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In the art world, those who forget the past are destined to repeat it — often for the benefit of a bored court stenographer. This is especially true in the area of art restoration, where mistakes by prior owners can haunt those down the line.

Stuart was a prime example. His grandfather Charlie made the mistake of hiring Cromwell to restore a 17th-century portrait damaged in a great fire. Cromwell was unqualified as a restorer, a profession that remains unregulated in the U.S. and most of Europe, and he botched the job royally by painting over non-damaged areas of the work, thereby covering up the artist's own brushwork. The crowning blow: Cromwell's restoration technique was non-reversible, in violation of the Code of Ethics of the International Institute for Conservation of Historic and Artistic Works.

Charlie died and bequeathed the portrait to Stuart, who promptly decided to auction it off. The auction house advised Stuart that the shoddy

restoration had greatly reduced the painting's value — and that's when he called us.

We suggested as a starting point that Cromwell and his firm may have liability based on professional malpractice. Typically, a court would decide to what extent Cromwell had owed his client a duty of care, skill and knowledge. Stuart would then need to show that Cromwell had breached this duty and that Stuart had suffered an actual loss or damage as a result of this breach.

Depending on where the case was brought, however, Stuart's claim might be time-barred by the applicable statute of limitations for negligence, which varies from state to state. For instance, in the 1991 District of Columbia case *O'Hearn v. Parsons*, plaintiffs alleged that a conservator had committed negligence in 1971 by mounting a 15th-century Ming dynasty scroll painting on an unsupported frame rather than on solid backing or on a stretcher with a lattice center. When the painting split

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in 1983, the plaintiff sued for negligence, malpractice, breach of contract and breach of warranty.

The O'Hearn court reportedly reasoned that the statute of limitations would not begin upon the plaintiff's discovery of the error, but rather from the date the conservation was performed, and was therefore time-barred by the District of Columbia's three-year statute of limitations.

In our case Cromwell had signed a contract before beginning the restoration work — something we always advise our clients to do — so we thought that Stuart might be able to benefit from the longer statute of limitations for a breach of contract claim (six years in many states).

We reviewed Cromwell's contract and found that he had promised to restore the painting to the "best condition possible." Similar wording had been used in an agreement between the City of Amsterdam and the American conservator Daniel Goldreyer for restoration of Barnett Newman's painting *Who's Afraid of Red, Yellow and Blue 111*, which a vandal had slashed in 1986 while it was hanging in the Stedelijk Museum. Amsterdam alleged that Goldreyer had inappropriately overpainted the work (rather than using the "pinpointing method" of layering dots), thereby destroying its translucency, and had applied a sealer that could not be removed without harming the painting. The dispute resulted in the famous 1995 New York district court case *City of Amsterdam v. Daniel*

Goldreyer, Ltd. Goldreyer argued that the contract claim should be dismissed, since Amsterdam had signed releases when it received the painting. The court held for Amsterdam, reasoning that the validity of the releases was a question of fact to be resolved at trial, and the lawsuit was reportedly settled out of court in 1997.

Unfortunately for Stuart, his grandfather's contract included two clauses favorable to Cromwell: one absolving him from any liability related to the restoration, and the other waiving all claims by Charlie and his successors. Such clauses are common in the restoration world, and are usually enforceable as long as the restorer has not engaged in willful misconduct or gross negligence — a high hurdle for a would-be plaintiff like Stuart.

One example of an allegation of gross negligence occurred in the 2001 Southern District of New York case *Flack v. Friends of Queen Catherine, Inc.* (discussed in *Brothers in Law*, March 2005). The artist Audrey Flack claimed that the non-profit organization Friends of Queen Catherine, Inc., which had commissioned her to create a statue of the 17th-century Queen Catherine of Braganza, and the foundry involved had been grossly negligent when they hired Flack's assistant David Simon to restore the face on her sculpture. (The face had been damaged when the defendants placed it in what Flack termed a "garbage dump.") Flack alleged that Simon was "a mere assistant who was not trained in

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conservation, [and] was not competent to perform work without supervision." Flack further claimed that Simon had sculpted a "distorted, mutilated" work in which the nose, nostrils, eyes and lips were uneven and the wrong size.

Flack sued in part under the Visual Artists Rights Act of 1990 (VARA), a federal law which grants the authors of visual art of "recognized stature" the right to prevent any intentional distortion, mutilation or other modification of an author's work of visual art that would be prejudicial to the artist's honor or reputation. VARA specifically states that "modification of a work of visual art" resulting from conservation does not constitute "destruction, distortion... [or] mutilation" unless the conservation was done with gross negligence. But Flack alleged that hiring the restorer rose to the level of gross negligence, and the Court found the allegation sufficient to deny defendants' motion to dismiss. The case was ultimately settled.

We believed that VARA was of little help to Stuart, however, since it protects the rights of the work's artist, not its owner.

Stuart was still incensed, and wanted to denounce Cromwell in the press, but he was worried about inviting a costly defamation suit. Such cases do arise, as with the restorer Goldreyer's 1995 libel action in New York State court against Time, International. Time had written that the Barnett Newman painting which Goldreyer had restored should be re-hung with a

warning sign: "Newman according to Goldreyer." Goldreyer lost that case. Similarly, the Columbia University art history professor James Beck was sued by an Italian restorer for "aggravated slander," a crime carrying a three-year prison term in Italy, after Italian journalists had quoted Beck as remarking in 1991 that the restoration of a 15th-century sculpture by Quercia in Lucca looked "as if it had been treated with acid, cleaned with Spic and Span and polished with Johnson's Wax." Beck was acquitted.

We tried to console Stuart that his situation could be worse. For instance, in 1992 Paolo Veronese's Renaissance masterpiece *Marriage at Cana* was not only spattered by water from a leaky air vent at the Louvre during a storm but during a restoration two days later was also dropped by workers and gashed in five places. Furthermore, in 2001 Leonardo da Vinci's drawing of *Orpheus* being attacked by the Furies, a privately owned work that had been discovered by the Leonardo expert Carlos Pedretti in 1998, was reportedly destroyed when restorers tried to clean it by submerging it in alcohol and water but ended up washing away the ink. Pedretti was later quoted as saying that he was amazed that restorers had submerged the piece without conducting tests in advance. In addition, in 1999, after the restorer Pinin Brambilla spent 20 years working on Leonardo's masterpiece *The Last Supper*, she was criticized for depriving the painting of its own history by removing the work of

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previous restorers, thereby creating
The Lost Supper.

Stuart, however, was definitely not
amused. After all, his was no
Restoration Comedy.

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