

INVESTED INT

52



AS ATTORNEYS for a range of art-collecting clients, from those who merely dabble in the market to those who have made a Gagosian amount of money buying and selling art, we find that we give the same ironclad advice over and over: Your art investment is potentially worthless if you fail to protect it legally. Moreover, without the proper protocols in place, you stand to lose more than your purchase price in the event of a legal challenge. Many pitfalls, from issues of authenticity to ownership disputes, can be avoided with proper legal procedures. In the hope that you end up like Larry G—and not as a cautionary tale in one of our future columns—we have answered a few of the most common investment-related legal questions from our e-mail inbox.

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.

Q

I am considering buying an ancient Greek vase from a gallery, but I hear that fakes are rampant. How can I protect myself if it turns out to be junk?

A

First, do your due diligence (and second and third, do your due diligence). This means making certain that you know with whom you are dealing and what you are buying,

enlisting outside help if necessary. Consult an expert who specializes in antiquities. Ask your lawyer to do both a lien search on the seller (so you know the vase isn't pledged or encumbered) and an Art Loss Register search to confirm that the vase hasn't been reported lost or stolen, which could invalidate your title to it.

Even if your due diligence turns up nothing and you decide to buy the vase, these efforts will be helpful should you later face an ownership dispute. In fact, all else being equal, showing that you have done your homework may sway a court in your favor in the case of a competing claim.

It is also critical to have in place a good purchase agreement, which would include solid representations and warranties by the gallery should things go awry.

I bought the vase anyway after the dealer showed me a certificate of authenticity. Another dealer just told me that the vase was probably manufactured in Athens, Georgia. Now what?

The mere specter of doubt raised by another dealer (or anyone else) about a piece's authenticity is not enough to rescind a sale, since opinions on authenticity may differ over time. However, if you can demonstrate that the work is indeed a fake, you should be on strong legal

ILLUSTRATION BY JACK DYLAN

ERESTS

by Thomas and Charles Danziger

footing. In addition to suing the seller for a breach of the warranties in the contract (assuming you signed one), you may be able to take advantage of a New York State law declaring that when an arts merchant sells fine art to a non-arts merchant and furnishes a certificate of authenticity or similar instrument, that instrument creates an express warranty. Similar statutes exist in Michigan, Iowa, and Florida. In all these states you would be entitled to a full refund of your purchase price—and perhaps additional damages, if you could prove the gallery deliberately defrauded you.

A Hong Kong dealer recently sent me an image of a Tang Dynasty horse in his gallery, together with paperwork showing that it was exported from China in 2005. If I buy it, will I have problems importing the piece based on the memorandum of understanding between the U.S. and China?

The MOU restricts the importation into the U.S. only of antiquities that were exported from China after January 16, 2009, so you should have no problem bringing in the horse. That said, to smooth the way through the sometimes Byzantine U.S. Customs process, we recommend that the paper trail be verifiable, which generally means meticulous documentation (preferably on appropriate letterhead) concerning the provenance, export dates, and other relevant facts, together with good contact information in the event of questions by customs officials.

One approach we have used successfully in this area is to submit detailed provenance information (including supporting documentation) to U.S. Customs and obtain unofficial U.S. government approval before even attempting to import the work. In this way, we have avoided difficulties at the border—so far.

How important is it that a work of art be signed by the artist?

In terms of marketability, it depends on the artist and the work. In terms of proving authenticity, it's about as important as feathers are to

a turtle, since a signature is one of the easiest elements to fake. We have even seen paintings where the "artist" misspelled his own name (suggestion to would-be forgers: a little more effort would be nice).

I am interested in buying a drawing that was once owned by a Hollywood legend—or so the dealer assures me. What if this provenance turns out to be false?

In your purchase agreement, make sure your lawyer includes a strongly worded representation and warranty by the seller attesting to the provenance, or ownership history; a provision stating that you are expressly relying on this "rep and warranty" in buying the drawing; and an indemnification provision that specifically survives the delivery of the work and says that if the drawing turns out not to have come from this collection, you may rescind the sale and receive a full refund of the purchase price plus interest.

Is my art collection safe under my homeowner's insurance policy?

We recommend that collections valued above \$200,000 be covered by fine-arts insurance, which generally offers greater protection than a standard homeowner's policy, including worldwide coverage. In addition, fine-arts insurance (unlike homeowner's) usually covers breakage. We also suggest insuring your collection not at a fixed figure but at market value, which can rise over time, so that in the event of a casualty, your payout would be the amount for which the works could have sold at the date of your loss rather than, say, the historical purchase price.

I bought a sculpture at auction in New York 20 years ago. I now have solid evidence that it's a fake. Can I sue?

Fortunately for the legal industry, anybody can sue for anything (more or less), but you will face a statute-of-limitations problem here. The Uniform Commercial Code generally requires that a legal action in connection with the sale of goods (including

art) be brought within four years of the purchase date, although the major auction houses extend this period to five years. You would have more time if you could show that the house acted fraudulently, since in New York fraud cases may be brought within six years from the sale date, or two years from the date that the fraud was (or could have been) discovered. But you'll have to demonstrate that the seller made representations about the sculpture knowing they were false or with a reckless disregard for the truth and intended to deceive you—which is usually difficult to prove.

My cheating soon-to-be ex-husband is making a claim for my Fabergé collection. How can he do this if I assembled it before our marriage?

The general rule in most states is that in a divorce, art acquired during the marriage (marital property) is distributed equitably between spouses, while works acquired before marriage or through gift or inheritance (separate property) typically remain distinct. Unfortunately, the application of this rule isn't always so straightforward. For instance, if the pieces you bought while you were single appreciated in value during your marriage in part because of the efforts of your dirtbag husband, the amount of that appreciation could be considered marital property for equitable-distribution purposes. Note that the question of what these efforts might entail is often fiercely contested. Is a recommendation not to sell a work enough of a contribution, as many spouses have claimed, or must there be more-active management? Legal opinions differ. In any event, it's important to retain proper documentation showing how and when your pieces were acquired, since the party with more-complete paperwork—not to mention the better attorney—often emerges victorious.

If you guys are so smart, why aren't you flying around in private jets like your clients?

That would just be showing off. ☐

CHARLES AND THOMAS DANZIGER ARE THE LEAD PARTNERS IN THE NEW YORK FIRM DANZIGER, DANZIGER & MURO, SPECIALIZING IN ART LAW.