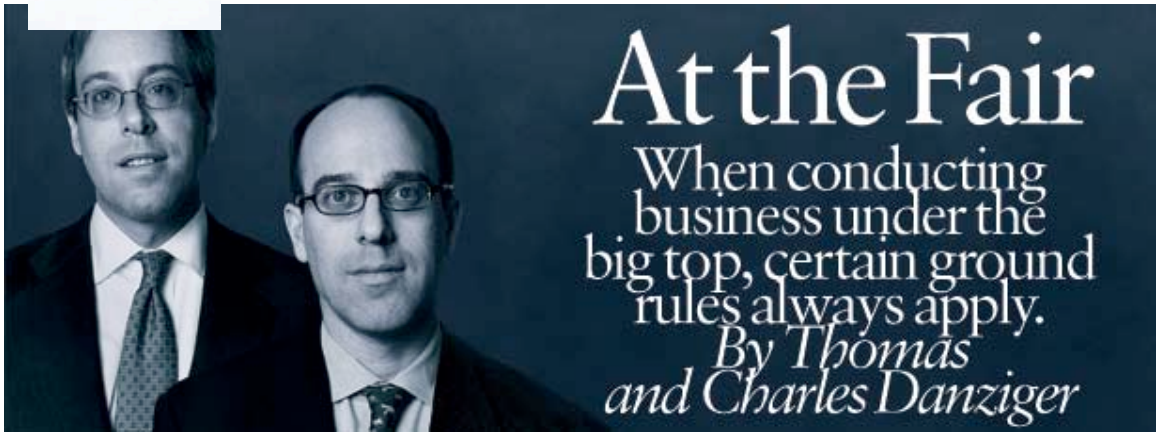
BROTHERS IN LAW



By Thomas and Charles Danziger

Like lemmings to the sea, we join the rest of the art world each December at Art Basel Miami Beach. None of our clients has ever drowned off South Beach, but given the feeding frenzy that now surrounds dealers at popular art fairs, more than a few have had close calls with sharks.

Lacey, a collector and occasional private art dealer, was a perfect example. When we bumped into her at a vip preview for the fair, she happily steered us to a booth displaying two worn-out pieces of "wearable art," one titled Left Shoe and the other (you guessed it) Right Shoe. Next to both were half-moon red dots, indicating that the gallery had placed the works on reserve for her consideration.

When we saw Lacey just an hour later, she was plotting murder. The gallery's owner, Mr. Weston, had decided to sell Left Shoe to another buyer at a higher price. Although Lacey hadn't formally committed to the purchase and had nothing in writing from the dealer, she believed she still had the exclusive right to buy the works.

Unfortunately for Lacey, contract law 101 requires at least two elements for a legally binding agreement: an offer and an acceptance. This applies whether the transaction takes place at an art fair, at a gallery or anywhere else. Although Lacey could argue that Weston had made the offer to sell the work, no contract was formed unless (and until) she accepted it. Legally, a party has accepted an offer if a "reasonable person" would perceive that the offer was accepted, either by implied or express agreement, such as a written contract. An added wrinkle: Under Florida's statute of frauds—a law that has been adopted in different forms in all 50 states—an agreement to purchase goods priced at $500 or more must be in writing to be enforceable.

Many dealers at art fairs don't require a deposit to place a work on reserve, nor is there typically a time limit for firming up the deal. However, putting down a deposit and setting out the terms of the reserve in writing would greatly help the collector's position, since these acts should create a legally enforceable purchase option. Sadly for Lacey, no such option was available.

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"But I flew to Miami especially to purchase these works and held off buying other pieces by the artist, which are now long gone!" Lacey railed. "Doesn't that count for anything?"

Not much, we replied.

She could try to argue that, even absent a valid contract, Weston's promise to sell her Left Shoe should still be binding under the legal doctrine of promissory estoppel, under which a promise is enforceable if one party has relied on it and if enforcing it is determined to be fair, among other requirements. But judging from the result of the 1989 U.S. District Court case Hoffmann v. Boone, we doubted that she would prevail on this theory.

In that federal case, the plaintiffs, Paul and Camille Hoffmann, sued New York dealer Mary Boone to obtain Brice Marden's painting Grey #1, which they said Boone had orally agreed to sell to them for $120,000 after Paul Hoffmann placed a reserve on it. Boone moved for summary judgment, arguing that because the alleged contract was not in writing, it was barred by the statute of frauds. The Hoffmanns argued that the contract should be enforced under promissory estoppel, which in New York requires a clear and unambiguous promise, reasonable and foreseeable reliance on that promise and an unconscionable injury. Their injuries included traveling from Florida to New York to settle the contract, listing the work in a planned exhibition of their collection at Chicago's Museum of Contemporary Art and refraining from buying other works by the artist.

The court ruled for Boone after deciding that the injuries were simply not unconscionable: "Plaintiffs' failure to purchase another Marden and their embarrassment in connection with the show at the Chicago museum are nothing more than part of the usual disappointment that attends a failed deal."

Lacey thought Weston was a heel and declared that she wouldn't buy Right Shoe at any price. Now that the shoe was on the other foot, however, Weston had other ideas. He angrily accused her of "outright fraud" for first agreeing to buy Right Shoe and later changing her mind, and he threatened to sue. Fortunately, as art lawyer Peter R. Stern points out, "Putting a work on hold and then changing one's mind does not, in itself, amount to fraud or, for that matter, breach of contract."

Weston also claimed that since his gallery was based in London, English law should apply. By chance, he knew of a case stating that English law does not recognize the statute of frauds, so even an oral agreement for the sale of goods over $500 can be enforced by a British seller against a U.S. buyer.

Weston was referring to Spink & Son, Ltd. v. General Atlantic Corp., a 1996 New York State Supreme Court case involving a dispute that took place at an antiques fair in London between a New York resident, Edwin Cohen (the chairman of General Atlantic Corp.), and an English gallery, Spink & Son. Cohen allegedly agreed to purchase $33,968 worth of works from the gallery at the fair, but there was nothing in writing, he never took possession of any works, and

he even denied having agreed to buy anything.

The Spink court reasoned that when determining which law should apply to contracts, the law of the country having the greatest interest in the lawsuit should rule. Specifically, this test involves considering several significant points of contact: "the place of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties."

Applying this test, the court ruled that English law should govern in the Spink case: "While defendants are New York residents, the place of the alleged negotiation and contracting is England, and the art is located in there as is plaintiff's place of incorporation and place of business. Cohen traveled there to attend the antiques fair, and England has an interest in enforcing contracts made there by its citizens doing business in the country. When a person travels abroad it is not unfair that they subject themselves to the laws of the land to which they visit."

Spink notwithstanding, we advised Lacey that since her negotiations occurred at an art fair in the U.S., not England, her contacts gave the U.S. a substantial interest in applying its own law, including the requirement of written contracts under the statue of frauds. We believed that U.S. law would govern her case, and that a court would not compel her to buy the remaining work.

By the end of Art Basel, Lacey had recognized that the red-dot reserve was an ethical obligation but not necessarily a legal one, and that all is not fair at art fairs. Our parting words to the still-furious Weston: "Shoe us."

Some facts have been altered for reasons of client confidentiality or, in some cases, created out of whole cloth. Nothing in this article is intended to provide specific legal advice. Charles and Thomas Danziger are the lead partners in the New York firm Danziger, Danziger & Muro*, specializing in art law.*

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