a bad bargain."⁴¹ This decision essentially adopts the common law analysis of *Jendwine v. Slade*, with its emphasis on the distinction between a warranty and an opinion and its reliance on the doctrine of *caveat emptor*.⁴²

In *Vom Lehn v. Astor Art Galleries, Ltd.*,⁴³ the court attempted to avoid the common law doctrines of deceit and misrepresentation and provide some relief to a plaintiff when the circumstances were particularly unconscionable. In this case, the plaintiffs agreed to purchase for \$67,000 twenty jade carvings, which the seller represented as hand-carved and of the Ming Dynasty period.⁴⁴ The carvings were, in fact, neither and had a value of approximately \$15,000.⁴⁵ The court dismissed the plaintiffs' claims on the basis of fraudulent misrepresentation because they had failed to request a complete description of the carvings in the bill of sale and appraisal.⁴⁶ Relying on section 2-302 of the Uniform Commercial Code (U.C.C.), the court refused to enforce the remainder of the contract, which called for further payments, on the ground that the price charged was unconscionable. The court could not, however, award any damages under this provision.⁴⁷

Nonetheless, the court held that under New York's Home Solicitation Sales Act, the plaintiffs could repudiate the entire sale, thereby recovering their down payment and costs.⁴⁸ Because the defendant had failed to inform the buyers of their right of rescission, the court held that the buyers could cancel at any reasonable time by notifying the seller of this intention. The plaintiffs thereby attained a full rescission of the sale without establishing any claim

41. *Id.* at 81, 351 N.Y.S.2d at 912.

42. *See Jendwine v. Slade*, 170 Eng. Rep. 459 (1797).

43. 86 Misc. 2d 1, 380 N.Y.S.2d 532 (N.Y. Sup. Ct. 1976).

44. *Id.* at 2-5, 380 N.Y.S.2d at 534-36.

45. *Id.* at 7, 380 N.Y.S.2d at 538.

46. *Id.* at 8-10, 380 N.Y.S.2d at 539-40.

47. *Id.* at 11, 380 N.Y.S.2d at 541.

48. *Id.* at 12, 380 N.Y.S.2d at 541-42; N.Y. PERS. PROP. LAW §§ 425-30 (McKinney Supp. 1975-1976) amended by N.Y. PERS. PROP. LAW §§ 425-31 (McKinney Supp. 1987). The Home Solicitation Sales Act applied because the sale was concluded at a place other than the defendant's place of business. Section 428 of the Act requires the seller to inform the buyer of the right to rescind a sale made at a place other than the seller's place of business within three days of the transaction. If the seller fails to give the buyer the appropriate notice, the buyer may cancel the sale at any time until the seller complies with the notice requirement. *Id.* § 428.

for fraud or misrepresentation.⁴⁹ Because of its limited application to sales concluded at places other than the seller's place of business, the Home Solicitation Sales Act provides little precedent or protection for future buyers who rely on a seller's statement (whether opinion or representation) as to the nature and quality of a work of art.

The U.C.C. embodies an integrated statutory framework for the regulation of the sale of goods. Although virtually no reported cases interpret the application of the U.C.C. to the sale of art works, considerable disagreement has flourished among legal scholars as to whether the U.C.C. affords adequate protection to the purchaser of a misattributed or forged work of art.⁵⁰ One opinion is that "the warranty provisions of the Code protect consumers of art both from the seller who intentionally misrepresents a forged piece as an original, and from the art dealer who innocently sells what he believes to be an authentic work of art."⁵¹ Other commentators, however, dispute the applicability of the Code to improve in any significant way the dilemma of the disappointed buyer under pre-Code law.⁵²

Consumer protection lies primarily in the express warranty provisions of section 2-313. Implied warranties are set out in sections 2-314 and 2-315 and disclaimers of warranties are regulated by section 2-316. The question of the adequacy of the U.C.C. centers initially on the problems involved in proving the creation of an express warranty and the purposes and motivations of the consumer who purchases a work of art. Section 2-313 provides that an express warranty may be created by "[a]ny affirmation of fact or

49. 86 Misc. 2d at 11-12, 380 N.Y.S.2d at 541-43. Whether the sellers in *Vom Lehn* knew that the pieces were not hand-carved Ming Dynasty jades was never clearly established, whereas in *Weisz*, Parke-Bernet certainly did not know that the paintings were forgeries at the time of sale. *Weisz*, 77 Misc. 2d at 81, 351 N.Y.S.2d at 912. If the facts of *Vom Lehn* had not involved a home solicitation, the plaintiffs, like those in *Weisz*, probably would have failed to recover the purchase price, and under far more suspicious circumstances than those in *Weisz*.

50. 2 F. FELDMAN & S. WEIL, *ART LAW: RIGHT AND LIABILITIES OF CREATORS & COLLECTORS* 4-6 (1986) [hereinafter F. FELDMAN & S. WEIL, *ART LAW*]; F. FELDMAN & S. WEIL, *ART WORKS: LAW, POLICY, PRACTICE*, 287-88 (1974) [hereinafter F. FELDMAN & S. WEIL, *ART WORKS*].

51. Note, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409, 414 (1972).

52. See *infra* notes 56-81 and accompanying text.

promise . . . which relates to the goods and becomes part of the basis of the bargain"⁵³ by description,⁵⁴ or by sample or model.⁵⁵ Several problems arise in the application of section 2-313 to the sales of art works.

The first problem of interpretation is whether the buyer must show reliance on the seller's statements in order to prove the creation of an express warranty. This issue depends, in turn, on the interpretation of the requirement that the affirmation or description become "part of the basis of the bargain." Considerable disagreement exists as to whether this formulation embodies the pre-Code requirement that the buyer relied in fact on the seller's statements in consummating the sale or whether the Code eliminates the reliance requirement.⁵⁶ Comment 3 to section 2-313 seems to eliminate the reliance requirement.⁵⁷ Several cases and commentators nevertheless have concluded that the "basis of the bargain" test is little more than a reformulation of the pre-Code reliance requirement. The authority for this conclusion stems primarily from the statement in comment 1 that express warranties "rest on 'dickered' aspects of the individual bargain."⁵⁸ If reliance is a required element of the buyer's claim, then presumably sophisticated purchasers, such as museums and major collectors, who have relatively equal access to information and a relatively equal bargaining position with sellers of art works, would not be able to establish an express warranty.

Even if the element of reliance can be established, or if it is not considered necessary, the disappointed buyer will have a more significant hurdle to overcome. Section 2-313(2) provides that "an af-

53. U.C.C. § 2-313(1)(a) (1978).

54. *Id.* § 2-313(1)(b).

55. *Id.* § 2-313(1)(c). This last provision probably would not apply to sales of art works.

56. Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 538-40.

57. Comment 3 states: "[N]o particular reliance on [affirmations of fact] need be shown in order to weave them into the fabric of the agreement." U.C.C. § 2-313 comment 3.

58. *Id.* comment 3; Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 539-40 & nn. 57, 60-64. Some commentators, of course, disagree with this conclusion. *See, e.g.*, Du Boff, *supra* note 9, at 1005-07 (reliance requirement eliminated but only in face-to-face negotiations; buyer must, however, show awareness of seller's statements); Hobart, *A Giant Step Forward — New York Legislation on Sales of Fine Art Multiples*, 7 *ART & THE LAW* 261, 274-75 (1983) (§ 2-313 eliminates proof of seller's scienter, intent to deceive, and buyer's reliance).

firmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."⁵⁹ This latter provision excludes "puffery" or statements of the seller's opinion or judgment.⁶⁰ Unfortunately, this omission seems to return to the common law distinction considered in *Jendwine v. Slade* and *Power v. Barham*.⁶¹ Any seller could attempt to evade liability for the lack of authenticity of a work of art by claiming that the statement of authorship was an opinion rather than a warranty. Although ordinarily the description of a painting as "a Picasso" would constitute the core description,⁶² several technical terms often used in catalog descriptions sound similar but probably would not create an express warranty that a painting was in fact executed by Picasso.⁶³ Because the authorship of a work by a deceased artist can never be ascertained with absolute certainty, any statement by a seller can be characterized as an opinion.⁶⁴ An excellent argument can be made that when the seller's statement increases the purchase price of an art work, even if such statement is considered to be merely an opinion, the seller should bear the burden if that opinion turns out to be incorrect.⁶⁵ Nonetheless, considerable disagreement remains

59. U.C.C. § 2-313(2).

60. Note, *supra* note 56, at 418.

61. *Jendwine*, 170 Eng. Rep. at 460; *Power*, 111 Eng. Rep. at 865; see *supra* notes 13-15, 21-26 and accompanying text.

62. Note, *supra* note 51, at 415, 420-22. This comment relies in part on the lower court decision in *Weisz v. Parke-Bernet Galleries, Inc.*, 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1972), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term 1974), which was subsequently reversed. See *supra* notes 29-39 and accompanying text. Furthermore, the author's statement that a general disclaimer of an express warranty, such as that contained in an auction sale catalog, is not valid is also based on this lower court decision.

63. In light of the industry's historical use of such technical terms as "attribution," "school," and "circle"—now partially codified in New York by statute, see, e.g., *infra* note 89—a description of a painting using such terms might be considered ambiguous. Du Boff, *supra* note 9, at 1003; Comment, *Current Practices*, *supra* note 9, at 556. Even the presence or absence of the artist's first name has been used in catalog descriptions to indicate differences in the degree of certainty of an attribution. Note, *supra* note 51, at 424-25, n.77.

64. Du Boff, *supra* note 9, at 1004-05; Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 541-42; Comment, *Current Practices*, *supra* note 9, at 557. Du Boff suggests that if both the seller and the buyer assumed that the work of art was authentic and this fact was part of the basis of the bargain, then the buyer should be entitled to rescission based on a mutual mistake of fact. *Id.* at 1005, n.162.

65. Comment, *Art Forgery*, *supra* note 9, at 332-33; Comment, *Current Practices*, *supra* note 9, at 557; Note, *supra* note 51, at 417.

as to whether this analysis of section 2-313 ultimately will be applied to sales of art works.

The implied warranty of merchantability in section 2-314 is probably of limited application to the sale of art works.⁶⁶ Although this implied warranty pertains to the seller who is innocent of any knowledge of a defect or the item's failure to conform to a standard of merchantability and applies even when the seller cannot discover the defect or failure, undocumented works probably would not be covered, particularly if they have been traded in the art market for any significant period of time without detection of their lack of authenticity.⁶⁷ Furthermore, this type of implied warranty applies only when the seller satisfies the U.C.C.'s definition of a "merchant with respect to goods of that kind."⁶⁸ A private collector or museum that engages in only sporadic sales of art works would not qualify as such, and the label might even be restricted to a dealer or auctioneer who regularly deals in works of a particular period or artist.⁶⁹ An even more significant consideration is the determination of what constitutes the "ordinary purposes for which such goods are used."⁷⁰ If the purpose of ownership of a work of art rests in the enjoyment of its general aesthetic value, rather than in the idiosyncratic value of the ownership of a particular work by a specific artist, then even a misattributed or forged work of art may fit the ordinary purposes for which such goods are used.⁷¹

Finally, the warranty of fitness for a particular purpose, set out in section 2-315, rarely applies to the sale of art works because the particular purpose must be more than simply the desire to own a particular work by a particular artist.⁷² Only if the purpose of the

66. Note, *supra* note 51, at 422-27.

67. Du Boff, *supra* note 9, at 1013.

68. U.C.C. § 2-314(1) (1978). Section 2-104(1) defines a "merchant" as one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. . . ." *Id.* § 2-104(1).

69. Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 546.

70. U.C.C. § 2-314(2)(c).

71. Comment, *Art Forgery*, *supra* note 9, at 336-37; Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 546-47. *Contra* Note, *supra* note 51, at 425 (forgeries would defeat the buyer's purpose in purchasing an original and would not be "honestly resalable" as required by U.C.C. § 2-314 comment 8).

72. Note, *supra* note 51, at 427-28.

purchase was to make a particular investment or gift or to complete a specific collection would the requirement of "particular purpose" be satisfied.⁷³

The U.C.C. also provides for and limits the disclaimer of warranties by the seller of goods. Section 2-316(1), concerning the disclaimer of express warranties, provides that the "negation or limitation [of an express warranty] is inoperative to the extent that such construction is unreasonable."⁷⁴ The foundation of an express warranty is arguably the "core description" or "quality of the subject matter of the sale to which the seller's performance must necessarily conform."⁷⁵ This warranty may not be abrogated and it applies even to the seller who acts in good faith and without any knowledge of forgery or misattribution.⁷⁶ An express warranty also is not excluded by the buyer's inspection or failure to inspect. However, low price, lack of adequate documentation, particularly poor execution of a forged art work, or the seller's demand that the buyer inspect the art work may put the buyer on notice that he or she is assuming the risk of defects that an examination would reveal.⁷⁷ Given the difficulty of establishing that the seller's statements created an express warranty, such limitations on disclaimers seem to afford the buyer little additional protection.⁷⁸

Section 2-316(2) limits disclaimers of implied warranties, again to protect the buyer from surprise, by requiring specific language and conspicuousness in a disclaimer.⁷⁹ These limitations seem to apply to sales of art works, just as to sales of other types of goods,

73. *Id.* at 428; Du Boff, *supra* note 9, at 1014; Comment, *Art Forgery*, *supra* note 9, at 335-36; Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 547-49.

74. U.C.C. § 2-316(1).

75. Note, *supra* note 51, at 415. See also Comment, *Current Practices*, *supra* note 9, at 557-58 (a general disclaimer of express warranties is likely to be considered ineffective).

76. Comment 1 to § 2-316 states that the purpose of this provision is "to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty . . ." U.C.C. § 2-316 comment 1.

77. U.C.C. § 2-316 comment 8; Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 551 (which defects are excluded depends on the skill of the buyer and the buyer's opportunity to conduct sophisticated tests).

78. Du Boff, *supra* note 9, at 1010; Comment, *Art Forgery*, *supra* note 9, at 334; Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 549-50.

79. U.C.C. § 2-316(2).

if the buyer can establish that an implied warranty was created.⁸⁰ The U.C.C. also permits the parties to an agreement, in cases of pure commercial loss, to limit the measure of damages when such a limitation is not unconscionable. For example, the buyer's remedies may be limited to return of the goods and refund of the purchase price.⁸¹

In 1966, New York enacted its comprehensive Arts and Cultural Affairs Law to supplement the U.C.C. and to confront the specific problems posed by the art market industry.⁸² Michigan subsequently enacted a statute substantially similar to the New York statute, at least as far as this aspect of the art market is concerned.⁸³ The first difference between the New York statute and the U.C.C. concerns the creation of an express warranty. Section 13.01(1) of the New York law specifically provides that whenever an art merchant gives a buyer who is not an art merchant a written statement concerning the authorship of a work of art, this statement is presumed to be part of the basis of the bargain and creates an express warranty.⁸⁴ The Michigan statute's definition of an ex-

80. Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 550. Some commentators have remarked on the relative ease with which implied warranties may be disclaimed. Du Boff, *supra* note 9, at 1015; Hobart, *supra* note 58, at 276.

81. U.C.C. § 2-719(1)(a). As is discussed *infra* notes 140-47 and accompanying text, courts do not necessarily honor the limitations set out in auction house catalogs. U.C.C. § 2-719(2) provides that when a limited remedy fails of its essential purpose, additional remedies may be allowed under other provisions of the Code.

82. N.Y. ARTS & CULT. AFF. LAW §§ 11.01-15.21 (McKinney 1984 & Supp. 1988). Other provisions of this statute regulate the relationship between the artist and the dealer and protect the artist's copyright interests. See Comment, *Regulation of the New York Art Market: Has the Legislature Painted Dealers into a Corner?* 46 FORDHAM L. REV. 939, 940-53 (1978).

83. MICH. COMP. LAWS ANN. §§ 442.321-.325 (West Supp. 1987). For a discussion of the Michigan statute, see Du Boff, *supra* note 9, at 1011-12.

84. Section 13.01 states:

1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it:

(a) shall be presumed to be part of the basis of the bargain; and

(b) shall create an express warranty for the material facts stated as of the date of such sale or exchange.

N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney Supp. 1988).

Section 11.01(2) defines an art merchant as

a person who is in the business of dealing, exclusively or non-exclusively, in works of fine art or multiples, or a person who by his occupation holds himself

press warranty goes even further in that it eliminates much of the ambiguity involved in the determination of whether a statement constitutes an expression of opinion or a warranty. It accomplishes this by providing that a writing creates a warranty even if the art merchant did not intend to do so or if a statement relating to authorship is "merely the art merchant's opinion."⁸⁵ Perhaps the most significant element of the Michigan statute pertaining to the creation of an express warranty is that a "written instrument" includes not only a bill of sale or memorandum but also "a written or printed catalog or other prospectus of a forthcoming sale."⁸⁶

Although both New York and Michigan statutes permit this express warranty to be disclaimed under a provision similar to U.C.C. section 2-316(1), for the disclaimer to be considered reasonable it must be written and conspicuous; under the New York statute the disclaimer must specifically inform the buyer that "the seller as-

out as having knowledge or skill peculiar to such works, or to whom such knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id. § 11.01(2).

This definition specifically includes an auctioneer who sells art works at public auction. Section 11.01(6) defines a certificate of authenticity as a "written statement by an art merchant confirming, approving or attesting to the authorship of a work of fine art or multiple, which is capable of being used to the advantage or disadvantage of some person." *Id.* § 11.01(6).

85. Section 442.322(2)(a) of the Michigan statute states:

When an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, the description shall be presumed to be part of the basis of the bargain and shall create an express warranty of the authenticity of the authorship as of the date of the sale or exchange. The warranty shall not be negated or limited because the art merchant in the written instrument did not use formal words such as "warrant" or "guarantee" or because he did not have a specific intention or authorization to make a warranty or because any statement relevant to authorship is, or purports to be, or is capable of being merely the art merchant's opinion.

MICH. COMP. LAWS ANN. § 442.322(2)(a). Section 442.321(1)(a) specifically defines a public auctioneer as an art merchant. *Id.* § 442.321(1)(a).

86. *Id.* § 442.321(1)(f). This section defines "written instrument" as

a written or printed agreement, bill of sale, or any other written or printed note or memorandum of the sale or exchange of a work of fine art by an art merchant and includes a written or printed catalog or other prospectus of a forthcoming sale as well as any written or printed corrections or amendments thereof.

Id.

sumes no risk, liability or responsibility for the material facts stated."⁸⁷ Furthermore, the disclaimer is ineffective if the art work turns out to be a counterfeit or the information given "is proved to be, as of the date of sale or exchange, false, mistaken or erroneous."⁸⁸ The auction houses are able to circumvent this to some extent, however, by qualifying the attribution to artist or date by a complex system of terminology that limits their liability in case of misattribution.⁸⁹ One may question the extent to which these terms would be understood by the prospective purchaser. It is

87. N.Y. ARTS & CULT. AFF. LAW § 13.01(4)(b)(i).

88. *Id.* § 13.01(4). This section of the New York statute provides in part:

(a) An express warranty and disclaimers intended to negate or limit such warranty shall be construed wherever reasonable as consistent with each other but subject to the provisions of section 2-202 of the uniform commercial code on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is unreasonable.

(b) Such negation or limitation shall be deemed unreasonable if:

(i) the disclaimer is not conspicuous, written and apart from the warranty, in words which clearly and specifically apprise the buyer that the seller assumes no risk, liability or responsibility for the material facts stated concerning such work of fine art. Words of general disclaimer are not sufficient to negate or limit an express warranty; or

(ii) the work of fine art is proved to be a counterfeit and this was not clearly indicated in the description of the work; or

(iii) the information provided is proved to be, as of the date of sale or exchange, false, mistaken or erroneous.

Id. It is interesting to note that the second provision of subsection 4(b) imposes a continuing strict liability on the art merchant because liability is not qualified by when the art work is discovered to be a "counterfeit." In the case of a misattribution, however, the art merchant is liable only if the information was known to be incorrect as of the date of sale. Apparently no liability attaches if this is established later. Section 442.323 of the Michigan statute is virtually identical to the quoted portion of the New York statute.

89. Section 13.01(2) of the New York law requires that in construing the warranty, "due regard shall be given the terminology used and the meaning accorded such terminology by the customs and usage of the trade at the time and in the locality where the sale or exchange took place." N.Y. ARTS & CULT. AFF. LAW § 13.01(2). Section 13.01(3) further defines this terminology by specifying that

(a) The work is by a named author or has a named authorship, without any limiting words, means unequivocally, that the work is by such named author or has such named authorship;

(b) The work is "attributed to a named author" means a work of the period of the author, attributed to him, but not with certainty by him; or

(c) The work is of the "school of a named author" means a work of the period of the author, by a pupil or close follower of the author, but not by the author.

Id. § 13.01(3). The Michigan statute contains virtually the same provision in § 442.322 (2)(b).

most likely that the sophisticated buyer, who least needs protection, will benefit the most from these distinctions, whereas the unsophisticated, unless an avid reader of the information at the front of the catalog, will be less likely to benefit.⁹⁰ Although the apparent intent of this legislation was to clarify the application of the U.C.C. warranty provisions to sales of art works and make such application more effective in protecting the consumer,⁹¹ some commentators have argued that this legislation is duplicative of the

A Sotheby Parke-Bernet catalog of the early 1970s, which predated the latest version of this statute, stated under "Glossary" that "all statements in this catalogue as to authorship, period, culture, source or origin are qualified statements and are made subject to the provisions of the conditions of sale" There follows a list of terms used in the catalog with their explanations. For example: author's name followed by "ascribed to the named artist" indicates the highest category of authenticity but is not an unqualified statement as to authorship; "attributed to . . ." indicates an attribution on the basis of style but with less certainty than the preceding; "circle of . . ." indicates work by an unknown hand closely associated with the named artist; "studio of . . ." indicates a work by an unknown hand executed in the style of the artist under his direct supervision; "school of . . ." indicates a work by a pupil or close follower of the artist; "manner of . . ." indicates a work in the style of the artist and probably later; "after . . ." indicates a copy of a known work of the artist. PARKE-BERNET, GALLERIES, OLD MASTER AND ENGLISH PAINTINGS (New York Galleries 1971).

90. Section 13.03 of the New York statute provides that the intentional issuance of a false certificate of authenticity is a class A misdemeanor. N.Y. ARTS & CULT. AFF. LAW § 13.03. The statute also provides additional, special protections for purchasers of visual art objects produced in multiples. Section 13.05 makes the express warranty provisions of section 13.01 available to the buyer of multiples who is also an art merchant (who is otherwise excluded from protection under this section). *Id.* § 13.05. Furthermore, article 15 places an affirmative obligation on the art merchant who sells a visual art object produced in multiples to disclose certain information about the object. *Id.* §§ 15.01-19. The information required varies with the date of the object being sold. Hobart, *supra* note 58, at 262-64. California, Illinois, Maryland, and Hawaii also have enacted special legislation to protect purchasers of fine art multiples, presumably because this area seems to be particularly susceptible to flagrant abuses. CAL. CIV. CODE §§ 1740-1745.5 (West 1985); ILL. REV. STAT. ch. 121-½, §§ 361-69 (Smith-Hurd 1987); Hobart, *supra* note 58, at 265-70; Comment, *Art Forgery*, *supra* note 9, at 350. Attempts to enact broader art legislation in these and other states have been unsuccessful, presumably because the legislators believed that the U.C.C. provided adequate protection. Du Boff, *supra* note 9, at 1012.

91. See Du Boff, *supra* note 9, at 1010-11 (New York statute provides greater protection to consumer than U.C.C. does, particularly by limiting art merchant's ability to disclaim express warranty); Comment, *Art Forgery*, *supra* note 9, at 339-41, 342-51 (statute's warranty provision shifts burden of proving authenticity from buyer to seller and eliminates uncertainty created by U.C.C.); Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 555-56 (New York statute helps consumer but does not go far enough); Comment, *Current Practices*, *supra* note 9, at 558-63 (despite drawbacks, New York statute offers consumers the best protection particularly by shifting responsibility of proving authenticity to seller and eliminating uncertainty).

U.C.C. provisions or, even worse, detrimental to the proper functioning of the art market.⁹²

This specialized New York legislation has been used only once to define more precisely the application of the U.C.C. to the problems raised by dealing in art objects. In *Dawson v. G. Malina, Inc.*,⁹³ the plaintiff had purchased eleven Chinese ceramics and jade sculptures from the defendant. After consulting with several experts who expressed doubts concerning the authenticity of one of the pieces, Dawson attempted to rescind the purchases.⁹⁴ GMI, the defendant, agreed to the return of several of the objects, but the disposition of five remained in dispute. The central issue in the case was whether the defendant had breached a warranty in connection with the sale of these five disputed items.⁹⁵ Dawson argued that GMI had expressly warranted that the objects were in conformity with the descriptions provided in letters, invoices, and the final bill of sale sent by GMI.⁹⁶ Dawson relied on section 219-c of the New York General Business Law, which incorporated any benefit that might be derived from section 2-313 of the New York Commercial Code. The court interpreted this statute as intending to eliminate any uncertainty as to whether an art dealer's representations concerning authorship constituted an affirmation of fact, so as to create an express warranty under the U.C.C., or merely an expression of opinion.⁹⁷ In fact, the New York statute was so clear that the defendant conceded that the descriptions of the objects consti-

92. See, e.g., Comment, *supra* note 82, at 953-62 (protection afforded consumer under New York statute is similar to that provided by U.C.C. although the former makes it easier for an art merchant to disclaim an express warranty).

93. 463 F. Supp. 461, 463 (S.D.N.Y. 1978).

94. *Id.*

95. *Id.* at 465.

96. *Id.* at 466.

97. *Id.* at 465 n.3. At the time of the *Dawson* decision, § 219-c of the General Business Law, which was later replaced by § 13.01 of the Arts and Cultural Affairs Law, stated:

Any provision in any other law to the contrary notwithstanding: 1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, such description (i) shall be presumed to be part of the basis of the bargain and (ii) shall create an express warranty of the authenticity of such authorship as of the date of such sale or exchange. Such warranty shall not be negated or limited because the seller in the written instrument did not use formal words such as "warrant" or "guarantee" or because he did not have a specific intention or

tuted express warranties, and the only issue litigated was whether the descriptions given were significantly incorrect, so as to constitute a breach of the express warranties.⁹⁸

In order to determine whether the warranties had been breached, the court had to decide the appropriate standard of proof and determine which party should bear the burden of proof.⁹⁹ Dawson argued that he should have to show only that the works of art failed in any respect to conform to the descriptions given, whereas the defendant maintained that the applicable standard should take into account the inherent inexactness of any attribution of a work of art.¹⁰⁰ The court determined that the plaintiff had the burden of proof and that the appropriate standard would be based on whether the representations "can be said to have had a reasonable basis in fact, at the time that these representations were made, with the question of whether there was such a reasonable basis in fact being measured by the expert testimony provided at trial."¹⁰¹ Using the testimony of expert witnesses presented by both parties, the court concluded that three of the five warranties given for the disputed objects did not have a reasonable basis in fact and that the defendant had thereby breached these warranties.¹⁰²

The Michigan Fine Arts statute, which is virtually the same as the New York Arts statute, was used similarly in *Lawson v. London Arts Group*.¹⁰³ In *Lawson*, the plaintiff had purchased for \$29,000 a pastel that the dealer certified was an original work of

authorization to make a warranty or because any statement relevant to authorship is, or purports to be, or is capable of being merely the seller's opinion.

N.Y. GEN. BUS. LAW, § 219-c (McKinney Supp. 1977), *quoted in Dawson*, 463 F. Supp. at 465-66.

98. *Dawson*, 463 F. Supp. at 466.

99. *Id.* at 466-67.

100. *Id.*

101. *Id.* at 467.

102. *Id.* at 467-71. The defendant had provided unequivocal attributions of the five Chinese pieces to specific dynasties and dates. In the cases of the three warranties that the court concluded had been breached, expert witnesses for both plaintiff and defendant stated that the pieces might belong to the attributed time periods but more probably belonged in different dynasties or periods. The court weighed the relative credibility and degree of certainty of the different experts' opinions in determining whether the plaintiff had met his burden of establishing a breach by a preponderance of the evidence. *Id.*

103. 708 F.2d 226 (6th Cir. 1983).

Frederick Remington. Several years after the sale, the buyer began to doubt the work's authenticity and brought suit after her suspicions were confirmed by an expert. At the time of trial, an original Remington was considered to be worth between \$150,000 and \$175,000.¹⁰⁴ Three issues were decided by the court on appeal. First, it determined that the dealer's written statement that "this is to certify that An Indian Brave by Frederick Remington Drawing done in 1901 . . . is an original work as described" constituted an express warranty in accordance with statutory provision.¹⁰⁵ Second, the court affirmed the jury's finding that the warranty had been made in bad faith because the dealer knew or should have known that the pastel was a copy and had made no effort to authenticate it.¹⁰⁶ Because the warranty was made in bad faith, the plaintiff was entitled to full appreciation damages, which in this case the jury found to be \$140,000.¹⁰⁷

The third and most complicated issue was which statute of limitations to apply. The court characterized the dealer's warranty as one of quality or fitness and so applied the discovery rule to the four-year limitation period. The limitation period therefore did not commence until the plaintiff began to doubt the work's authenticity.¹⁰⁸ The measure of damages awarded and the application of the discovery rule provide significant additional protection for the purchaser of art works and vary significantly from accepted practices of dealers and auction houses in the absence of statutory regulation. The *Dawson* and *Lawson* cases demonstrate that although the U.C.C. by itself may not deal adequately with the problems presented in the art market, in combination with specialized legislation targeted for the art market, such as that existing in New

104. *Id.* at 227.

105. *Id.* The court relied on § 442.322(2)(a) of Michigan's Warranty in Fine Arts Statute. MICH. COMP. LAWS ANN. § 442.322(a)(2) (West Supp. 1987), discussed *supra* notes 85-86 and accompanying text.

106. 708 F.2d at 227-28.

107. *Id.* at 228. The written warranty given to the plaintiff limited her damages to return of the purchase price if the work was not an original. *Id.* at 227. Section 442.324(3) of the Michigan statute provides that an art merchant who makes a warranty in good faith is liable only for return of the purchase price. MICH. COMP. LAWS ANN. § 442.324(3). However, § 442.324(1) states that this act is to be considered supplementary to, rather than exclusive of, any other rights or liabilities provided by law. *Id.* § 442.324(1).

108. 708 F.2d at 228-29 (citing MICH. COMP. LAWS ANN. § 600.5833).

York and Michigan, the Code may make a considerable contribution to clarifying the duties of the auctioneer or dealer to a purchaser, particularly in the area of warranties and misrepresentation.

In conclusion, adoption of the U.C.C. alone may do little to provide increased protection for the consumer over what the common law affords. Such protection is dependent on the distinction between the making of an opinion and the making of an express warranty. Sellers of art works generally have succeeded in claiming that their statements concerning authenticity and authorship constituted mere representations rather than warranties.¹⁰⁹ Although the Code has been adopted in virtually every state, its failure to go beyond the common law in this particular area once again raises the question of the need for additional consumer protection through either statutory or decisional law.

B. Warranties of Title

U.C.C. section 2-312 provides that in every contract for the sale of goods, the seller warrants that the title is good and the transfer rightful.¹¹⁰ Under certain circumstances, however, it is assumed that the buyer realizes the seller is not claiming to convey good title or is claiming to convey only such title as a third person may

109. One may agree with another commentator's statement that by a more realistic view, "the Code, which purports to deal with all forms of personal property, does not always draw appropriate distinctions which are required to be made where a work of fine art or other unique article is involved." F. FELDMAN & S. WEIL, *ART WORKS*, *supra* note 50, at 287-88; see also Feldman, *New Protection for the Art Collector—Warranties, Opinions and Disclaimers*, 23 REC. A.B. CTRY N.Y. 661 (Dec. 1968); Hodes, *Wanted: Art Legislation for Illinois*, 57 ILL. B.J. 218 (1968).

110. U.C.C. § 2-312 provides:

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

have.¹¹¹ As an example, an auction house does not generally have or claim to have title to the items it offers at auction.¹¹² A dealer, on the other hand, generally purchases the art work from the original owner or artist, and in such situations the warranty of title should be assumed to apply.¹¹³ When a buyer purchases from an auction house, however, there may be a question whether the auction house has made such a warranty, although the owner or consignor undoubtedly has, and thus whether the auction house has any liability if the owner, who may be unavailable for suit, ultimately cannot convey good title. In addition, whether a dealer or auction house is involved, a question may arise as to whether the warranty has been breached and, if so, what the appropriate measure of damages should be.

The case of *Menzel v. List*¹¹⁴ illustrates the issues raised when an auction house or dealer conveys a work of art without also conveying good title. In 1932, the Menzels purchased a Chagall painting in Belgium for the equivalent of \$150. When the Germans invaded Belgium during World War II, the Menzels left. When they returned to their apartment after the war, they discovered that the painting had been taken and a receipt left in its place by the Ger-

111. *Id.* § 2-312(2) & comment 5 (1978).

112. *Id.* Comment 5 mentions sales by sheriffs, executors, foreclosing lienors, and persons "similarly situated" but does not specify auction houses. Nonetheless, at least those purchasers familiar with auction house practices should be assumed to realize that the auction house does not own the items it auctions. For a discussion of the distinctions in the ways that auction houses and dealers operate, see *infra* notes 265-69 and accompanying text. The 1987 New York regulations of auctioneers prohibit an auction house from disclaiming the warranty of title and require reimbursement of the purchaser if the title to the auctioned item later proves not to have been transferable. CITY OF NEW YORK ADMIN. CODE § IV, ¶ 24 (1987).

113. For example, a current case involves the sale of an El Greco painting reportedly for \$2 million by a New York dealer, Wildenstein, to a Dutch dealer who intended to resell the painting to a Japanese art gallery. Wildenstein did not inform the Dutch dealer that the painting was subject to claims by the Romanian government, which asserted that it, and not the Romanian royal family that had sold the painting to Wildenstein, was the true owner. Although the Romanian government's claim was rejected in a suit brought against Wildenstein, the Dutch dealer alleges that it has been unable to resell the painting to the Japanese art gallery because of the cloud on its title. The Dutch dealer has now sued Wildenstein for \$30 million, alleging misrepresentation, breach of warranty of title, breach of contract, damage to its reputation, and interference with business relations. *Van Rijn v. Wildenstein & Co.*, 1987 U.S. Dist. *lexis* 3955, No. 85-3597 (S.D.N.Y. May 18, 1987) (denying motions in limine); Burnham, *supra* note 5, at 28, col. 4.

114. 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

man authorities. In 1955, the owners of a New York art gallery purchased the painting in Paris for \$2800 and resold it to Albert List for \$4000. In 1962, Mrs. Menzel recognized the painting in an art book that identified List as the owner.¹¹⁵ She then brought suit against List to recover the painting,¹¹⁶ and he in turn impleaded the New York art gallery for breach of an implied warranty of title and asked for the painting's fair market value of \$22,500.¹¹⁷

The court, after returning the painting to Mrs. Menzel, held that List was entitled to the benefit of his bargain, the fair market value of the painting at the time of its return to Menzel, rather than simply rescission, which would have given List only the purchase price plus interest.¹¹⁸ The court thus placed the full burden of investigation as to the state of title on the seller, even though in this case the sellers argued that this would expose them to "potentially ruinous liability" and that their own seller was essentially judgment proof.¹¹⁹ Finally, the court indicated that the

115. *Id.* at 93-94, 246 N.E.2d at 742-43, 298 N.Y.S.2d at 980.

116. *See infra* notes 186-89 and accompanying text for a discussion of Mrs. Menzel's claim against List for return of the painting and the application of the statute of limitations.

117. 24 N.Y.2d at 94, 246 N.E.2d at 743, 298 N.Y.S.2d at 980.

118. *Id.* at 97-98, 246 N.E.2d at 745, 298 N.Y.S.2d at 983.

119. *See id.* at 98, 246 N.E.2d at 745, 298 N.Y.S.2d at 983. The imposition of absolute liability for breach of a warranty of good title has interesting implications for the sale of antiquities with questionable title. Under this theory, a purchaser who had to return an antiquity to its country of origin might be able to obtain not only rescission of the sale but also "benefit of the bargain" damages if the value of the object has appreciated in the interim.

The modern antiquities laws of many Mediterranean, Middle Eastern, and Central and South American countries make all antiquities the property of the country in which the object is found. Bator, *Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 286-87 (1982). Therefore, any archaeological object that left the country after the date of enactment of the law is "stolen property" unless taken with specific government permission. 1 J. MERRYMAN & A. ELSER, *supra* note 6, at 115, 120-21. In addition, some countries have prohibited the export of objects of archaeological or historical value, even though the exporter may have good title to the item. *Id.* at 115; Bator, *supra*, at 287. Thus, although such an object may enter the United States legally, the purchaser's title to the object may be in doubt, and the country of origin could perhaps argue successfully for its return. This point, however, rarely has been litigated in U.S. courts. *See, e.g., Jeanneret v. Vichey*, 693 F.2d 259, 267 (2d Cir. 1982) (illegal exportation of art works from country of origin not equated with failure of good title); *United States v. McClain*, 545 F.2d 988, 1001-02 (5th Cir. 1977) (National Stolen Property Act applies to objects taken wrongfully from proper owner although not to objects illegally exported from country of origin); *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974) (affirming conviction of defendants for transporting art works stolen from Guatemala); *Winkworth v. Christie, Manson & Woods*,

buyer has a choice of remedies: rescission when the value of the piece has depreciated or damages to compensate for the lost expectation interest in case of appreciation.¹²⁰

Another dispute, *Abrams v. Sotheby Parke-Bernet, Inc.*,¹²¹ discussed the extent of the auctioneer's responsibility to investigate the state of the title of items offered for sale at auction. This suit involved the auction of a collection of 59 Hebrew books and manuscripts dating from the fifteenth and sixteenth centuries. These items originally had belonged to the library of the Hochschule für die Wissenschaft des Judenthums, an institution of Jewish learning located in what is now East Berlin which had been closed by the Nazi government in 1942. Sotheby's offered the collection for auction in the spring of 1984 on consignment from a private individual. Sotheby's claimed to have undertaken an extensive investigation into the state of the title and was satisfied that title was properly in the consignor.¹²²

The suit was based partially on various asserted misrepresentations in the catalog that Sotheby's had prepared in conjunction with the sale, including the statement that the offerings were comprised of "selected property from various American and Continental collections."¹²³ The primary contention, however, was that the consignor could not convey proper title to the collection and that

Ltd., 1 All E.R. 1121, 1135-36 (1979) (purchaser in Italy of art works stolen in England acquired good title even when art works were returned to England, as long as Italian law recognized purchaser as having good title). See also Bator, *supra*, at 287 (U.S. law does not equate illegal export of an object with failure of title); Comment, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 443 & n.4 (1983) [hereinafter Comment, *Title Disputes*] (U.S. policy has generally been to refuse to enforce foreign restrictions on export of art and archaeological objects); Comment, *Title to Illegally Exported Items of Historic or Artistic Worth*, 33 INT'L & COMP. L.Q. 203, 206-07 (1984) (discussing the *lex situs* rule applied in the *Winkworth* decision). Under the reasoning of *Menzel v. List*, the dealer could be held liable to the purchaser for the value of such works with invalid title if the country of origin succeeded in obtaining the return of the object. See *supra* note 118 and accompanying text.

120. 24 N.Y.2d at 99, 246 N.E.2d at 745, 298 N.Y.S.2d at 984.

121. No. 42255-84, slip op. at 1-2 (N.Y. Sup. Ct. Aug. 24, 1984) (granting motion for preliminary injunction).

122. *Id.*

123. *Id.*, slip op. at 3.

Sotheby's thus had failed to disclose adequately the questionable state of the title to prospective purchasers.¹²⁴

Although this suit was expected to establish the requisite standards for an auction house's research into the quality of title of a prospective consignor, it never came to trial and was settled without any finding of fault or liability.¹²⁵ Sotheby's, however, claimed to have undertaken an extensive study of the collection's background and the propriety of the sale. Routine procedure apparently involved checks with the FBI, study of stolen property lists

124. *Id.*, slip op. at 1-5. At the time the suit was initiated, the state Attorney General and other interested parties thought that the consignor was a former Nazi who presumably had appropriated the books and manuscripts after the closing of the Hochschule. The consignor, however, turned out to be the wife of a Professor of Talmudic Studies at Hebrew Union College who also had been on the faculty of the Hochschule. Professor Guttman claimed that he had been given the books and manuscripts by the Chairman of the Board of the Hochschule, Dr. Heinrich Veit Simon, in exchange for successfully smuggling the books to safety from Nazi Germany in 1938. Questions were raised as to whether Dr. Veit Simon had in fact given (as opposed to entrusted) the books to Professor Guttman and whether Dr. Veit Simon had the authority, pursuant to the Hochschule's internal regulations, to transfer title without the consent of the remaining members of the Board of Directors. Although these questions were never resolved, due to the settlement of the case, a temporary restraining order was granted after the sale to prevent the distribution of the auctioned items and the disbursement of the funds realized by the sale. In granting the order, the judge stated that given Dr. Guttman's silence and secrecy for over forty years, his "actions [were] not consistent with a firmly held belief in his rightful title" and that the Attorney General had made a preliminary showing of likelihood of success on the merits. *Id.*, slip op. at 8-9. See Bleich, *The Controversy Concerning the Sotheby Sale*, 8 CARDOZO L. REV. 91, 91-97 (1986); Comment, *Why Is This Sale Different from All Other Sales? Abrams v. Sotheby Park-Bernet, Inc.*, 4 CARDOZO ARTS & ENT. L.J. 139 (1985).

125. Stipulation and Order of Settlement, *Abrams v. Sotheby Parke-Bernet, Inc.*, No. 42255-84 (N.Y. Sup. Ct. July 16, 1985), slip op. at 1-2. The settlement agreement provided that any books and manuscripts sold at the Sotheby's auction to private individuals would be returned to Sotheby's and then redistributed to public institutions specializing in higher Jewish learning or with Judaica library collections. Those individuals would receive a refund of the purchase price of these items. A particularly old Bible and Machzor sold to the Jewish Theological Seminary were to be exhibited for several months at particular institutions in the United States and then sold, respectively, to Yeshiva University and the Jewish National University Library. These two institutions purchased the Bible and the Machzor for \$900,000, which came from an anonymous donation made specifically for this purpose. The Jewish Theological Seminary was refunded the purchase price for these two items. Professor Guttman was to receive \$900,000, and Sotheby's seems to have given up most or all commissions earned in connection with the auction. *Id.*, slip op. at 2-11.

Another controversy, involving Sotheby's and the Deshong Museum, also concerned the consignment of stolen art works. Because this case was also settled out of court, it does not elucidate the standard of care an auction house should utilize in accepting items on consignment. 2 F. FELDMAN & S. WEIL, *ART LAW*, *supra* note 50, at 258-59.

and bills of sale, and public knowledge about the history of an object. In the case of the Guttmann collection, Sotheby's also had studied the history of the sale of Jewish books and manuscripts in private sales and public auctions and had consulted with Jewish scholars, librarians, and book dealers. Legal research was undertaken by both Sotheby's in-house counsel and a German law firm to investigate German and postwar restitution law.¹²⁶ Whether such an apparently extensive investigation would have proven sufficient to establish that Sotheby's had fulfilled its obligations to prospective purchasers remains unanswered.

In attempting to establish whether a prospective consignor of items to be offered for sale has the requisite quality of title, customary auction house practice apparently relies primarily on a contract, signed by the owner, stating that the owner has the right to consign the property and that title and right to possession will pass to the purchaser free of all liens.¹²⁷ Auction houses also rely on the considerable publicity that accompanies the auctioning of major works of art to prevent the attempted disposition of stolen property through public auction. In addition, auction houses occasionally will research the pedigree of items offered for sale when the circumstances warrant, as demonstrated in the *Abrams* case.

The more difficult question is the determination of what happens upon the discovery, after the sale of an object, that the object was stolen property. Customary practice, according to the presi-

126. McGill, *How Sotheby's Research Rare Hebrew Books and Papers for Auction*, N.Y. Times, Aug. 30, 1984, at C17, col. 1 (late ed.). Although Sotheby's research did appear to be extensive, the Attorney General and other interested parties pointed to several factors that should have made Sotheby's suspicious, including the lack of any documentation to support Guttmann's claims, the bylaws of the Hochschule, which would have prevented such a transfer, and the secrecy with which Guttmann dealt with the materials for over forty years. The auction house of Christie's apparently was also contacted concerning the collection, but it had not initiated any investigation at the time that Sotheby's acquired the books and manuscripts. *Id.*

127. The following discussion of auction house practices regarding title of objects offered for sale is based on interviews with officials at New York's four largest art auction houses (Sotheby's, Christie's, Phillips Son & Neale, and William Doyle Galleries), as reported in Reif, *Auctions—The Silent Role of Consignors*, N.Y. Times, Aug. 2, 1985, at C23, col. 1 (late ed.).

dent of Christie's, is to refund the entire purchase price to the buyer and return the object to the rightful owner.¹²⁸

Although this may appear to be a relatively generous practice on the part of auction houses, it does not seem to comport with the law, at least as enunciated in the *Menzel* decision.¹²⁹ According to that case, the disappointed buyer is entitled to the expectation interest and not merely rescission of the sale, which is what the voluntary practice appears to afford. The auction house therefore must not only refund the purchase price but also give the buyer the fair market value of the item at the time it is returned to its rightful owner.¹³⁰ An additional distinction must be made, however. *Menzel* involved not an auction house but an art gallery or dealer, and as will be discussed later, different standards of duties and liabilities may apply to each.¹³¹ Because the *Abrams* case was never decided on its merits, apparently no reported decisions determine the appropriate remedy to be afforded the auction purchaser of stolen items.

C. Auction House Practices and Self-Regulation

Several practices commonly followed by auction houses represent attempts by the industry to respond to legal criticism and court decisions and to accommodate changes in the art market as well. One of the more controversial practices is the use of the "reserve" system of bidding. Under this system, the consignor (usually the owner or an agent) and the auction house agree on a secret price beneath which only the consignor may purchase the art work. If this price is not met in the bidding, then the consignor "buys in" the work and, in addition, pays a commission of approximately five percent, which is less than the commission paid for an actual sale.¹³² This system can become very complicated if several items are consigned with a combined reserve or floating reserve, so that

128. *Id.* The refund to the buyer is made even if the auction house has turned over the proceeds to the consignor and the consignor is unavailable for suit.

129. 24 N.Y. 2d 91, 98, 246 N.E.2d 742, 745-46, 298 N.Y.S.2d 979, 984 (1969).

130. *Id.* at 97, 246 N.E.2d at 745, 298 N.Y.S.2d at 983. See *supra* notes 118-20 and accompanying text.

131. See *infra* notes 265-69 and accompanying text.

132. 2 F. FELDMAN & S. WEIL, ART LAW, *supra* note 50, at 192; F. FELDMAN & S. WEIL, ART WORKS, *supra* note 50, at 356; 2 J. MERRYMAN & A. ELSÉN, *supra* note 6, at 505-07.

the reserve price can fluctuate during the progress of the sale.¹³³ Finally, the auction house, in publishing the sale prices of art works, may list a repurchase by the owner at the reserve price in the same way as a sale to a third party. As a result, the owner could set a high reserve price, and, even if the object did not sell at this high price, the work would receive a market valuation equivalent to the reserve because the object was assumed to have actually sold at that price. The owner thus would be able to inflate the value of that work as well as that of other works by the same artist.¹³⁴

In response to criticism, Sotheby's changed this practice in the early 1970s. The "Conditions of Sale" listed in the front of the auction catalog now states that a reserve system may be in effect and that the catalog includes an estimated value that is above the reserve price.¹³⁵ In this way, a potential buyer would have at least some idea of the reserve price and, at the auction, would have some indication whether the bidding was against a third party buyer or against the auctioneer "bidding" on behalf of the owner. In addition, a "buy in" by the consignor is no longer listed in the post-auction catalog as a sale.

In 1972, Sotheby's also instituted a policy of guaranteed prices. Under this policy, the auction house guarantees the owner a certain price, and if this price is not met, will itself purchase the item. Such a guarantee is subject to payment of an increased commission.¹³⁶ Although this practice is not in itself objectionable, it can be used in combination with the reserve system to make the auction house both the seller and the buyer of the object, setting up what is essentially a "mock auction." Such a system, using third-party bidders to legitimize what could be viewed as an attempt to create inflated values, may be unethical or even illegal.¹³⁷

133. 2 F. FELDMAN & S. WEIL, *ART LAW*, *supra* note 50, at 184-86; F. FELDMAN & S. WEIL, *ART WORKS*, *supra* note 50, at 356.

134. *See* 2 F. FELDMAN & S. WEIL, *ART LAW*, *supra* note 50, at 184-86, 191-92; 2 J. MERRYMAN & A. ELSEN, *supra* note 6, at 504-07.

135. *See, e.g.*, SOTHEBY PARKE-BERNET, *FINE JUDAICA: PRINTED BOOKS, MANUSCRIPTS AND WORKS OF ART* (New York Galleries, Nov. 24, 1982) [hereinafter *SOTHEBY'S, FINE JUDAICA*].

136. 2 F. FELDMAN & S. WEIL, *ART LAW*, *supra* note 50, at 192.

137. Feldman and Weil suggest that such a "mock auction" would constitute a misdemeanor under New York law. 2 F. FELDMAN & S. WEIL, *ART LAW*, *supra* note 50, at 192. The 1987 New York regulations prohibit the practice of guaranteed minimums unless its use is

Another major change in auction house practices occurred in reaction to the lower court decision in *Weisz*, even though that decision ultimately was reversed.¹³⁸ In 1973, Sotheby's announced that it would guarantee the authorship of all post-1870 works and the authenticity of pre-1870 works.¹³⁹ Several limits were put on this guarantee, however. First, it extends only to the heading in bold type listed in the catalog according to the technical terminology system of attribution established by the auction house.¹⁴⁰ Second, the guarantee is valid for only five years from the date of sale, regardless of when the discovery of lack of authenticity is made.¹⁴¹ In contrast, the court in *Weisz* applied the statute of limitations from the time of discovery, not the time of sale.¹⁴²

A purchaser probably will not undertake the kinds of sophisticated and expensive scientific testing required to determine the au-

disclosed in the catalog. CITY OF NEW YORK ADMIN. CODE § II, ¶ 11. Sotheby's catalog now specifies which objects are "owned property," defined as "property which . . . is owned solely or partially by us or an affiliate (and in the sale of which we are acting as a principal and not an agent)." The auctioneer may make bids to protect the reserve placed on the item by Sotheby's as owner. This practice is comparable to the bids which the auctioneer may make to protect the reserve placed on an item when it is consigned by an outside seller. SOTHEBY'S, FINE JUDAICA, *supra* note 135.

138. *Weisz v. Parke-Bernet Galleries*, 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (N.Y. App. Term 1974).

139. 2 F. FELDMAN & S. WEIL, ART LAW, *supra* note 50, at 195-97.

140. SOTHEBY'S, FINE JUDAICA, *supra* note 135. See *supra* note 89 and accompanying text.

141. SOTHEBY'S, FINE JUDAICA, *supra* note 135.

142. See *Weisz*, 67 Misc. 2d at 1083, 325 N.Y.S.2d at 582-83. In commenting on a 10-day limit imposed by the catalog's conditions of sale, the court in *Weisz* stated:

The rule was well established under the former Sales Act (and continues to be followed under the Uniform Commercial Code) that a limitation which applied to a claim that could not realistically be known before the end of the limitation was unreasonable and invalid. . . . The instant facts—where a buyer justifiably relied on a representation that a named artist created a work of art, was intended to rely on it, and no reason was presented for questioning the accuracy of the representation during the 10-day period—clearly come within that rule.

Id., 325 N.Y.S.2d at 582. The court applied the same reasoning to hold that the statute of limitations did not bar the action. *Id.* at 1083, 325 N.Y.S.2d at 583.

Regardless of whether the discovery rule should always be applied in such suits to modify the relevant statute of limitations, the auction house should not have the unilateral right to exact a waiver of legal rights from a prospective purchaser unless the waiver has been specifically and freely negotiated between the parties. For a fuller discussion of applicable statutes of limitation in the context of recovery of stolen art works, see *infra* notes 186-220 and accompanying text.

thenticity of a work, especially, for example, of an older archaeological object. The fortuitous decision of an expert to study a certain category of objects therefore is often the catalyst that leads to a discovery of lack of authenticity. Because a purchaser cannot reasonably investigate a work's authenticity, the court's decision in *Weisz* to start the statute of limitations at the time of discovery seems correct in this context.¹⁴³ Sotheby's guarantee thus attempts to limit considerably the legal recourse otherwise available to the purchaser. Furthermore, this guarantee is not assignable to subsequent purchasers,¹⁴⁴ which further restricts the relief that should be available.

Third, the guarantee states that rescission of the sale and return of the purchase price are "exclusive and in lieu of any other remedy which might otherwise be available as a matter of law."¹⁴⁵ In *Menzel*, which admittedly involved failure of title rather than failure of authorship, the court awarded the purchaser's expectation interest—that is, the value of the painting at the time of trial—rather than simple rescission.¹⁴⁶ As in *Menzel*, the difference between these two measures of damages can be considerable. According to the implication of the catalog statement, the purchaser, by participating in the auction, presumably agrees to the terms of the guarantee and thus forfeits the right to recover the larger amount of damages. Although this point apparently has not been litigated, one may question whether the notice printed in the catalog is adequate to constitute a waiver of legal rights. At the least, a court would again need to engage in consideration of questions of adequacy of notice, as in the *Weisz* decision.¹⁴⁷

Finally, one should note that this guarantee and the other changes in industry practice are voluntary changes that have been adopted to varying degrees by the different auction houses. Such voluntary practices do not afford the prospective purchaser of art

143. 67 Misc. 2d at 1083, 325 N.Y.S.2d at 583.

144. SOTHEBY'S, FINE JUDAICA, *supra* note 135, *Terms of Guarantee*, at para. 3.

145. *Id.* at para. 4.

146. 24 N.Y.2d 91, 97, 246 N.E.2d 742, 744-45, 298 N.Y.S.2d 979, 982-83. *See supra* notes 118-20 and accompanying text.

147. 67 Misc. 2d at 1080-81, 325 N.Y.S.2d at 580. *See supra* notes 29-41 and accompanying text.

works the same extent of protection as statutes and judicial decisions.

III. DUTIES TO THE OWNER, CONSIGNOR, OR ORIGINAL ARTIST

A. *Fraud and Misrepresentation*

Although the nature of the duty owed by the seller of art works to a buyer has not yet been fully developed by existing case law, the nature of the duty owed to the owner, consignor, or original artist is much clearer. The relationship between the seller and the owner is an agency relationship, and the duty thus resembles that of a fiduciary. This standard is well illustrated by the recent decision in *Cristallina S.A. v. Christie, Manson & Woods International, Inc.*¹⁴⁸

This case involved the attempted auction of eight Impressionist paintings by Christie's on behalf of a consignor, Cristallina, a corporation engaged solely in the purchase and sale of works of art. According to the complaint, Cristallina, through its representative Dimitri Jodidio, asked Christie's to arrange an auction of these paintings. In a series of meetings between February and April 1981, David Bathurst, Christie's president at the time, selected eight paintings, presented low and high estimates of the amount Jodidio could expect to realize at an auction, and emphasized the advantages of a public auction over a private sale. The lowest anticipated private sale figure was \$7,850,000; the auction estimates ranged from \$8,500,000 to \$12,600,000. Jodidio signed a consignment contract with Christie's, which then proceeded to advertise the sale and prepare a catalog for the auction.¹⁴⁹ This process also included setting reserve figures.¹⁵⁰

148. 117 A.D.2d 284, 502 N.Y.S.2d 165 (N.Y. App. Div. 1986).

149. *Id.* at 286-87, 502 N.Y.S.2d at 167-68.

150. *Id.* at 287 & n.2, 502 N.Y.S.2d at 168 & n.2. The setting of a reserve figure permits the owner and his or her agent, the auctioneer, to withdraw an item from auction if the highest bid is too low. Such withdrawal theoretically is explained by characterizing the bid as an offer and the hammering down of the item as the acceptance. As a result, there is no binding contract to sell until the auctioneer signifies acceptance. This reasoning was first set out by Lord Kenyon in *Payne v. Cave*, 100 Eng. Rep. 502 (1789), and is generally accepted in most common law jurisdictions and codified by the Uniform Sales Act, UNIF. SALES ACT § 21(2), reprinted in I. MARIASH, A TREATISE ON THE LAW OF SALES § 171, at 411-13 (1930), and the Uniform Commercial Code, U.C.C. § 2-328(2), (3). The theory is apparently re-

After the paintings arrived in New York but before public announcement of the auction, Christopher Burge, the head of Christie's Impressionist painting department, expressed his doubts to Bathurst concerning the auction appeal of the paintings. These doubts, however, were not passed on to Jodidio.¹⁵¹ In early May, just a few weeks before the sale, Burge suggested high estimates¹⁵² for the collection which were only slightly above the reserves suggested by Burge in February and approximately \$2,000,000 lower than the high presale estimate figures used by Bathurst in his initial discussions with Jodidio.¹⁵³ According to accepted industry practice and Christie's own policy as announced in its catalogs, the reserve, which is kept secret, is not supposed to exceed the high presale estimate.¹⁵⁴ Despite this policy, however, the reserves for several of the paintings equalled or exceeded the published high estimates.¹⁵⁵ In addition, at the last moment before the auction and without consulting Jodidio, Bathurst decided to add a "floating reserve" to two of the paintings, thus further increasing the discrepancy.¹⁵⁶

The sale itself was a virtual failure. Only one painting actually sold—a Degas, which received a record price of \$2,200,000.¹⁵⁷ After the sale, however, Bathurst advised Christie's press office that

jected, however, by many civil law nations. See Hickling, *Auctions Without Reserve*, 5 U. BRIT. COLUM. L. REV. 187, 187-191 (1970) (arguing that the common law should also permit auctions without reserve by characterizing the placing of an item for auction as the offer and the highest bid as the acceptance that creates a binding sale contract).

151. *Cristallina*, 117 A.D.2d at 287-88, 50 N.Y.S.2d at 168.

152. High and low estimates are published in the auction catalog to inform prospective purchasers of the approximate price range within which the auction house expects the final price to fall. *Id.* at 288, 502 N.Y.S.2d at 168.

153. *Id.* at 288 & n.3, 502 N.Y.S.2d at 168-69 & n.3.

154. *Id.* at 288, 502 N.Y.S.2d at 169.

155. For example, the reserve for one Van Gogh painting, "Houses," initially had been set at \$2,200,000. At Bathurst's recommendation, the reserve was raised in May to \$2,300,300, although the high estimate for the painting was only \$2,000,000. According to Burge, other reserve figures were excessively high and violated the normal practice, as Burge noted, that "[i]deally, reserves should be around 80 percent of our published estimates." *Id.* at 289, 502 N.Y.S.2d at 169. In addition, just a few days before the auction, Christie's advised the media that it expected to realize between \$5,000,000 and \$9,000,000 for the group of paintings. The total reserve, however, was set at \$9,250,000, which exceeded Christie's publicly announced expectations. *Id.* at 289-90, 502 N.Y.S.2d at 169.

156. *Id.* at 291, 502 N.Y.S.2d at 170.

157. *Id.*

three paintings had in fact sold, and this was subsequently confirmed by a formal press release approved by both Bathurst and Burge.¹⁵⁸

Cristallina then initiated a suit against Christie's, alleging fraudulent misrepresentation, negligence, breach of contract, and breach of fiduciary duty.¹⁵⁹ Cristallina's claims were based on Bathurst's conduct in selecting paintings that would be difficult to sell at auction, failing to advise Jodidio of questions concerning the appeal of these paintings, advising the media and the public that the value of the paintings was lower than that told to Jodidio, and setting reserves higher than the published high presale estimates.¹⁶⁰ The trial court granted summary judgment for Christie's and Bathurst, but this was reversed on appeal.¹⁶¹

The appellate division held that an auction house acts as an agent of the consignor and, as such, Christie's had "a fiduciary duty to act in the utmost good faith and in the interest of Cristallina, its principal, throughout their relationship."¹⁶² The court found that because Bathurst had not told Jodidio of Burge's doubts that the full value of the paintings could be realized through a public auction, Christie's had failed to inform Cristallina of vital information that might have led Cristallina to change its decision concerning the auction and thus preserve the value of the paintings.¹⁶³ In addition, by setting reserves higher than the presale high estimates in violation of its own policy, Christie's had made any sale of the paintings at auction virtually impossible.¹⁶⁴ In reinstating the claims for breach of contract, negligence, and breach of fiduciary duty, the court stated:

While an auctioneer, acting as the agent of an art seller, is not required to guarantee the results of a sale or, for that matter,

158. *Id.* The release of this false information led to the temporary suspension of the auction licenses of both Bathurst (for two years) and Burge (for four months) and the fine imposed on Christie's. *See supra* notes 3-4 and accompanying text.

159. *Cristallina*, 117 A.D.2d at 291, 502 N.Y.S.2d at 171.

160. *Id.* at 291-92, 502 N.Y.S.2d at 171.

161. *Id.*

162. *Id.* (citing *Elco Shoe Mfg., Inc. v. Sisk*, 260 N.Y. 100, 103, 183 N.E. 191, 192 (1932); *In re Premier Container Corp.*, 95 Misc. 2d 859, 866, 408 N.Y.S.2d 725, 729-30 (1978)).

163. *Id.* at 292-93, 502 N.Y.S.2d at 171.

164. *Id.* at 292-93 & n.7, 502 N.Y.S.2d at 171-72 & n.7.

even predict the price that a particular item will bring, he is nonetheless held to a standard of care commensurate with the special skill which is the norm in the locality for that kind of work.¹⁶⁵

Christie's argued that Cristallina's claim of misrepresentation should fail because Bathurst was merely expressing an opinion, not making a representation as to an existing fact. The latter is actionable, whereas the former is not.¹⁶⁶ This dichotomy between expression of opinion and statement of fact raises the same difficulty in establishing a claim for fraud as was considered in the discussion of buyers' claims for fraud and misrepresentation.¹⁶⁷ The court, however, rejected this argument, noting that even if Bathurst had been presenting only an opinion, he had an obligation to render such opinion truthfully and that even statements of value could, in certain circumstances, constitute a representation of existing fact.¹⁶⁸ The court also permitted Cristallina's claim for punitive damages to stand because it was based on allegations that Christie's had acted recklessly and in conscious disregard of Cristallina's rights.¹⁶⁹

In addition to the court's clear definition of the relationship between an auction house and the seller as that of agent and fiduciary, the court in *Cristallina* enunciated the standards for determining the appropriate measure of damages if Cristallina were to prevail at trial on the merits.¹⁷⁰ The court concluded that the measure of damages should be the difference between the paintings' pre-auction value and their value after the auction.¹⁷¹ The court

165. *Id.* at 293-94, 502 N.Y.S.2d at 172.

166. *Id.* at 294, 502 N.Y.S.2d at 172.

167. See *supra* notes 13-26 and accompanying text.

168. *Cristallina*, 117 A.D.2d at 294, 502 N.Y.S.2d at 172. Such statements are considered to constitute a statement of material existing fact when the author makes an expression or prediction about some future event and knows or anticipates at the time the statement is made that the event will not occur. *Id.* at 294-95, 502 N.Y.S.2d at 172.

169. *Id.* at 295, 502 N.Y.S.2d at 173.

170. *Id.* The case did eventually go to trial, only to be settled out of court after approximately one week of testimony. Under the settlement, Cristallina dropped its charges against Christie's in exchange for a cash payment of undisclosed amount. After announcement of the settlement, Burge stated, "The unpredictability of auctions has been upheld, and the impossibility of guaranteeing estimates." McGill, *An Out-of-Court Settlement Reached in Christie's Case*, N.Y. Times, Jan. 22, 1987, at C20, col. 1.

171. 117 A.D.2d at 295, 502 N.Y.S.2d at 173.

looked to Bathurst's initial estimates of the paintings' value and the value Christie's had placed on them for insurance purposes to establish pre-auction values.¹⁷² At the time the decision was written, four paintings had been sold privately at prices significantly lower than Bathurst's pre-auction appraisals. The difference in these values would serve as the basis for determining the damages to be awarded.¹⁷³

In reaching its conclusion, the court in *Cristallina* relied in part on another decision that also raised the issue of the appropriate measure of damages when the sale of art works involved the breach of a fiduciary duty. *In re Estate of Rothko*¹⁷⁴ concerned the disposition of the estate of the abstract expressionist painter Mark Rothko, which included 798 paintings. The executors of his estate agreed to sell these paintings to Marlborough Gallery with a fifty-percent commission, unless the paintings were sold to or through other dealers, in which case the commission was to be forty percent.¹⁷⁵ Several of the contract terms were questionable, including the inflated commission (paintings sold during Rothko's lifetime through Marlborough had earned only a ten-percent commission), interest-free installment payments over a twelve-year period, and the sale of so many paintings within a short period of time.¹⁷⁶ Of the three estate executors, one was a director, secretary, and treasurer of Marlborough and another was an aspiring artist who, within months after the signing of the estate contract, concluded another contract in which Marlborough agreed to represent him.¹⁷⁷ The court determined that all three executors had violated their

172. *Id.*

173. *Id.* For this differential to serve as the basis for the measure of damages, the decrease in the value of the paintings that had not been sold at auction must have been attributable to the failure of the auction. Burge had expressed his opinion that although the paintings were in fact worth Bathurst's original high estimates, the higher estimates were not obtainable at a public auction but apparently might have been obtainable through a private sale. *Id.* at 292, 502 N.Y.S.2d at 171. Given Bathurst's assertions to Jodidio that an auction would realize higher prices than a private sale and Jodidio's reliance on Bathurst's expert advice, this result seems to be appropriate.

174. 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449, *aff'g* 56 A.D.2d 499, 392 N.Y.S.2d 870 (1977).

175. *Id.* at 314-15, 372 N.E. 2d at 293, 401 N.Y.S.2d at 451.

176. *Id.*, 372 N.E.2d at 293-94, 401 N.Y.S.2d at 451-52.

177. *Id.* at 315-16, 372 N.E.2d at 294, 401 N.Y.S.2d at 452.

duty of loyalty and that two of them had serious conflicts between their personal interests and those of the estate.¹⁷⁸

The type of damages awarded for these breaches of fiduciary duty accords with that awarded in *Cristallina*. The New York Court of Appeals, relying on *Menzel v. List*,¹⁷⁹ upheld an award for what it termed "appreciation" damages.

To make the injured party whole, in both instances the quantum of damages should be the same. In other words, since the paintings cannot be returned, the estate is therefore entitled to their value at the time of the decree, i.e., appreciation damages. These are not punitive damages in a true sense, rather they are damages intended to make the estate whole. . . . [T]hese damages might be considered by some to be exemplary in a sense, in that they serve as a warning to others, but their true character is ascertained when viewed in the light of overriding policy considerations and in the realization that the sale and consignment were not merely sales below value but inherently wrongful transfers which should allow the owner to be made whole.¹⁸⁰

The holdings in *Rothko*, *Cristallina*, and *Menzel* are all in accord. When works of art are wrongfully transferred due to theft, breach of fiduciary duty, or fraudulent misrepresentation, the wronged party, whether the seller or buyer, is entitled to be made whole. In *Rothko* and *Menzel*, the value of the art works had appreciated between the time of the wrongful conduct and the date of the court decision. The wronged parties therefore were awarded appreciation damages; that is, the increase in value during the interim period.¹⁸¹ The decision in *Cristallina* demonstrates the application of similar principles when the value decreases. Here, the value of the paintings had decreased between the time of the

178. *Id.* at 319-20, 372 N.E.2d at 296-97, 401 N.Y.S.2d at 454-55. The case finally ended with the virtual dissolution of the Rothko Foundation. Following these court decisions, the foundation recovered and then distributed more than 1000 Rothko paintings to various museums. The attorney for one of the plaintiffs in the case stated that it "symbolized the commercialism of art today. It has too much of a dollar sign attached to it." Glueck, *Rothko Art Dispute Ends Quietly After 15 Years*, N.Y. Times, Aug. 20, 1986, at C17, col. 1.

179. 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

180. *Rothko*, 43 N.Y.2d at 322, 372 N.E.2d at 298, 401 N.Y.S.2d at 456 (citations omitted).

181. *Id.* at 322-23, 372 N.E.2d at 298-99, 401 N.Y.S.2d at 456-57; *Menzel*, 24 N.Y.2d at 97-98, 246 N.E.2d at 745, 298 N.Y.S.2d at 982-83.

wrongful conduct and their ultimate disposition, allegedly due to the wrongful conduct of the defendant.¹⁸² The court therefore ruled that the defendant could be held liable for "depreciation" damages; that is, the decrease in value attributable to the defendant's breach of fiduciary duty.¹⁸³ The fact that the same measure of damages is applicable, regardless of whether the injured party is the buyer or the owner of an art work, indicates that a unifying theory of the duties and liabilities that the art merchant owes to the buyer and the owner might be devised to ensure adequate protection for both types of participants in the art market.¹⁸⁴

B. Questions of Title.

In the previous section, the question was raised concerning the obligation of the seller to the buyer when a subsequent discovery reveals that the former was not able to convey good title to the latter. This section considers a different type of issue concerning passing of title—when can the auction house or dealer gain or convey good title to an art work even though the owner (sometimes the original artist) has not intended to pass title? This issue may arise in two different contexts—theft or entrustment—with differing consequences for the ability to convey title. In case of a theft, the common law rule is that a thief can never pass good title, whereas in an entrustment situation, under certain circumstances now generally regulated by the U.C.C., a merchant may be able to convey good title. However, several recent cases demonstrate that situations involving both theft and entrustment have now become intertwined with the law of adverse possession and the policy considerations which it invokes.

1. Theft

As stated above, the general rule under both the common law and the U.C.C. is that in a case of theft, the thief can never convey good title to stolen property because the original owner did not intend to part with the item. This is true even when the thief sells

182. *Cristallina*, 117 A.D.2d at 295, 502 N.Y.S.2d at 173.

183. *Id.*

184. See *infra* notes 279-300 and accompanying text for consideration of such a unifying theory of the art merchant's duties and liabilities.

the item to a bona fide purchaser for value who takes without notice of the theft.¹⁸⁵

In *Menzel v. List*, although the defendant was a bona fide purchaser for value, he did not obtain good title to the Chagall painting he had purchased from a New York art dealer because the painting had been stolen from the original owner.¹⁸⁶ In the lower court, List argued that the statute of limitations had run against the original owner, thereby barring the suit for replevin. The court rejected this defense, stating:

[W]ith respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner. . . . If that be so, then the statute of limitations did not begin to run until demand and refusal.¹⁸⁷

Because the plaintiff, Mrs. Menzel, had instituted her suit within three years of asking List to return the painting to her, her suit was not barred, even though more than twenty years had passed since the theft and seven years since List had acquired the painting.¹⁸⁸ The cause of action did not accrue until the rightful owner requested the return of the item and the demand was refused.¹⁸⁹ This case thus introduced into the law concerning theft of art works the "demand and refusal" requirement for the beginning of

185. The common law rule has been stated as: "One who purchases stolen property from a thief, no matter how innocently, acquires no title in the property; title remains in the owner. This rule places the responsibility of ascertaining true ownership on the purchaser." *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 216 (Tex. Ct. App. 1984) (citations omitted). This rule is codified in U.C.C. § 2-403(1), which states: "A purchaser of goods acquires all title which his transferor had or had power to transfer. . . ." Since a thief has no title, no title can be conveyed once a theft breaks the chain of conveyance.

186. 49 Misc. 2d 300, 302-03, 267 N.Y.S.2d 804, 807-08 (N.Y. Sup. Ct. 1966), *modified and aff'd*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969). For the facts of *Menzel*, see *supra* text accompanying notes 114-20.

187. *Menzel v. List*, 22 A.D.2d 647, 647, 253 N.Y.S. 2d 43, 44 (N.Y. App. Div. 1964) (affirming lower court's denial of motion to dismiss).

188. *Id.*

189. *Id.* Neither did the Statute of Limitations bar List's third-party complaint against the New York gallery that sold the painting to him. Stating that List's action was one for breach of the warranty of "quiet possession," the court held that List's quiet possession had not been disturbed until Menzel's request for the return of the painting. List thus was entitled to sue the gallery for breach of this warranty. 28 A.D.2d at 516, 279 N.Y.S.2d at 609.

the running of the statute of limitations or, in other words, for the accrual of the cause of action.

Although serving to protect the victim of art theft, the "demand and refusal" rule has met with considerable criticism. This criticism centers on the notion that the genesis of the rule is the protection of the innocent possessor of stolen property, who is not considered a converter of property until he or she refuses a demand for its return by its rightful owner.¹⁹⁰ The application of the rule in this type of situation, however, may serve to protect the knowing wrongdoer, in whose favor the statute of limitations begins to run at the moment the theft occurs. On the other hand, the rule does not protect the innocent possessor, who may possess the stolen property for many years before the statute of limitations begins to run because the original owner has not yet demanded return of the property.¹⁹¹

Another approach to this statute of limitations problem is exemplified by *O'Keeffe v. Snyder*.¹⁹² The artist Georgia O'Keeffe claimed that three of her paintings were stolen while on display in the gallery of her husband, Alfred Stieglitz, in 1946.¹⁹³ Nearly thirty years later, O'Keeffe discovered the paintings in the possession of a New York art gallery and sued in replevin to recover them.¹⁹⁴ Snyder, representing the Princeton Gallery of Fine Art, which had subsequently purchased the paintings, defended on the grounds that the six-year statute of limitations barred O'Keeffe's action.¹⁹⁵ The trial court granted summary judgment for Snyder, applying the statute of limitations to bar her suit.¹⁹⁶

190. The bona fide purchaser, who is unaware of the original theft (unlike the thief or one who takes with notice of the theft), should be given the opportunity to right the wrong before suit can be brought. *Gillet v. Roberts*, 57 N.Y. 28, 34 (1874). See Ward, *The Georgia Grind—Can the Common Law Accommodate the Problems of Title in the Art World, Observations on a Recent Case*, 8 J.C. & U.L. 534, 554 (1981-1982).

191. *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982). For criticism that the demand requirement for accrual of the cause of action is against public policy because it protects the bad faith-possessor but not the good-faith possessor, see Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1138-40 (1980).

192. 170 N.J. Super. 75, 405 A.2d 840 (1979), *rev'd*, 83 N.J. 478, 416 A.2d 862 (1980).

193. *O'Keeffe*, 83 N.J. at 484, 416 A.2d at 865.

194. *Id.* at 486, 416 A.2d at 866.

195. *Id.*, 416 A.2d at 864-65.

196. *Id.*, 416 A.2d at 865.

The Appellate Division reversed, finding that Snyder had failed to establish all the elements of adverse possession. Without these elements, his possession could not trigger the running of the statute of limitations and thus bar O'Keeffe's claim.¹⁹⁷ In particular, the court held that Snyder's possession and that of his predecessors in title, whose periods of possession were to be tacked so as to constitute the required number of years, were not sufficiently open and notorious.¹⁹⁸ This element of adverse possession failed primarily because the paintings had almost always been kept in private homes rather than on public display.¹⁹⁹ The intended purpose of the elements required to establish adverse possession, particularly the open and notorious requirement, is to give the rightful owner adequate notice of the existence of a cause of action. Without such notice, it may be inequitable to allow the statute of limitations to run.²⁰⁰ The standard for determining whether this element has been met is often formulated as a requirement that the adverse possessor use the property in the same manner as the rightful owner would.²⁰¹

Although this concept, borrowed from the law of real property, may work reasonably well with land or even with larger chattels, difficulties arise in its application to smaller chattels. The possessor of smaller items may well use them as a rightful owner would, yet such use and possession would never serve to give the true owner the requisite notice to initiate a claim against the posses-

197. *O'Keeffe*, 170 N.J. Super. at 87, 405 A.2d at 844.

198. *Id.* To establish title by adverse possession, the possession must be hostile or adverse; actual; visible, notorious, and exclusive; continuous; and under a claim or color of title. *Augustus v. Lydig*, 353 Ill. 215, 220, 187 N.E. 278, 281 (1933); see *Goen v. Sansbury*, 219 Md. 289, 295, 149 A.2d 17, 21 (1959).

199. 170 N.J. Super. at 90, 405 A.2d at 844.

200. *Id.* at 91, 405 A.2d at 844.

201. The notion that adequate notice is given when the property is used as the rightful owner would stems from the theory that the community at large can "take notice of" and presume, at least ostensibly, that the person whom the community views as treating the land (or other property) as his or her own is, in fact, the rightful owner. Because land is the primary form of property to which one may establish title by adverse possession, the matter-of-fact visible quality of the property lends itself to "community notice." See generally 3 AMERICAN LAW OF PROPERTY §§ 15.1-.3 (1952). See also *Augustus v. Lydig*, 353 Ill. at 221, 187 N.E. at 281 (stating that "[u]sing and controlling property as owner is the ordinary mode of asserting claim of title").

sor.²⁰² In fact, O’Keeffe argued that for the use to satisfy the elements of adverse possession, it would have to include public display of the items, for example in a museum.²⁰³

On appeal, the New Jersey Supreme Court recognized that the difficulties of establishing the elements of adverse possession for personal property might undermine the purposes of the statute of limitations and impose too heavy a burden on purchasers of art works.²⁰⁴ The court thus rejected the strict application of adverse possession doctrine to personal property²⁰⁵ and instead chose to fashion a rule that would be more responsive to the needs of the art world.²⁰⁶ The court also wanted to avoid harsh results caused by mechanical application of the statute of limitations, particularly given what it termed “the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance.”²⁰⁷

Recognizing that there is as yet no effective system for the registration of ownership of art works which would protect the interests of both owners and prospective good-faith purchasers, the court adopted the discovery rule to determine the commencement of the

202. See *O’Keeffe*, 83 N.J. at 495-96, 416 A.2d at 870-72.

203. *Id.* at 496, 416 A.2d at 871. The conclusion that the defenses of adverse possession and expiration of the statute of limitations were identical led the dissent at the appellate level to argue that the appellate court’s decision would provide a “handbook” for prospective art thieves of available art works. 170 N.J. Super. at 95-96, 405 A.2d at 850 (Fritz, J., dissenting).

204. *O’Keeffe*, 83 N.J. at 495-96, 416 A.2d at 870-72. For additional criticism of the appellate court decision (before its reversal), see Comment, *supra* note 191, at 1146-49.

205. 83 N.J. at 496, 416 A.2d at 872. In rejecting application of this doctrine to the *O’Keeffe* case, the court overruled *Redmond v. New Jersey Historical Soc’y*, 132 N.J. Eq. 464, 28 A.2d 189 (1942). Yet *Redmond*, which applied adverse possession to personal property, involved not a theft but the loan of a painting for an indefinite period of time and so was presumably inappropriate precedent for the *O’Keeffe* decision. For discussion of *Redmond*, see *infra* notes 252-53 and accompanying text.

The United States District Court for the Southern District of New York, in deciding a case involving a Monet painting stolen from Germany during World War II, also distinguished a defense based on the expiration of the statute of limitations and a defense based on adverse possession. The adverse possession defense was rejected because display of the painting in the possessor’s home did not satisfy the “open and notorious” requirement. *DeWeerth v. Baldinger*, 658 F. Supp. 688, 693-95, 697 (S.D.N.Y. 1987), *rev’d on other grounds*, 836 F.2d 103 (2d Cir. 1987).

206. *O’Keeffe*, 83 N.J. at 497, 416 A.2d at 872-73.

207. *Id.* at 497, 416 A.2d at 872.

statute of limitations for replevin of a painting.²⁰⁸ The statute thus would begin to run when "the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action."²⁰⁹ The court remanded the case to the trial court for determination of whether O'Keeffe had exercised reasonable diligence in attempting to discover the location of her paintings so as to delay the running of the statute of limitations.²¹⁰ Application of the discovery rule thereby focuses attention on the conduct of the original owner rather than on the conduct of the possessor, and in particular on whether the owner has acted with due diligence in pursuing his or her claim.²¹¹ In addition, the burden of proving such diligence is placed on the owner.²¹²

The most recent decision to comment on the application of the statute of limitations to bar a claim for the return of stolen art works by the original owner does not, however, involve either an auction house or a dealer. In *Kunstsammlungen zu Weimar v. Elicofon*,²¹³ the *Kunstsammlungen* claimed ownership of two paintings by Albrecht Dürer, executed in approximately 1499. At the end of World War II, some American soldiers apparently stole the paintings, which had been stored in a castle located in what is now East Germany. The paintings ultimately were sold to Edward Elicofon, who did not understand either their considerable value or their uncertain provenance.²¹⁴ Although the decision was fraught

208. *Id.* at 493, 416 A.2d at 870.

209. *Id.* at 491, 416 A.2d at 869.

210. *Id.* at 493-94, 416 A.2d at 870.

211. *Id.* at 497, 416 A.2d at 873.

212. *Id.* Justice Handler based his dissent on the principle that each transfer of the stolen property constituted a new and different act of tortious conversion. *Id.* at 511, 416 A.2d at 879-80 (Handler, J., dissenting). The statute of limitations therefore would begin to run again after each transfer of possession. The majority criticized this approach for failing to permit "tacking" of the possessions of successive adverse possessors. *Id.* at 503-04, 416 A.2d at 875-76. Justice Handler, however, suggested that tacking applied to adverse possession of personal property only in exceptional circumstances, such as those involving negotiable instruments. *Id.* at 511-12, 416 A.2d at 879-80. He also cited briefly, with approval, the "demand and refusal" rule of *Menzel*. *Id.* at 510, 416 A.2d at 879. *See supra* notes 186-91 and accompanying text. The majority relied on its analysis of the choice of law issue (New York or New Jersey) rather than on the validity of the *Menzel* decision as applied to this area of law. *Id.* at 489-90, 416 A.2d at 868.

213. 678 F.2d 1150 (2d Cir. 1982).

214. *Id.* at 1152-56.

with several convoluted issues of ownership,²¹⁵ the only one of import here was whether the claim of the rightful owner was barred by New York's three-year statute of limitations for recovery of chattels.²¹⁶ The United States Court of Appeals for the Second Circuit, relying on the "demand and refusal" rule enunciated in *Menzel*, held that the claim was not barred because the demand was made in October 1966 and the claim was filed in April 1969.²¹⁷ A necessary element of this holding was that the demand requirement was not merely a procedural requirement but rather a substantive one.²¹⁸ Finally, the court rejected the argument that this rule favored the thief over the bona fide purchaser because "familiar principles of equitable estoppel will prevent a wrongdoer from asserting the statute of limitations defense and thereby 'tak[ing] refuge behind the shield of his own wrong.'"²¹⁹ Although the Second Circuit admitted that it was limited by New York law and did not have the ability to change the law to comport with relevant policies, the court was clear that *Menzel* still appeared to be good law in New York and that the "demand and refusal" rule was not as open to criticism as had at times been implied.²²⁰

215. These issues involved whether the Kunstsammlungen or the Grand Duchess of Saxony-Weimar was the rightful owner of the paintings. *Id.* at 1153-60. Ownership was resolved in favor of the Kunstsammlungen. *Id.* at 1160. For further discussion of these issues, see Note, *Kunstsammlungen zu Weimar v. Elicofon: Theft of Priceless Art Treasures Gives Rise to Protracted International Legal Battle*, 19 TEX. INT'L L.J. 189, 191-201 (1984).

216. *Elicofon*, 678 F.2d at 1160. In 1946, at the time Elicofon purchased the paintings, the applicable limitation period was six years. *Id.* at 1161 & n.19.

217. *Id.* at 1161.

218. *Id.* Because the demand was considered a substantive requirement for accrual of the action, the statute of limitations did not begin to run until the demand was made. See *supra* text accompanying notes 186-91. For criticism of this doctrinal interpretation, see Comment, *supra* note 191, at 1137-38. The court clearly considered *Menzel* to represent the prevailing law in New York and rejected Elicofon's contention that the "demand and refusal" rule had been undermined by subsequent decisions. 678 F.2d at 1162-63.

Another case presenting factually similar circumstances to those of *Elicofon* was also decided on the basis of New York's "demand and refusal" rule. In addition, the court seemed to require that the plaintiff exercise due diligence in locating the stolen art work and making demand for its return once its location had been ascertained. *DeWeerth v. Baldinger*, 658 F. Supp. 688, 693-95. See *supra* note 205.

219. *Elicofon*, 678 F.2d at 1163 (quoting *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 127, 219 N.E.2d 169, 170, 272 N.Y.S.2d 337, 339 (1966)). Cf. *supra* text accompanying notes 190-91 (discussing criticisms of the *Menzel* holding).

220. *Elicofon*, 678 F.2d at 1160, 1162-64 & nn. 22-25. The court also based its holding on the alternate point that the statute of limitations was tolled under New York's judicially

2. *Entrustment*

In attempting to fashion a satisfactory rule for adjudication of the rights between an owner of stolen art works and the innocent purchaser, the court in *O'Keeffe* rejected the strict application of the doctrine of adverse possession and chose to apply the discovery rule to the mandate of the statute of limitation. The court thus sought to encourage prospective purchasers of art works to buy from legitimate art dealers and thereby discourage trafficking in stolen art works.²²¹ This goal is further enhanced by the treatment of entrustment situations under the U.C.C.

Entrustment arises when, contrary to the situation of theft, the owner intends to pass possession, although not title, of personal property to a merchant who deals in goods of that kind. Under U.C.C. section 2-403(2), a bona fide purchaser who purchases such property in the ordinary course of business may receive good title to it even as against the original owner.²²² The theory underlying this result is that the owner has given the merchant the indicia of ownership and therefore takes the risk that his or her property

created "non-recognition" toll until 1974, when the United States first recognized the government of the German Democratic Republic (East Germany), of which the Kunstsammlungen zu Weimar was considered to be an agent. *Id.* at 1164; Note, *supra* note 215, at 206-07.

221. *O'Keeffe v. Snyder*, 83 N.J. 478, 497, 416 A.2d 862, 872-73 (1980). Exactly how the decision in *O'Keeffe* will encourage that goal may be unclear. Nevertheless, the court stated: "The interplay between the statute of limitations as modified by the discovery rule and the U.C.C. should encourage good faith purchases from legitimate art dealers and discourage trafficking in stolen art without frustrating an artist's ability to recover stolen art works." *Id.*, 416 A.2d at 873.

Among the reforms urged by the court in *O'Keeffe* as well as by other individuals and organizations involved in the art market is the establishment of a national registration system for art works. Not only would such a system help the prospective purchaser determine the state of title for art works, it also would establish the means by which an owner from whom an art work was stolen could diligently pursue his or her claim to the piece. See Meyer, *For a National Art Registry*, N.Y. Times, July 30, 1986, at A22, col. 1. As Meyer points out, the statute of limitations controversy also has significance for foreign nations that attempt to recover illegally exported archaeological objects. *Id.*

222. U.C.C. § 2-403(2) states: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Section 2-403(3) defines "entrusting" as including "any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law."

may be sold with good title passing to the bona fide purchaser.²²³ Entrustment difficulties arise frequently in the context of the art market because both artists and art collectors "leave" art works with auction houses and dealers on consignment to display and sell the work. Although the relationship between artist or owner and dealer is generally regulated by private contract, when the relationship is not clearly defined, an entrustment situation can occur.

One such situation arose in *Porter v. Wertz*.²²⁴ The plaintiff, Porter, was an art collector and had had prior dealings with one Harold Von Maker, who at the time was using the alias Peter Wertz.²²⁵ Porter temporarily gave a Utrillo painting to Von Maker while Von Maker was deciding whether to purchase it.²²⁶ When a note given by Von Maker to Porter to finance a previous purchase was dishonored, Porter investigated Von Maker, learned his true identity, and attempted to have the Utrillo painting returned.²²⁷ Porter and Von Maker, through their attorneys, then worked out a new agreement that permitted Von Maker to keep the Utrillo for ninety days while it was on consignment with a client. Von Maker was then to return the painting or pay Porter \$30,000. In addition, Von Maker's attorney held another painting in escrow which was to be sold in partial satisfaction of the amount owed to Porter if Von Maker failed to return the painting or pay Porter.²²⁸

Von Maker, acting through the real Peter Wertz, had, in fact, already sold the painting to Feigen Gallery for \$20,000. Feigen then sold the painting to another defendant, Brenner, who again sold it, with the result that the painting was exported to Venezuela.²²⁹ When Porter subsequently sued to recover the painting or its value, Feigen attempted to defend on the grounds of statutory

223. Under the doctrine of common law or equitable estoppel, an innocent purchaser does not acquire title as against the original owner "unless there has been some affirmative act by the owner which either creates apparent authority to sell the property in the seller or clothes the seller with the indicia of ownership." *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 216 (Tex. Ct. App. 1984).

224. 68 A.D.2d 141, 416 N.Y.S.2d 254 (N.Y. App. Div. 1979), *aff'd*, 53 N.Y.2d 696, 421 N.E.2d 500, 439 N.Y.S.2d 105 (1981).

225. *Porter*, 68 A.D.2d at 143, 416 N.Y.S.2d at 255.

226. *Id.* at 143, 416 N.Y.S.2d at 255-56.

227. *Id.* at 143-44, 416 N.Y.S.2d at 256.

228. *Id.* at 144-45, 416 N.Y.S.2d at 256.

229. *Id.* at 145, 416 N.Y.S.2d at 256.

estoppel, embodied in section 2-403(2) of the U.C.C.²³⁰ For this section to apply, Feigen had to establish that Wertz qualified as a merchant—that is, “a person who deals in goods of the kind”²³¹—and that Feigen qualified as a “buyer in the ordinary course of business.”²³²

The court held that this defense failed for two reasons. First, Wertz was not an art dealer and thus did not fit the definition of a merchant who deals in goods of the kind.²³³ Second, Feigen could not qualify as a person who had dealt in good faith. U.C.C. section 2-103(1)(b) defines “good faith” for a merchant as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”²³⁴ The appellate court stated that although this definition countenanced the commercial standards of the trade, “it should not—and cannot—be interpreted to permit, countenance or condone commercial standards of sharp trade practice or indifference as to the ‘provenance’ . . . such as is present in the case before us.”²³⁵

230. *Id.*, 416 N.Y.S.2d at 257. This section provides that “[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.” U.C.C. § 2-403(2) (1978).

231. U.C.C. § 2-104(1).

232. *Porter*, 68 A.D.2d at 145-46, 416 N.Y.S.2d at 257. This term is defined in U.C.C. § 1-201(9) as “a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights . . . of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. . . .”

233. The appellate court stated that “[i]f anything, [Wertz] was a delicatessen employee . . . a seller of caviar and other luxury food items . . . over whom . . . Von Maker ‘cast his hypnotic spell . . . and usurped his name, his signature and his sacred honor.’” 68 A.D.2d at 145-46 & n.6, 416 N.Y.S.2d at 257 & n.6.

234. U.C.C. § 2-103(1)(b).

235. *Porter*, 68 A.D. 2d at 146, 416 N.Y.S.2d at 257. The appellate court thus held that it was not a reasonable commercial practice for Feigen to fail to determine Wertz’s status as an art merchant or to inquire as to the provenance of the Utrillo painting. *Id.* at 149, 416 N.Y.S.2d at 259. On appeal, however, the New York Court of Appeals affirmed the appellate court on the basis of its holding that Wertz was not an art merchant and declined to reach the issue of Feigen’s good faith. *Porter v. Wertz*, 53 N.Y.2d 696, 700-01, 421 N.E.2d 500, 501-02, 439 N.Y.S.2d 105, 106-07 (1981). It is interesting that both the New York Attorney General and the Art Dealers Association of America, Inc. filed *amicus curiae* briefs for this appeal. *Id.* at 701, 421 N.E.2d at 502, 439 N.Y.S.2d at 107. The Attorney General argued that the court should hold that good faith among art merchants requires inquiry as to the ownership of an art work, whereas the Art Dealers Association urged that “the ordinary custom in the art business is not to inquire as to title and that a duty of inquiry would cripple the art business which is centered in New York.” *Id.* This result seems to follow what may be a somewhat typical pattern in these cases. Courts appear reluctant to interfere

The second defense put forth was based on the doctrine of equitable estoppel, according to which the title to property of a good-faith purchaser for value cannot be questioned by the original owner if the owner has endowed the seller with possession and the apparent authority to convey title.²³⁶ The appellate court held that Porter's conduct was not blameworthy and that, more specifically, Porter had only lent the painting to Von Maker for private display in his own home. He thus did not confer any indicia of ownership on Von Maker, and mere possession, without more, was insufficient to create an estoppel.²³⁷ The court therefore rejected the defenses of statutory and equitable estoppel.²³⁸ An art dealer or other merchant in the art market would need to inquire of the seller the state of the title and to investigate, at least to a limited extent, the provenance of art works the dealer undertakes to handle.²³⁹ The Court of Appeals in *Porter* could have gone further in setting a higher standard of investigation as a reasonable commercial practice. The merchant, nonetheless, will be liable to the true owner of an art work if the merchant deals with unknown individuals under questionable circumstances without inquiring further into the background and legitimacy of the title to a work.

The final case that considers these issues involved an entrustment or bailment of a painting by the original artist which ultimately lasted 59 years. In *Mucha v. King*,²⁴⁰ Alphonse Mucha, a painter and perhaps originator of the Art Nouveau style, in 1920 consigned a painting entitled "Quo Vadis" to the Newcomb-Macklin gallery, a dealer located in Chicago. Under the original terms of

with anything that is termed standard practice in the art market industry, even if such practice becomes a shield behind which art dealers and auction houses can hide from the imposition of legal liability. The appellate court, however, commented that "commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art. Commercial indifference diminishes the integrity and increases the culpability of the apathetic merchant." 68 A.D.2d at 149, 416 N.Y.S.2d at 259.

236. *Porter*, 68 A.D.2d at 148, 416 N.Y.S.2d at 258 (citing *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 187, 111 N.E.2d 871, 875 (1953), and 46 AM. JUR. SALES § 463 (1943)).

237. *Id.* at 148-49, 416 N.Y.S.2d at 258-59. The New York Court of Appeals emphasized that Porter had not given the painting to Wertz and had not done anything to induce Feigen to believe that Wertz was a merchant entitled to convey good title to the painting. 53 N.Y.2d at 700, 421 N.E.2d at 501-02, 439 N.Y.S.2d at 106-07.

238. 68 A.D.2d at 147, 149, 416 N.Y.S.2d at 258, 259.

239. Comment, *Title Disputes*, *supra* note 119, at 448-50.

240. 792 F.2d 602 (7th Cir. 1986).

the consignment agreement, the consignee was to pay Mucha a predetermined price for this and other art works and could then keep whatever additional profit was realized when the art works were sold. Perhaps anticipating that the paintings would appreciate in value, the gallery placed "Quo Vadis" and other works by Mucha in storage. Mucha, who was a native and resident of Czechoslovakia, and the gallery owner corresponded intermittently until Mucha's death in 1939. Although some items were shipped back to Czechoslovakia or otherwise disposed of, "Quo Vadis" seems to have remained in Chicago.²⁴¹

The defendant, King, argued that the correspondence between Mucha and the dealer indicated that Newcomb-Macklin had converted the painting by failing to follow Mucha's instructions. The district court, however, interpreted the tone of these letters otherwise and held that Mucha was still the owner of the painting at the time of his death.²⁴² Further intermittent communication between the gallery and Mucha's son, Jiri, culminated in a visit by Jiri to the gallery in 1973. At that point, however, neither Jiri nor the gallery seemed to be aware of the existence of "Quo Vadis" in the gallery's storage.²⁴³ In 1979, the gallery gave the painting to a hot tubs merchant, who in turn sold it to the art dealer from whom King bought it in 1981 for \$35,000 in cash and merchandise.²⁴⁴ In 1981 or 1982, a friend of King contacted Jiri to inquire about some of the symbolism in the painting.²⁴⁵ Jiri investigated the painting and traced it to King. He then initiated a suit against King in 1983, seeking the return of the painting. The value of the painting was variously estimated at trial to be between \$100,000 and \$800,000.²⁴⁶

The salient legal issue raised by these facts was whether Jiri's suit was barred by the running of the statute of limitations.²⁴⁷ King conceded that the statute of limitations would not begin to

241. *Id.* at 606-08.

242. *Id.* at 609.

243. *Id.* at 611.

244. *Id.* at 604, 612.

245. *Id.* at 612-13. In one place the court puts Jiri's discovery of the painting's existence in 1982 and elsewhere as 1981. *Id.*

246. *Id.* at 604.

247. *Id.* at 606.

run until the bailor discovered or should have discovered that the bailee had converted the property.²⁴⁸ Nevertheless, King argued that the statute had begun to run, at the latest, in 1973 when Jiri failed to find the painting at the gallery or in its storage; the suit therefore would have been barred by the five-year limitation period.²⁴⁹ The underlying issue the court needed to resolve concerned when the consignment or bailment had become a conversion so as to trigger the running of the statute of limitations.

As was discussed previously in connection with the *Cristallina* decision, the relationship between an auction house and the seller is that of an agent to its principal.²⁵⁰ For an agent's conduct to constitute conversion, the agent must do more than simply use the principal's property openly and notoriously in the same manner as the owner would. Because such conduct is consistent with the agency relationship, the agent who would convert the principal's property not only must act adversely to the ownership interest of the principal but also must clearly communicate such adverse use to the principal.²⁵¹

The principles involving conversion in the context of a bailment or agency relationship are explained more clearly in two decisions

248. *Id.* at 611-12. The United States Court of Appeals for the Seventh Circuit implied that this concession was unwise. Referring to the New Jersey Supreme Court's adoption of a discovery rule to modify the statute of limitations in the *O'Keeffe* decision, *see supra* notes 208-12 and accompanying text, the Seventh Circuit questioned whether an Illinois court would have done the same in this case, because the passage of time and the death of many of the principals had created considerable problems of proof. *Mucha*, 792 F.2d at 612. If the hot tub merchant had been a purchaser in the ordinary course of business, then King might have relied on the principle that once the owner has entrusted a painting to a merchant who regularly deals in goods of that kind, the merchant can pass title to a bona fide purchaser and this title would be good even as against the original owner. *Id.* The appellate court did not decide whether King bought in the ordinary course of business but implied that the mere fact that King purchased the painting from a dealer doing business under the none-too-reassuring name of "Fly-by-Nite" would not in itself destroy King's status as a bona fide purchaser. *Id.* The court also noted that King might have a cause of action against the owner of Fly-by-Nite for breach of warranty of title. *Id.*

249. *Id.* at 612.

250. *See supra* text accompanying notes 162-65.

251. For example, in the case of a bailment, the bailee may possess the bailor's property for an indefinite period of time, and conversion occurs only when he or she violates the terms of the bailment agreement. Furthermore, a court need not imply a time limitation in the agreement if an indefinite bailment is consistent with the nature of the property and the parties' intentions. *Estate of McCagg*, 450 A.2d 414, 416-17 & n.3 (D.C. 1982).

concerning loans of art works to a museum for an indefinite period of time. In *Redmond v. New Jersey Historical Society*,²⁵² a Gilbert Stuart portrait had been in the possession of the Society from 1887 until 1938, when the descendants of the owner demanded its return. The court held that under the doctrine of adverse possession, the Society had not acted inconsistently with the claims of the true owners until it refused their request for return of the portrait. The statute of limitations therefore did not begin to run until the Society's possession became adverse and hostile to the owners' interest.²⁵³

Essentially the same reasoning was applied in *Estate of McCagg*.²⁵⁴ In *McCagg*, two paintings had been given on indefinite loan to the National Museum of American Art in 1917. The owner of the paintings died in 1932 and her descendants did not learn of the paintings' existence until 1979. They demanded their return in 1981 and brought suit within two weeks of the Museum's refusal to return them.²⁵⁵ Without explicitly invoking the doctrine of adverse possession, the court held that the claimants' cause of action was not complete until the Museum acted inconsistently with the terms of the bailment agreement by refusing to return the paintings and that therefore the claim was not barred by the statute of limitations.²⁵⁶ The court did not apply the *O'Keeffe* discovery rule and relied instead on the demand and refusal rule, reasoning that until the bailee acted inconsistently with the bailor's claim to title there would be nothing for the bailor to "discover" and the facts necessary to create the cause of action would not yet have occurred.²⁵⁷

The reasoning in these cases points out the essential difference between a theft and a bailment or consignment of art works. In the former, the owner presumably knows from the beginning that a theft has occurred, and one may reasonably argue that the cause of action accrues at that time. In the *O'Keeffe* case, the harsh result caused by running the statute of limitations from the time of theft

252. 132 N.J. Eq. 464, 28 A.2d 189 (1942).

253. *Id.* at 473-75, 28 A.2d at 189, 195.

254. 450 A.2d 414 (D.C. 1982).

255. *Id.* at 415.

256. *Id.* at 416, 419.

257. *Id.* at 416, 418-19.

was mitigated by the discovery rule because the victim had not known the identity of the thief (or the subsequent possessor). The court thus considered the cause of action incomplete.²⁵⁸ In the case of a bailment or consignment, however, no cause of action exists until the bailee or agent acts inconsistently with the terms of the bailment or consignment—usually by refusing to return the property at the owner's request—and thereby commits a conversion.

Although the court in *Mucha* failed to state these principles of agency and bailment clearly, they seem to be applicable because both the district court and the appellate court refused to interpret the gallery's failure to follow Mucha's instructions as a conversion.²⁵⁹ The court seemed to be searching for an unequivocal action or communication from the gallery to Mucha that would indicate the requisite hostility or adverse use on the part of the gallery. The court therefore held that the conversion did not occur until either the gallery's disposal of the painting in 1979 or Jiri's realization of this in 1981, so that Jiri's claim was not time-barred.²⁶⁰

The significance of the *Mucha* decision therefore rests on its implicit characterization of the underlying relationship between the artist or consignor of a work of art and the auction house or dealer. This relationship was clearly established in the *Cristallina* case and less clearly stated but still necessary to the result in the *Mucha* decision. Once this relationship is viewed as one of agency and fiduciary responsibilities, many legal conclusions flow which make the adjudication of disputes or controversies between the parties easier to resolve. In attempting to determine the liabilities of an auction house or art dealer to the purchaser, the relationship with the seller may be used as a model and will be considered in the next section.

IV. LIABILITY OF ART MERCHANTS

The preceding analysis concluded that because an agency and fiduciary relationship exists between the auctioneer and the original owner or consignor of a work of art, the interests of the owner receives adequate legal protection. The purchaser of a work of art

258. *O'Keeffe v. Snyder*, 83 N.J. 478, 485, 416 A.2d 862, 869-70 (1980).

259. *Mucha v. King*, 792 F.2d 602, 609-12 (7th Cir. 1986).

260. *Id.* at 613.

through such an intermediary, however, does not seem to receive equivalent protection. Because the auctioneer is the agent of the owner or consignor, no particular obligation is owed to the buyer.²⁶¹ Both the common law and most statutory schemes, as exemplified by the U.C.C., put the burden on the purchaser to establish that the merchant has made a warranty that is actionable if the statement turns out to be inaccurate.²⁶² Only New York and Michigan,²⁶³ whose statutes go significantly beyond the U.C.C., have specifically confronted the particular issues and problems raised by the practices of the art market.²⁶⁴

Although at the beginning of this Article the terms "dealer" and "auctioneer" were used interchangeably,²⁶⁵ it may be necessary at this point to introduce the traditional distinctions between these terms. An art dealer usually purchases an art work from the owner or artist at a definite price and then sells it to a purchaser on his or her own behalf, rather than on behalf of the original owner or artist.²⁶⁶ Works of art sold in this manner generally are considered to command a higher price than if sold at public auction. Although the dealer, as owner, has an explicit financial stake in the art work,

261. If the buyer suffers a loss, the law traditionally would dictate that the buyer should attempt to recover from the original owner. This result unfortunately ignores the reality that the owner's identity may be secret and, more problematical, the owner may be judgment proof, whether by insolvency, absence from the jurisdiction, or any other reason.

262. See *supra* notes 50-81 and accompanying text.

263. See *supra* notes 82-92 and accompanying text.

264. The establishment of a national registry for works of art also has been proposed as a possible solution to the peculiar problems raised by the art market. In 1966, Congress considered legislation to establish such a registry. See Comment, *Title Disputes*, *supra* note 119, at 458-63 (also discussing such registries and other art theft archives maintained by various organizations, including the Art Dealers Association of America, the FBI, INTERPOL, and the International Foundation for Art Research). See also Meyer, *supra* note 221 (also urging establishment of such an art registry).

Such a system would provide all owners and prospective purchasers of art works with a centralized registry where proper title and provenance could be established and checked. Unfortunately, such a system would work only in a prospective fashion, primarily benefiting art works registered at the time of their creation by the original artist, who could personally verify the work's authenticity. Clearly the value of such a registration system would diminish for older art works and antiquities. Although the creation of such a national or even international registration system would reduce such problems for newer works of art, it would not help in the area of older works, where the potential for abusive practices is much greater.

265. See *supra* note 10.

266. *Id.*

he or she is also held to a higher standard of obligation to the purchaser in establishing the title and authenticity of the art work. This may be seen as a counterbalance to the higher price, in exchange for which the purchaser can rely on and reasonably expect greater protection from the dealer.

An auction house, on the other hand, generally does not purchase the art work itself, and therefore it has no direct financial stake in the work.²⁶⁷ Its financial interest is based solely on the commission it receives for selling the item, although the commission will be greater if the object sells at a higher price. The price may be lower than if the same object were sold through a dealer, but the purchaser is considered to have assumed a greater risk as to the authenticity of the art work.²⁶⁸

This dichotomy may also be reflected in a consideration of whether the term "merchant" as used in the U.C.C. would apply equally to both dealers and auctioneers. Section 2-104(1) defines a "merchant" as one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."²⁶⁹ One question this definition raises is whether a dealer or auctioneer would be considered a merchant with respect to all types of art works and antiquities or only those of a particular specialized period or genre. More significant, however, is whether an auctioneer, as opposed to a dealer, would be considered under the U.C.C. definition to be an art merchant—that is, one with particular knowledge or skill concerning art—or simply one who is skilled in the practice of auctioneering.

Nevertheless, this distinction between dealers and auctioneers is diminishing for several reasons. First, the differences in methods of operation by dealers and auction houses are blurred by several

267. *Id.*

268. See, for example, the comments of the judge in *Weisz v. Parke-Bernet Galleries*, 77 Misc. 2d 80, 81, 351 N.Y.S.2d 911, 912 (N.Y. App. Term 1974); *supra* text accompanying note 41.

269. This section also considers a merchant to be one "to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." U.C.C. § 2-104(1) (1978). This refers to the standard to be applied to a principal who employs an agent who qualifies under the first part of § 2-104(1) as a merchant.

changes in accepted practices.²⁷⁰ Auction houses purchase art works to resell on their own behalf and thus gain a direct financial interest in the objects, although they are required to inform prospective purchasers of this before the sale.²⁷¹ On the other hand, dealers and galleries offer for sale objects given to them on consignment and thus operate on a system comparable to that of the auction houses.²⁷² The New York and Michigan statutes recognize this fact by explicitly applying their standards uniformly to the generic term "art merchant," which encompasses dealers, galleries, and auction houses.²⁷³ These developments have led at least one commentator to conclude that "the auction house must be governed by the same standard as the dealer and gallery."²⁷⁴

This breakdown in the practical distinctions between dealers and auctioneers is reflected in the elimination of the legal distinctions between the consequences applied to their respective roles. As was previously discussed, the remedies fashioned by the courts in the *Menzel*, *Cristallina*, and *Rothko* decisions, which involved both dealers and auctioneers, buyers and owners, were essentially the same—that is, the courts gave the injured parties their choice of rescission or full expectation damages and awarded those damages on the basis of the appreciated or depreciated value of the art works.²⁷⁵ This result was not unusual in the *Rothko* decision, which involved the actions of estate executors who were thus clearly fiduciaries. In *Cristallina*, the relationship between an auction house and the consignor also was characterized as that of an agent or fiduciary. Even more significantly, in *Menzel* the relationship between a dealer and a purchaser established the basis for comparable liability.

270. Comment, *supra* note 124, at 151.

271. See *supra* note 137 and accompanying text.

272. Comment, *supra* note 124, at 151 (citing *Jeanneret v. Vichey*, 541 F. Supp. 80 (S.D.N.Y.), *rev'd*, 693 F.2d 259 (2d Cir. 1982) in which the dealer had sometimes accepted paintings on consignment).

273. Section 11.01(2) of the New York statute defines an art merchant as one "who is in the business of dealing . . . in works of fine art" and specifically includes auctioneers. N.Y. ARTS & CULT. AFF. LAW § 11.01(2) (McKinney Supp. 1988). Section 442.321(1)(a) of the Michigan statute uses similar language and also specifically includes auctioneers. MICH. COMP. LAWS ANN. § 442.321(1)(a) (West Supp. 1987).

274. Comment, *supra* note 124, at 151 (footnotes omitted).

275. See *supra* text accompanying notes 120, 179-84.

This trend toward diminishing distinctions is also apparent in a comparison of the results in the *Cristallina* and *Mucha* decisions. Both cases involved the relationship of the consignor of art works—in *Mucha*, to a dealer; in *Cristallina*, to an auction house.²⁷⁶ Yet both decisions depended on the characterization of this relationship as an agency relationship.²⁷⁷ A comparison of all four decisions indicates that the relationship between dealer and owner, dealer and buyer, and auction house and owner should be subject to the same legal framework. The only missing “prong” in this quartet is the relationship between auction house and buyer. The *Abrams* case might have clarified this relationship but did not because of the out-of-court settlement. The judge’s comments in granting the preliminary injunction, however, may indicate a willingness to impose on the auction house a specific obligation to the purchaser.²⁷⁸

These recent decisions, coupled with the diminution in practical distinctions between dealers and auctioneers, may lead to the formulation of a single theory of potential liability that would apply equally to both dealers and auctioneers and would regulate the relationship of the art merchant to both the owner and the purchaser of art works. Several such theories may be proposed and the advantages and disadvantages of each will be discussed in turn.

The first such theory is based on agency principles. As previously considered, an auction house acts as the agent of the owner and clearly owes a fiduciary duty to the owner. This theory would characterize the relationship between the art merchant and the purchaser as an agency relationship as well. The art merchant

276. The fact that in *Mucha* the paintings were on consignment to the dealer illustrates that a dealer can act like an auction house and justifies the similar legal treatment accorded to a dealer and an auctioneer.

277. *Mucha v. King*, 729 F.2d 602, 609-13 (7th Cir. 1986); *Cristallina S.A. v. Christie, Manson & Woods Int’l, Inc.*, 117 A.D.2d 284, 291-92, 502 N.Y.S.2d 165, 171 (N.Y. App. Div. 1986).

278. Whether such liability would have been based on a characterization of Sotheby’s actions as constituting fraud and misrepresentation and perhaps violating New York City’s ordinance regulating the conduct of auctions, or on the imposition of some higher standard of duty, cannot be determined. The specific relevant issue in *Abrams* would have been whether Sotheby’s had adequately disclosed to prospective purchasers the questionable title of the auctioned items. See *Abrams v. Sotheby Parke-Bernet, Inc.*, No. 42255-84, slip op. at 6 n.1 (N.Y. Sup. Ct. Aug. 24, 1984) (granting preliminary injunction).

therefore would act as the agent for both parties. The primary objection to the imposition of such an agency relationship is that if the auctioneer were to act as the agent of both the owner and the buyer, there would be considerable potential for conflict of interest.²⁷⁹

The answer to this objection is perhaps that the buyer often relies on the auctioneer's expertise and reputation whether or not the law recognizes the existence of a formal agency relationship. Certainly in real estate sales, a broker, who under traditional legal principles is recognized as the agent only of the seller, often acts on behalf of both the buyer and the seller, regardless of whether the law grants any legal recognition of this dual relationship.²⁸⁰ Recent decisions, however, now recognize this duality by imposing an agency relationship on the cooperating broker when the buyer, in fact, views the broker as his or her agent.²⁸¹ A California appellate court has gone even further in characterizing the listing broker as owing a fiduciary obligation and thus an affirmative duty of investigation and disclosure to the buyer.²⁸² In some unusual cases involving the art market, a broker, auctioneer, or other employee of

279. See *supra* note 10. A second objection is that if the art merchant is selling objects he or she owns, then as a party to the transaction the merchant cannot act as agent of the other party. *Romani v. Harris*, 255 Md. 389, 394-97, 258 A.2d 187, 190 (1969). For this reason, a tort or warranty theory, see *infra* notes 285-300 and accompanying text, may be better suited to the art market.

280. For a discussion of the real estate broker's relationship to both buyer and seller, see Comment, *The Real Estate Broker's Fiduciary Duties: An Examination of Current Industry Standards and Practices*, 12 PEPPERDINE L. REV. 145 (1984).

281. In *Cashion v. Ahmadi*, 345 So. 2d 268, 271 (Ala. 1977), the court remanded to the trial court for a factual finding as to whether the cooperating broker acted as the agent of the buyers, regardless of whether it was also the agent of the sellers; if the broker was the buyers' agent, then it owed the buyers a duty of faithfulness to disclose defects in the house that buyers had purchased.

282. *Easton v. Strassburger*, 152 Cal. App. 3d 90, 99, 199 Cal. Rptr. 383, 388 (1984). This decision was based on an earlier California decision in which the court held that if the seller's broker or agent knew of a material defect in the property of which the buyer was not aware, then the broker had a duty to disclose the defect to the buyer. *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735-36, 29 Cal. Rptr. 201, 204-05 (1963); Comment, *Broker Liability after Easton v. Strassburger: Let the Buyer Be Aware*, 25 SANTA CLARA L. REV. 651, 654-55 (1985). California subsequently limited by statute the broker's duty to investigate and disclose defects. CAL. CIV. CODE §§ 2079-2079.5 (West Supp. 1987). Cf. *Browder v. Hanley Dawson Cadillac Co.*, 62 Ill. App. 3d 623, 629, 379 N.E.2d 1206, 1211 (1978) (an insurance broker, as opposed to an agent, acts as the agent of the purchaser rather than of the insurance company and so owes a fiduciary duty to the buyer).

an auction house also has been held to act as agent for the buyer.²⁸³ Extension of such liability to the art merchant in the form of a fiduciary obligation would offer several advantages.

The primary advantage in adoption of an agency or fiduciary analysis would be the flexibility it would afford in different circumstances. Rather than making the auction house liable as an insurer of authenticity to all buyers, this theory would adapt to situations in which the buyer reasonably regarded the auction house as acting on its behalf. Such a characterization might depend, for example, on the relative sophistication of the buyer. The buyer could be a first-time amateur collector or an art dealer or museum that is very well aware of the risks involved and has participated often in such auctions. Relief for the buyer should perhaps depend on the extent to which the buyer actually relies on the auction house's knowledge and expertise. If the buyer is as sophisticated as the auction house, then one might question why such a high standard of fiduciary obligation should be imposed on the auctioneer. A factual determination would have to be made as to whether the purchaser had reasonably relied on and viewed the auctioneer as acting as his or her agent, as the court in *Cashion v. Ahmadi* required in the context of determining the liability of a real estate broker.²⁸⁴ Although this theory may at times present complex problems of proof, it would allow the unsophisticated purchaser some protection and limit the liability of the art merchant to situations in which it actually has superior knowledge and resources. Such flexibility would, however, come at the cost of decreased certainty and increased litigation involving factual determinations as to whether the purchaser regarded the art merchant as his or her agent.

The second theory is one of strict liability based on tort notions of enterprise responsibility and the best cost-avoider and cost-

283. For example, in *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970), the court held that an out-of-state bidder was represented at an auction by, and so was bound by the acts of, the auctioneer's employee who carried out the bidder's telephoned instructions, and thus the employee acted as the bidder's agent. *Id.* at 18-19, 256 N.E.2d at 509, 308 N.Y.S.2d at 341-42. See also *Romani v. Harris*, 255 Md. 389, 394-97, 258 A.2d 187, 190-91 (1969) (an auctioneer, when selling goods on behalf of the owner, can act as agent of the buyer so as to bind the buyer to the sale terms; the clerk of an auctioneer who owns the goods can also act as the buyer's agent).

284. 345 So. 2d at 271.

spreader.²⁸⁵ The policy underlying the development of this theory depends on the unequal bargaining position between a manufacturer or other individual who places goods into the stream of commerce and the consumer of a particular product. This doctrine is also justified by the superior ability of the manufacturer either to avoid the loss or to absorb and spread the costs of those losses that are unavoidable.

Although this theory may resolve certain problems, one major difficulty lies in the essential nature of the strict liability in tort theory. The judicial trend is to limit its application to situations in which the product is inherently defective and unreasonably dangerous and the losses involve personal injury or property damage; pure economic loss, on the other hand, is to be regulated by the commercial law of sales.²⁸⁶

285. See, e.g., *Spring Motors Distrib., Inc. v. Ford Motor Co., Inc.*, 98 N.J. 555, 568, 489 A.2d 660, 666-67 (1985); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1258-63, 1375-78 (1974).

286. See, e.g., *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); RESTATEMENT (SECOND) OF TORTS § 402A (1964). Section 402B(a) creates strict liability for the seller of chattels who makes a misrepresentation, even if without fault, concerning a material fact. The imposition of such liability, however, still requires physical harm and therefore would still not be relevant to the art market context. Cf. *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 59-60, 207 A.2d 305, 312 (1965); Rabin & Grossman, *Defective Products or Realty Causing Economic Loss: Toward a Unified Theory of Recovery*, 12 SW. U.L. REV. 5, 9 (1980-1981) (arguing that no distinction should be made based on type of injury or damages suffered but that strict liability still should be limited to personal injury).

New Jersey, formerly the leading jurisdiction in advocating the application of strict liability in tort for pure economic loss, seems to have departed considerably from this view in a recent decision, *Spring Motors Distrib., Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985). In this decision, the New Jersey Supreme Court held that in a commercial transaction, a purchaser suffering pure economic loss would need to sue in contract under the U.C.C. provisions for express and implied warranties, although it eliminated any contractual privity requirement. *Id.* at 569-75, 489 A.2d at 668-72. The court relied on the significant policy considerations that strict liability should protect only purchasers with unequal bargaining position and that the U.C.C. intended to "make uniform throughout the United States the law governing commercial transactions" by "constitut[ing] a comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods." *Id.* at 565, 489 A.2d at 665. It is unclear whether the other jurisdictions that had followed New Jersey's earlier, more expansive interpretation of strict liability will now follow its more restrictive approach. These jurisdictions include Ohio, Michigan, and Wisconsin. *Id.* at 574, 489 A.2d at 669-70. For application of this argument specifically to the art market, see Comment, *U.C.C. Warranty Provisions*, *supra* note 9, at 551-54.

There is, however, some precedent for applying a strict tort liability for misrepresentations made by a seller concerning chattels that result in pure economic loss. The primary source for such a strict liability can be found in a proposed section of the *Restatement (Second) of Torts*, section 552D.²⁸⁷ This section was intended to parallel sections 402A (involving defective products) and 402B (involving misrepresentations that result in physical injury).²⁸⁸ Section 552D apparently never was adopted but was cited with approval in at least one decision.²⁸⁹ However, such a precedent may provide the inspiration for fashioning a theory of strict liability for misrepresentation in the sale of chattels which would apply in the art market context, regardless of whether such liability would be classified as sounding in warranty or in tort.²⁹⁰

287. The proposed section, entitled "Misrepresentation by Seller of Chattels to Public," states:

One engaged in the business of selling chattels who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for pecuniary loss caused to another by his purchase of the chattel in justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

RESTATEMENT (SECOND) OF TORTS § 552D (Council Draft No. 17, at 76 (1963), *quoted in* *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 414-16, 398 S.W.2d 240, 246-47 (1966), and in *Shapo*, *supra* note 285, at 1144.

288. Comment a to § 552D makes the comments to § 402B applicable to pecuniary loss. *Lonon*, 217 Tenn. at 414-16, 398 S.W.2d at 247. The comments to § 402B set up several parameters for its application. Section 402B comment i eliminates the contractual requirement of privity. Further, liability under § 402B may not be disclaimed, and the consumer is not required to give notice to the seller within a reasonable time. RESTATEMENT (SECOND) OF TORTS, *supra* note 286, § 402A comment m, made applicable by § 402B comment d. On the other hand, the consumer must justifiably rely on the misrepresentation, *id.* § 402B comment j, and the misrepresentation must concern a material fact relating to the character or quality of the chattel. *Id.* comment g (specifically excluding "sales talk" and "puffing"). This last limitation may significantly reduce the usefulness of this type of strict liability for misrepresentation because, as previously discussed, the attribution of an art work to a particular artist or time period may be classified as "puffing." See *supra* notes 60-65 and accompanying text. Such an attribution would clearly seem to be "material," although under warranty concepts it may be categorized as an opinion rather than a statement of fact.

289. *Lonon*, 217 Tenn. at 414-16, 423, 398 S.W.2d at 246-47, 250.

290. Now that the privity requirement for suing for breach of a warranty has largely been reduced or eliminated, see, e.g., U.C.C. § 2-318 alternatives A, B, and C and comments 2 and 3 (eliminating privity to varying degrees), the primary relevant distinction between tort and warranty doctrine seems to be whether liability may be disclaimed by the merchant. The following description of a proposed strict liability theory is based in part on the notion of a strict "claim" liability for representations made in advertising, as developed in *Lewis, To-*

The policy underlying the creation of such a theory of strict liability would rely on the superior knowledge and expertise of the art merchant. The premise is that the merchant is in a better position than the purchaser to determine the authenticity of the art work—whether by scientific tests, research, questioning of the owner, or simply refraining from making unreliable claims as to authenticity and attribution. In cases in which the merchant errs, even if without fault, the merchant is also in a better position to spread the costs among all the purchasers rather than imposing the entire cost on a single buyer. The lower court in *Weisz v. Parke-Bernet Galleries, Inc.*²⁹¹ and the court in *Menzel v. List*²⁹² essentially relied on this theory in finding for the plaintiff and imposing the risks on the auction house or dealer. The theory of strict liability may be particularly well suited to solving the problems of the art market because of the high degree of uncertainty involved in the identification of art works. The specialized skills required to make an attribution combined with the ultimate uncertainty of such attributions may place the merchant, who puts the art objects into the stream of commerce, in the best position to bear the risks of mistakes, whether avoidable or not, and to spread such costs among all purchasers. In its application to the art market, such a strict liability doctrine therefore would apply only in transactions between an art merchant and a nonmerchant.²⁹³ One could adopt

ward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations, 47 OHIO ST. L.J. 671 (1986). Lewis advocates that transactions between buyers and sellers should be regulated by warranty law, although a form of strict liability should be imposed on advertisers for much the same policy reasons that justified the imposition of strict liability in the tort context. *Id.* at 691-95. A comprehensive review of liability for representations concerning products and an argument for application of a single form of strict liability for commercial loss caused by an advertiser's misrepresentations, even if without fault, can be found in Shapo, *supra* note 285, at 1172-1203, 1251-85.

291. 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (1974). The trial court specifically referred to "a relationship between parties in which there is a basic inequality of knowledge, expertness or economic power." 67 Misc. 2d at 1082, 325 N.Y.S.2d at 582.

292. 24 N.Y.2d 91, 98, 246 N.E.2d 742, 745, 298 N.Y.S.2d 979, 983 (1969).

293. Both the Michigan and New York statutes define an "art merchant" to include not only an auctioneer but also the auctioneer's consignor or principal. MICH. COMP. LAWS ANN. § 442.321(1)(a) (West Supp. 1987); N.Y. ARTS & CULT. AFF. LAW § 11.01(2) (McKinney Supp. 1988). The intention of this inclusion is presumably to make the consignor or principal liable to the purchaser for failures of quality and title. Such liability to the purchaser is, of course, justified. However, in transactions between the consignor or owner and the auction-

the definitions given in the New York and Michigan statutes, with perhaps some modifications, to determine which purchasers are to be considered art merchants.²⁹⁴

This liability would depend primarily on the creation of an express warranty largely as defined in the New York and Michigan statutes. These statutes provide that an express warranty is created by any identification or description of an art work given by an art merchant in a written instrument and is not negated or limited because "any statement relevant to authorship is, or purports to be, or is capable of being merely the seller's opinion."²⁹⁵ This provision thus eliminates the defense that the statement is only the seller's opinion or that the statement relates to something that cannot be established and therefore must be classified as opinion or "puffery," neither of which is actionable. However, this extension appears to apply only to statements of authorship and not to other elements of an art work's attribution—for example, the date and provenance of the object. It would seem that under a strict liability doctrine, this limitation should be eliminated.

These statutes also permit the merchant to incorporate within this warranty "the terminology . . . and the meaning accorded to such terminology by the customs and usage of the trade at the time and in the locality where the sale . . . took place."²⁹⁶ The nonmerchant thus is charged with understanding the technical

eer or dealer, the parties should not necessarily be considered as having equal bargaining position, and the consignor or owner should therefore not be considered an "art merchant." Owners and consignors traditionally are protected by the characterization of their relationship to the dealer or auctioneer as a fiduciary or agency relationship. If, however, a unitary theory based on strict liability for misrepresentation were to be adopted, then the determination of whether the owner or consignor should be considered an "art merchant" should be made in the same way as would such a determination for the status of the purchaser.

294. In some situations, determining whether the purchaser has the status of an art merchant may be difficult—for example, a museum curator purchasing art works outside the area of his or her expertise or a major collector who does not "deal" in art but rather purchases art primarily for its aesthetic pleasure. Nevertheless, the category of art merchant should not be restricted overly because a museum or collector may have superior access to expertise and information. Such sophisticated purchasers should be encouraged to use available expertise rather than to ignore it in order to avoid assuming the risk of an incorrectly attributed or authenticated work of art.

295. MICH. COMP. LAWS ANN. § 442.322(2)(a); N.Y. ARTS & CULT. AFF. LAW § 13.03(1). Such a description of authorship is presumed to be part of the basis of the bargain, and the purchaser therefore need not show separate reliance on the description.

296. MICH. COMP. LAWS ANN. § 442.322(2)(b); N.Y. ARTS & CULT. AFF. LAW § 13.03(2).

terms and trade usage employed in the art market. The policy notions underlying the creation of a strict liability doctrine would seem better served by imposing the duty on the art merchant to explain these terms or simply to use plain language rather than imposing the duty on the nonmerchant to understand technical terms and trade usage.

The last significant issue that must be resolved is whether such a warranty may be negated or limited. It seems clear that a disclaimer or negation of the warranty contained in a place separate from the description or attribution should not be effective. For example, a disclaimer or limitation, which could easily be incorporated in the description but which appears instead in the front of an auction catalog, should be deemed unreasonable and should fail to negate any express warranty created by the description itself.

The New York and Michigan statutes also deem any negation or disclaimer of this warranty to be unreasonable if the work of art is proved to be a counterfeit or if an unqualified statement of authorship is proved to be false, mistaken, or erroneous at the time of sale or exchange.²⁹⁷ True strict liability thus is imposed only if the art work turns out to be a counterfeit. In the case of an incorrect attribution, the art merchant is liable only if this inaccuracy has previously been determined; the art merchant's duty thus extends only to obtaining relevant scholarship and knowledge and not to conducting research.²⁹⁸ Such a limitation on the art merchant's liability for knowing what may, in fact, be "unknowable" may represent a realistic compromise in the allocation of risks.²⁹⁹ Nevertheless, when the art merchant can relatively easily qualify any attribution with a "perhaps" or a "probable," one may posit that

297. MICH. COMP. LAWS ANN. § 442.323(3)(b), (c); N.Y. ARTS & CULT. AFF. LAW § 13.03(2).

298. The distinction between a counterfeit and an incorrect attribution seems to turn on the fact that a counterfeit is a work of art "made or altered, with intent to deceive, in such manner that it appears to have an authorship which it does not in fact possess." The term is also "deemed to include any work of fine art made, altered or copied in such manner that it appears to have an authorship which it does not in fact possess even though such work may not have been made with intent to deceive." N.Y. ARTS & CULT. AFF. LAW § 13.01(6). The Michigan statute employs similar but not identical language. MICH. COMP. LAWS ANN. § 442.321(1)(c). One may wonder whether, for example, a Roman statue that is a copy of a Greek original and which may well have been made to deceive an ancient art patron would be considered a "counterfeit" if mistakenly sold as a Greek statue.

299. See Shapo, *supra* note 285, at 1358-59.

the extension of strict liability for an incorrect attribution is justified.

The primary objection that can be raised to the application of this theory concerns its fairness and economic utility in the context of the art market. The auctioneer, in particular, might argue that the buyer is able to purchase works more cheaply at auction and thereby assumes the additional risk of a misattribution of the work of art. When purchasing from a dealer who buys the work from the owner, rather than taking it on consignment, and who therefore acts as a seller on his or her own behalf, the buyer pays a premium and shifts the risk to the dealer. By limiting the auctioneer's liability, one can preserve a system of choices—the buyer who is risk averse can buy from a dealer, whereas the buyer who wants a bargain can assume the risk and buy from an auction house.

This dichotomy, however, is breaking down, and even the case law, reflecting the realities, now often fails to make clear distinctions among dealers, brokers, galleries, and auction houses when confronting the art market. Furthermore, the truly unsophisticated buyer probably is not even aware of this theoretical choice when deciding to buy at an auction. In such a situation, the imposition of strict warranty liability on the art merchant seems justified.³⁰⁰

Both proposed theories—one relying on agency principles and the other on strict liability, whether based in tort for innocent misrepresentation or in contract for breach of warranty—would represent considerable protection for the unsophisticated purchaser who participates in the art market. Both theoretical models may also be criticized for simply not corresponding to the realities of the marketplace. In the words of the New York appellate court in *Weisz v. Parke-Bernet Galleries*, purchasers “will not . . . be heard to complain that, in failing to act with the caution of one in circumstances abounding with signals of *caveat emptor*, they made a bad bargain.”³⁰¹ According to this view, any individual who undertakes to enter into the arcane world of the art market—where

300. Another theoretical difficulty with a strict liability doctrine is whether it adequately explains the relationship between the art merchant and the owner or consignor. Given the high standard of duty owed by an agent to its principal, there is probably little necessity to turn to strict liability for additional protection, except in the interest of creating a consistent doctrine to regulate the different facets of the art market.

301. 77 Misc. 2d 80, 81, 351 N.Y.S.2d 911, 912 (N.Y. App. Term 1974).

prices are high and information scant—must assume the risks inherent in such a transaction. Nonetheless, these very same circumstances should prompt a realization that the art market is an active and vital segment of commercial transactions which requires the formulation of a flexible and realistic yet also adequate model for protection of those consumers who do venture into that marketplace.