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Ishmael perfectly epitomized the old art market: He was blind and rich, and he collected works with the abandon of a drunken sailor. Unfortunately, he didn't fully understand the dynamics of the auction process, which in today's floundering economy turned out to be a whale of a mistake.

Ishmael's troubles began in the wake of an evening sale that he hadn't bothered to attend. On the strong advice of an auction house specialist, he had left the winning (and apparently only) bid on a sculpture given as collateral for a loan from the auction house to the consignor. Now the press was calling him "a sucker" who had greatly overpaid for the work. That's when he phoned us.

"Don't auction house specialists have to be straight with buyers?" Ishmael carped. "Mine totally filleted me!"

This very issue is currently being tested in a public legal tussle between Sotheby's and the collector Halsey Minor (who is also legally entangled with Christie's on an unrelated matter). Last October, the auction house sued

Minor for \$16.8 million because he allegedly failed to pay for three American paintings, including Edward Hicks's *The Peaceable Kingdom with the Leopard of Serenity*, that he had bought in a May 2008 auction. In response, Minor filed a class-action countersuit in U.S. district court in San Francisco claiming that "Sotheby's actively conceals information concerning its own significant economic interests in property that it places at auction." Minor alleges that by failing to disclose that the Hicks painting secured a loan Sotheby's had made to its consignor, Ralph Esmerian, the auction house "had disguised itself as a sincere and honest art adviser to plaintiff, while in reality acting as a self-profiteer." At this time, neither the Sotheby's claim nor the Minor countersuit has been heard by a court.

Until the 19th century an auction house was regarded primarily as the seller's agent, with a fiduciary duty to act in his interest (see *Brothers in Law*, June 2003). In fact, it was the apparent breach of this responsibility in the famous case *Cristallina, S.A. v. Christie, Manson & Woods* that led New York to

establish new auction regulations in 1987. In *Cristallina*, which was settled out of court during the appeal, the consignor accused Christie's of, among other things, providing unrealistically high estimates for eight Impressionist paintings.

Today courts recognize that once a bidder becomes a buyer, the auctioneer becomes the agent of both purchaser and seller. As a practical matter, the relationship between the auction house and the seller is governed by a consignment agreement. Consequently, we advise our clients to read this agreement carefully and, where possible, negotiate its terms. The relationship between the house and the buyer, by contrast, is governed by the auction catalogue's Conditions of Sale, which include the house's warranties and disclaimers. Unfortunately, few bother to read these conditions.

Some commentators have suggested that auctioneers have a greater obligation of fair dealing when a buyer with significantly less expertise than they have relies on their knowledge, but there is scant case law on the issue. Practically speaking, proving this disparity in knowledge is not easy.

For instance, in the 1993 case *Kelly v. Brooks*, paintings that the lawyer Peter Kelly and his wife purchased from R. M. Brooks's auction house, State Line Auction, in Enfield, Connecticut, turned out to be fake. Kelly had signed a bill of sale containing a disclaimer that the property was sold "as is." Asserting that they had relied on the auctioneer's representation that the paintings were authentic, the Kellys sued

for breach of warranty, fraud, reckless misrepresentation and breach of duty of honesty and fair dealing. The district court sitting in New York dismissed the complaint, finding the disclaimer "clear and unequivocal" and reasoning that the couple had not relied on the auctioneer's expertise since they had done independent research before buying the paintings. The court also noted that even if the Kellys had relied on the auctioneer, that reliance would have been unreasonable because they did not know the auction house before making the purchase.

In the absence of fraud or similar fishy conduct, buyers who believe that they have overpaid at auction because of bad advice are swimming against the tide. For example, in the 1976 court of appeals of Arizona case *Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, the plaintiffs sued an auction house for fraud and negligent misrepresentation, claiming that its expert had given them inflated price ranges for works that they purchased. The court held for the house after finding that the sale was not rigged and that the estimated market values given by the expert were in the range established by free and open bidding at the auction.

Disclaimers were addressed in the famous 1971 case *Weisz v. Parke-Bernet Galleries, Inc.*, in which a buyer sued Parke-Bernet (predecessor to Sotheby's) in New York civil court on the grounds that the catalogue had misattributed two paintings to Raoul Dufy. The plaintiff won, despite the auction house's argument that the catalogue disclaimed all warranties of attribution. However, in a decision three

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years later, a New York appellate court reversed the earlier decision and held for the auction house, suggesting that buyers at auction assume the risk of loss despite their lack of bargaining power and expertise.

"Given the auction house's financial interest in the work, it's no fluke that the specialist urged me to buy it," Ishmael reasoned. "Doesn't this interest have to be prominently disclosed?"

In New York the answer is yes. Section 122(h) of the city's auction regulations says that when an auction house makes loans or advances money to consignors, "this fact must be conspicuously disclosed in the auctioneer's catalogue or printed material." Whether this disclosure must be made on a lot-by-lot basis rather than as a general statement is a trickier question, although the New York City Department of Consumer Affairs has reportedly taken the position that the latter satisfies the regulation.

Smart bidders should pay close attention to disclosure symbols in auction catalogues. According to published reports, Sotheby's began using new icons in its fall 2008 Impressionist and modern art sales to indicate that certain works were subject to "irrevocable bids" (meaning they are essentially presold unless a higher bid is received during the auction), a refinement on the traditional third-party guaranty that some argue may actually hurt the value of a work.

"How about the auction house's duty to act responsibly not just to the

buyer and seller but also to the public at large?" Ishmael asked.

Good point. Some courts and commentators have suggested that given the dominant market position of Sotheby's and Christie's and the shift in their clientele from mainly art dealers to the general public, auction houses owe a duty to the public to act in a reasonable manner. Indeed, Halsey Minor's complaint alleges "injury in fact to the general public." Whereas the United States, Britain and other common-law countries (in contrast to civil-law countries, such as France) have traditionally viewed auction houses as private agents of sellers and buyers and thus not subject to regulation, today these nations are putting increased pressure on the houses to create a level playing field. In the U.S., some observers have even proposed holding auctioneers to the legal standards found in the 1933 Securities Act, suggesting that they meet the stringent disclosure requirements applicable to underwriters of financial instruments.

Although we couldn't help Ishmael, his case raised at least two interesting questions: When is it legally and ethically acceptable for an auction house to withhold information from a buyer? And who were the real sharks in the salesroom the night that Ishmael left his bid?

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