Reversal of Fortune

Your valuable artwork comes with a certificate of authenticity. What can you do if it turns out to be fake?

By Thomas & Charles Danziger

Some of our clients want us to work miracles, while others merely want the impossible. And then there was Dan, a hedge fund manager who arrived at our office balancing his BlackBerry and two cell phones on top of a 19th-century painting that he had inherited from his grandfather.

Dan was apoplectic. The world's leading expert on the artist had just excluded the work from an upcoming catalogue raisonné, declaring it a fake—and a bad one at that.

"That's ridiculous!" Dan railed. "When Grandpa bought the picture from a Madison Avenue gallery 40 years ago, it came with a certificate of authenticity from the painter's own son." He demanded that the gallery pay him what the painting would be worth if it were authentic.

The good news for our client was that in 1966, New York State enacted a law stipulating that whenever an art merchant delivers a certificate of authenticity to a buyer who is not an art merchant; the certificate creates an express warranty of authenticity. Accordingly, buyers may have the right to a refund in the event that a work turns out to be inauthentic.

The bad news was that claims for breach of warranty are subject to a statute of limitations—one that, in Dan's case, had probably run out. The Uniform Commercial Code, as adopted in each state, sets forth a statute of limitations for commercial transactions. In New York, an action for breach of a sales contract must be brought within four years after "the cause of action has accrued," which generally means four years from the delivery of goods. The major auction houses customarily extend this period to five years from the date of sale—a fact unknown to many collectors.

The four-year rule was applied in the 1988 federal case *Wilson* v. *Hammer.* In 1961 Dorothy and John Wilson paid more than $11,000 to the Hammer Galleries in New York for an original painting by Édouard Vuillard, *Femme Debout,* and were assured in writing that the picture's authenticity "is guaranteed." When they decided to sell it in 1984, an expert declared it a fake, and Dorothy Wilson, along with other executors of her late husband's will, sued the gallery. They argued that "a warranty of authenticity of a painting necessarily relates to the future condition of the artwork," and therefore their cause of action should begin at the time they actually discovered it was a fake.

But the federal court of appeals disagreed, noting that the four-year statute of limitations under the UCC, as enacted in Massachusetts (one of the four states covered by the court), begins at the delivery of the work, not the discovery of the breach. The court observed, "Because of the static nature of authenticity, the Wilsons were no less capable of discovering that *Femme Debout* as a fake at the time of purchase than they were at a later time."

Dan had an idea. Not a good one, but an idea nonetheless. "I know Grandpa spoke with the dealer several times over the years after buying the painting, and the dealer always praised it. Could that have extended the statute of limitations?"

Unfortunately, no. In the 1987 case *Firestone* v. *Parson,* the plaintiffs had bought a painting purportedly by Albert Bierstadt in 1981 from the Union League of Philadelphia for $500,000. But in 1986, a prominent art historian wrote in *Antiques*

magazine that the work was actually by John Ross Key—a view later adopted by other art historians. In their suit against the Union League to rescind the purchase contract and seek damages for lost profits, the buyers claimed that the painting was worth only $50,000 as a work by Key. They argued that the statute of limitations should have been tolled (that is, suspended) because the sellers continued to insist that the painting was by Bierstadt even after others raised serious doubts. But the court ruled that "the time limit for filing suit is not extended by reason of the adversary's refusal to agree that the claim is valid."

"Aren't there any important cases in my favor?" Dan demanded while he simultaneously made a stock trade on his Palm Pilot.

"Just one," we said, "a federal decision in the 1990 case *Balog* v. *Center Art Gallery-Hawaii*." The plaintiffs were private collectors Edward and Helen Balog, who, beginning in 1978, paid the Center Art Gallery in Hawaii approximately $36,200 for works that the gallery claimed were either originals or limited editions by Salvador Dalí. In the years following the Balogs' purchases, the gallery sent them a "Confidential Appraisal—Certificate of Authenticity" for each artwork showing its purported increase in market value. Seven years after the last purchase, the Balogs saw media reports questioning the authenticity of artworks sold by the gallery, and in 1989, they sued for breach of warranty.

Surprisingly, the court refused to dismiss the suit on statute of limitation grounds. Instead, it agreed with the Balogs that the four-year statute should be temporarily halted because the gallery's warranty extended to "future performance of goods." The court criticized *Wilson* and *Firestone* for a "too literalistic application of the Code which takes no cognizance of the unique problem presented by the application of the UCC to art and other collectibles." It probably didn't hurt the Balogs' case that the defendants were convicted separately of criminal mail and wire fraud for similar conduct.

"Great!" Dan exclaimed. "How could we get another court to follow the *Balog* ruling?"

"Move to Hawaii?" we suggested hopefully. Unfortunately for Dan, *Balog* is generally viewed as an anomaly, and its reasoning has not been followed in subsequent court cases. We told him that unless there is fraud, getting around the statute of limitations is unlikely. In New York State, cases involving fraud 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.

"That's it!" our truculent trader cried. "The dealer defrauded my grandfather—and I just found out about it."

Not so fast, we cautioned. To prove fraud, he would have to show that the dealer had made representations about the painting knowing they were false or with a reckless disregard for the truth and that the dealer had intended to deceive Dan's grandfather. And given the certificate of authenticity—not to mention the 40-year passage of time—this would be extremely difficult.

Dan lowered his voice. "I don't really think the dealer intended to deceive Grandpa, but if fraud will extend the statute of limitations, let's go for it." We patiently explained that our ethical obligations as attorneys precluded us from engaging in frivolous or harassing litigation and that such conduct

could subject us—and him—to sanctions by a court. We finally persuaded Dan to take a more practical approach—namely, appealing to the art dealer's good name.

A few days later, the dealer hobbled into our office, himself looking like a 19th-century relic. Blowing dust off the original sales invoice for the painting, he said: "I always liked this work. I got a similar one for my brother." Dan muttered, "Good trade."

The dealer admonished our client: "I know my rights, and it's too late for you to make a claim. But I stand behind my word, so I'll refund the original purchase price anyway."

In light of the statute of limitations, we advised Dan to accept the offer, which he reluctantly did, and the dispute was over.

The moral of our story? Not even a Master of the Universe can change the laws of time.