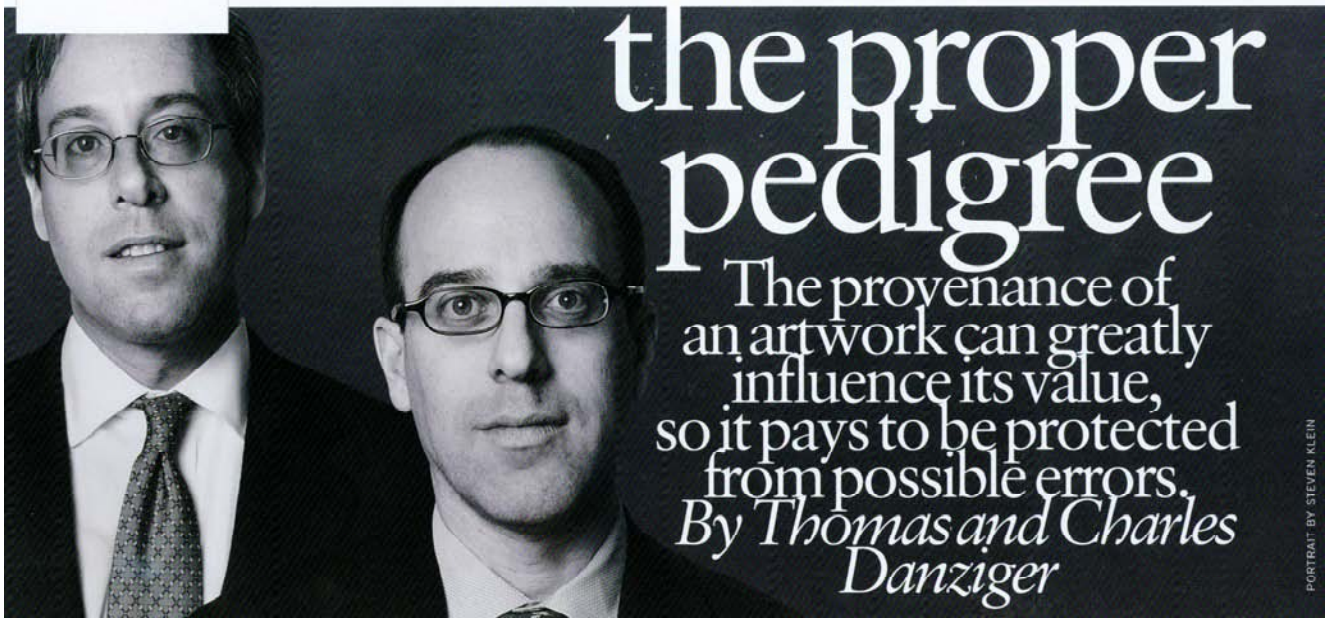
BROTHERS IN LAW



By Thomas & Charles Danziger

Like much of the art world, we head down to Art Basel Miami Beach every December for culture (sort of), sun and an escape from our legal practice in New York. Occasionally we manage two out of the three.

Last year we ran into our old friend Madeleine while checking into our hotel, and before we could even get our room keys, she cornered us for some professional advice. Madeleine was interested in buying an unsigned painting on display in the booth of a Chelsea gallery. The picture was nice enough, but its main selling point was that it had once been owned by a prominent collector, and the dealer was being cagey about guaranteeing the provenance in writing. Madeleine knew others were keen on buying the picture and wanted us to protect her interests while securing the sale.

Good provenance is especially important for unsigned works because it can be persuasive evidence of a picture's authenticity. Provenance should not be confused with authenticity- which is typically determined by expert opinions, physical examination and even scientific analysis- or with an appraisal, which is the opinion of a work's value.

Even courts have been known to conflate provenance and authenticity, and though this hasn't necessarily affected the outcome of the ruling, it underscores how the terms can be mistakenly used. For example, in the 1990 federal case *Jafari v. Wally Findlay Galleries*, which concerned a collector's attempt to purchase a Dali Painting from an art consultant, the court observes that the consultant couldn't provide the "original certificate of authenticity," which it incorrectly defines as "provenance."

Our work for Madeline seemed easy enough, or so we believed. For such transactions, we normally prepare two documents: a purchase agreement, which contains the relevant terms of the deal (such as purchase price, terms of payment and

delivery conditions), and a brief bill of sale (which serves to transfer title to the buyer). Many people don't pay attention to the bill of sale, but as the legal matter it's important. Its provisions generally last for an extended period, while those of the purchase agreement, including the seller's representations regarding provenance, often end on delivery of the artwork.

After attending there opening-night dinners, we returned to our hotel and spent most of the night preparing Madeleine's purchase agreement. Our draft contained a strongly worded warranty by the seller attesting to the work's provenance; a provision stating that Madeleine was expressly relying on the ownership history in buying the picture; and an indemnification provision (which specifically survived the delivery of the work) saying that if the painting turned out not to belong to the famous collector, Madeleine could rescind the sale and receive a full refund of her purchase price, together with interest.

So far so good. However, after sleepily e-mailing the draft agreement to the dealer's attorney, we received a quick reply: Either we forgo the warranty of provenance or there would be no deal. The lawyer insisted that the past ownership of the painting was such common knowledge that putting it in writing was unnecessary.

Unfortunately, that didn't work for us. Under New York's Uniform Commercial Code (UCC), which governs the sale of goods, including art, a seller's assertion of provenance can create an express warranty as long as it forms part of the so-called basis of the bargain. Should Madeleine later discover that the painting had not been owned by the collector, she would have an easier time recovering her money from the dealer with written documentation of the seller's claims in hand.

Although the UCC itself does not define the meaning of basis of bargain, art-law specialist John Cahill notes that almost any fact a seller offers in making the sale (including statements about provenance) are likely to become part of the basis of the bargain, according to the UCC's comments. Predictions or vague statements, such as "the work has an illustrious history," are less likely to be considered part of the bargain.

A famous federal case in this area, *Weber v. Peck*, held that a dealer's statement about a painting's provenance can create an express warranty and may make the seller liable for a mistake in the provenance. The 1999 litigation involved an oil on canvas, supposedly by Jacob van Ruisdael, and a bill of sale that incorrectly listed its ownership history. Some time after the plaintiff, Francis Weber, purchase the piece, and about 10 days before it was due to be offered at Sotheby's, he learned that the auction house couldn't verify the provenance and had therefore deleted references to seven previous owner and five publications. (Sotheby's also found that the painting had been previously sold to someone else as merely "attributed to" Ruisdael.) Nevertheless, Weber proceeded with the sale, which went poorly: A bid of $300,000 was accepted, but payment was never made. Weber sued the dealer, Ian Peck, and the court ruled in Weber's favor on the issue of breach of warranty based on the accuracy of the provenance. It ruled that damages would depend on the extent to which the painting's loss in value was caused by the breach. The court did not, however, allow Weber to rescind the entire sale.

Interestingly, not all warranties of provenance appear in written contracts. Some may be conveyed by a dealer's advertisements and catalogues, assuming the buyer relies on them. Moreover, even if a seller honestly believe that the painting was once part of an important collection, he could still be liable for breach of warranty if he's wrong. Of course, if a seller deliberately misleads a buyer about provenance, he could also be charged with fraudulent misrepresentation, larceny by false pretenses and other criminal offenses.

When we met Madeleine for stone crabs that evening, she said the dealer had agreed to state the provenance in the bill of sale. She asked how U.S. courts go about ruling on the matter. According to Georges Lederman, an attorney who handles cases in this area, "in the U.S., the parties produce their own expert witness testimony and the court weights the credibility of their opinion." The plaintiff bears the burden of proving that the seller breached the warranty.

We thought we had successfully resolved the issue, but the next day, we bumped into Madeleine on the terrace of the Delano Hotel. She told us he dealer now wanted to include a specific disclaimer of the ownership history in the purchase agreement- in short, *caveat emptor*. Since the disclaimer was vaguely worded and inconsistent with the bill of sale, we believed any New York court would probably disregard it. Still, we weren't taking any chances and insisted that it come out. The dealer's attorney reluctantly agreed.

Madeleine headed off happily to the beach after lunch, but the story didn't end there. When we saw her at the Miami airport late that afternoon, she was sporting a truly vicious sunburn. Through blistered lips, Madeleine explained that while she had dozed off at the beach, the dealer has sold the painting without any warranty of provenance to another buyer.

We weren't too sorry. Although we had spent most of our stay working indoors and had missed much of the fair, we had prevented Madeleine from making a foolish purchase. She had gotten burned in Miami, but at least not by her dealer.