offered art title insurance from 1982 to 1985 but withdrew it because of little demand. Instead, Chubb now offers all-risk fine-arts coverage that reimburses policyholders for legal costs up to $100,000 in the event of a title dispute involving a scheduled art work. It will not, however, reimburse owners for the value of pieces they have to forfeit, and it is not valid in certain states (including New York).

Art title insurance differs in one fundamental respect from the casualty, property, and liability insurance offered by traditional insurers: While the latter covers the risk of a loss occurring after the effective date the policy is issued, art title insurance covers defects that occurred in the past, before the policy is issued. It is most comparable to real-property title insurance, which buyers obtain with commercial and residential real-estate purchases and with all real estate bank loans. (Hint: The guy sitting at the end of the table at your house closing whose name you didn’t know was probably working for your title insurer, and without him your bank would not have made your loan.)

To address this thorny problem and others caused by title defects, Aris Title Insurance Corporation has been selling art title insurance since 2006. Aris, which was bought by Argo Group in 2010, covers the legal costs of defending a title dispute and compensates holders if they lose an ownership dispute. The company charges a onetime premium, paid upfront, whose amount depends on the covered work’s provenance risk profile and value.

Defective title is especially problematic in the U.S., because the law here (in contrast to Swiss law, for example) holds that the thief of a work generally cannot pass good title to a purchaser. This means that unwitting buyers of stolen goods often end up surrendering the art without any compensation. And since there is no official governmental registry of title to art works that would clearly show who owns a given piece—like, say, the land records maintained by all states—would-be art buyers have traditionally had to rely on their own due diligence to avoid disaster, with predictably mixed results.

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Aris was not the first to dip a toe in the art title insurance pool. According to Dorit Straus, worldwide specialty fine-art manager at the Chubb Group of Insurance Companies, Chubb

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.
Several high-profile restitution cases involving Nazi-looted art have drawn attention to the problem of title with regard to stolen art, but in fact as many as three-quarters of the claims in the area of art title insurance concern non-theft-related ownership problems, such as liens and encumbrances on inventory. For instance, a collector might unknowingly buy an artwork that had been used as collateral for a loan and end up with a cloud on title. Such was the case for buyers of jewelry that Ralph Esmerian, the former head of the famed jewelry store Fred Leighton, had pledged as collateral for loans from Merrill Lynch. (Esmerian pled guilty to bankruptcy fraud in April and was sentenced to six years in prison.) The Uniform Commercial Code adopted throughout the United States may offer legal protection to nonmerchant buyers of goods sold in the ordinary course of business, but the legal expenses that inevitably result from title claims are generally not recoverable, even if the innocent purchaser prevails.

Art title insurance might protect against a similar situation, but it does not cover all contingencies, and it’s important to understand its limitations. Physical loss and damage are excluded—as when Steve Wynn famously put his elbow through his Picasso painting Le rêve in 2006—as are matters usually not covered by real-property title insurance, such as information known by the insured as of the date of issuance of the policy but not disclosed to the insurer. And if your Van Gogh turns out to be a Van no Gogh, you’ll get no dough from Aris, since it does not insure against forgery or misattribution.

How widespread is the use of title insurance in the art world? Since 2006 Aris has sold about 1,000 policies, a number that corresponds to a tiny fraction of worldwide art transactions in any given year. (Full disclosure: We were early purchasers of Aris title insurance for a client; so far there has been no claim under this policy.) We do not believe the insurance is used with regularity by the prime movers in the art market, dealers and auction houses, because they generally rely on warranties by sellers that they have good title. That said, before Christie’s auctioned works from the bankrupt Salander-O’Reilly Galleries last June, it reportedly recommended that the seller purchase insurance from Aris to allay buyers’ fears about potential claims or encumbrances, even though the bankruptcy court had approved the sale.

Why isn’t title insurance more widespread? One possibility is that the people most likely to seek coverage are those who already know of a title defect, and to the extent that they don’t disclose this information to Aris, any claim they make might not be covered. Cost is also a factor, especially for works with gaps in provenance dating to around World War II. But the most significant reason may be that many collectors (including any number of our clients) view title insurance as an unnecessary expense because they simply avoid buying works from people they don’t already know and trust or buy through reputable auction houses, which stand behind their sales.

Those thinking about obtaining title insurance may want to consider having an attorney review a policy’s exact terms of coverage to make certain that it meets their needs. And although throughout the country so-called rate states set the maximum amount that real property title insurers can charge for coverage, no such regulation exists for art title insurance. In our admittedly limited experience, Aris’s fees and terms of coverage are at least somewhat negotiable.

Art title insurance may be a useful arrow in the quiver of art buyers, but we still believe there is no substitute for carrying out independent due diligence before making a purchase. Given the uncertainties of the art market, when our clients ask us how they can avoid a claim down the road, we advise that the surest and cheapest solution is not to buy a problem work in the first place. After all, we’re art lawyers, not fortune-tellers.

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