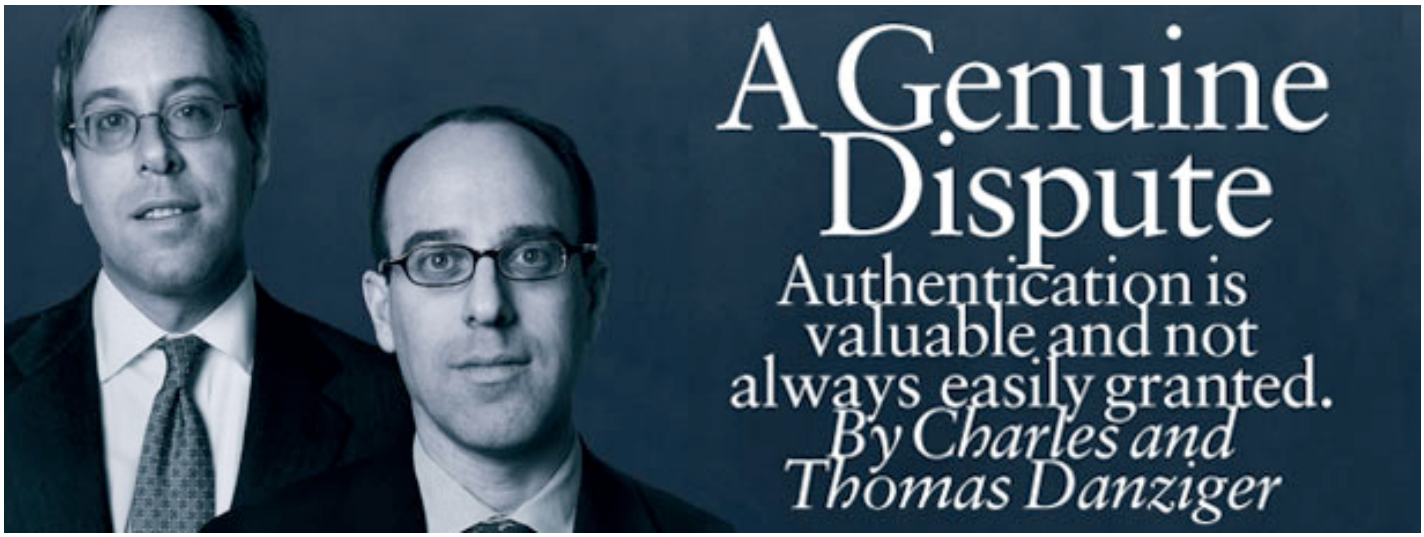

Published: April 1, 2010

Bunny G. (not her real initial) appeared in our office hopping mad. She had been the personal assistant (not her real function) to a famous sculptor, Max (no real reason for a parenthetical). Bunny now wanted to sell a signed sculpture her employer had given her shortly before his death. Bunny's problem: The buyer was insisting that Max's foundation (our client) issue a certificate stating that the work was authentic, but the foundation, controlled by Max's widow, Imke, wouldn't return Bunny's calls.

Bunny had demanded this meeting with Imke to discuss the situation. Even before sitting down, we sensed a slight tension between the two ladies. "Battle-ax!" spat Bunny. "Tramp!" retorted Imke. Then things got ugly. Bunny insisted that the foundation was trying to limit the number of authentic works by Max — thereby rendering its own collection of his sculptures more valuable — and that Imke was acting purely out of spite based on Bunny's "special relationship" with Max. Imke responded that the piece in question was "as fake as Bunny's face-lift" and that as a legal matter the foundation's motivation was irrelevant. Imke was right — about the motivation, at least.

Bunny's lawyer, who had joined the meeting late, declared that since the foundation was widely regarded as the arbiter of authenticity for Max's art, it had an obligation to authenticate Bunny's sculpture. We countered that this same argument had been rejected by the New York appeals court in the 2009 case *Thome v. Alexander & Louisa Calder Foundation*, in which the conductor Joel Thome tried to compel the Calder Foundation to authenticate two stage sets that he said the artist had redesigned after the originals were destroyed.

In July 1976, Calder had met with Thome in New York and approved working plans, based on his original drawings, for the sets for the musical *Socrate*. Thome had then had the sets completed at his own expense, but Calder died that November before seeing them. Eventually Thome decided to sell the sets, and in 1997 he asked the **Calder Foundation** to authenticate them and include them in its catalogue raisonné. The

foundation did neither and gave him no formal response — even though, according to Thome, its chairman had assured him that the pieces would be in the catalogue. Two collectors later offered to buy the sets from Thome, but only if the foundation authenticated them, so the sales fell through.

In 2007, Thome sued the Calder Foundation, asking the court to declare the sets authentic, compel their inclusion in the catalogue raisonné, and award him damages. The court dismissed his complaint, reasoning that authenticity decisions are "highly subjective" and "ill-suited" to resolution by declaratory judgment. It observed that the fact that the art market wouldn't recognize the sets as authentic unless they were in the catalogue was a marketplace problem, not a legal one.

Bunny's attorney next argued that since Max's foundation, according to its own Web site, had been established "to preserve Max's legacy and authenticate all his works," it couldn't arbitrarily refuse to authenticate a piece that was clearly genuine. We still saw no legal reason for the foundation to authenticate Bunny's sculpture. In the words of the *Calder* court: "Unless the plaintiff can establish an independent legal right to have the work included in the catalogue, such as an enforceable contractual promise to include it, there can be no injunction mandating the work's inclusion."

In response, Bunny's attorney claimed that such a contract had indeed arisen when his client submitted materials concerning the sculpture and the foundation accepted them for review. He pointed out that the Web site encouraged owners of Max's art to submit such materials. Although this wasn't an entirely harebrained position, in our view Bunny's actions didn't create an enforceable contract.

Undaunted, Bunny's lawyer next argued that the foundation's failure to authenticate the sculpture was malicious and defamed the work and accordingly constituted "product disparagement." He cited the famous 1929 New York case *Hahn v. Duveen*, in which the art dealer Joseph Duveen called a painting allegedly by Leonardo da Vinci a copy, derailing the work's sale to a museum. The owner, Andrée Hahn, sued Duveen, who settled by paying Hahn $60,000. (Contemporary scholars generally agree with Duveen's assessment of the "da Vinci" as a copy.)

We reminded Bunny's lawyer that a key element of product disparagement is publication to a third person, which did not occur in Bunny's case — even if the foundation's failure to authenticate the sculpture was arguably tantamount to telling the world it was fake.

The lawyer next claimed that the foundation had engaged in "tortuous interference with prospective business advantage" by willfully refusing to authenticate the sculpture in order to disrupt the purchase offer Bunny had received. However, we saw no evidence that the foundation had violated the law or acted with the sole purpose of harming her, which are two requirements of a tortuous-

interference claim.

Bunny's lawyer went on to speculate that Imke and the other members of the foundation's board had conspired to restrain the market for Max's works in violation of antitrust laws, comparing Bunny's situation to that of the plaintiff in the ongoing 2009 New York district court case *Simon-Whelan v. the Andy Warhol Foundation for the Visual Arts, Inc.* The plaintiff there, Joe Simon, claimed that the Andy Warhol Authentication Board and the Andy Warhol Foundation for the Visual Arts in New York had refused to authenticate his painting — which had previously been authenticated by the Andy Warhol Foundation — as part of a conspiracy to reduce competition in the Warhol market, increase the value of works owned by the foundation, and encourage museums and galleries to choose those works. Since there was no evidence of a conspiracy in our case, we could only assume that Bunny's lawyer had seen too many Oliver Stone movies.

Realizing that her lawyer was getting nowhere, Bunny tried one last tack. "If you don't give me that authenticity letter," she threatened, "I'll hire a big-gun law firm and sue you for millions!"

"Make our day," we replied, citing the 2007 Montana Supreme Court case *Seltzer v. Morton*. Steve Morton, heir to the Morton Salt fortune, retained a powerful law firm to sue the art expert Steve Seltzer for $750,000 plus punitive damages after Seltzer refused to change his opinion about the authenticity of Morton's painting *Lassoing a Longhorn*. Morton said the work was by the famous Western artist Charles M. Russell, while Seltzer thought it was by a lesser-known artist, O.C. Seltzer (who was Russell's protégé and happened to be Steve Seltzer's grand- father). Morton eventually dropped his suit, but Seltzer filed his own claim against Morton and his law firm for malicious prosecution and won an $11 million judgment. Both sides appealed (Seltzer sought higher damages), but the Montana State Supreme Court upheld the award, finding that the defendants had used their lawsuit "as an instrument of coercion rather than a legitimate means to resolve a genuine dispute."

Our decision to use a stick rather than a carrot was effective. The next thing we knew, Bunny and her lawyer had hightailed it out of our office. Bunny may have had a signed sculpture, but she had little chance of winnng her case. And that's for real.

"A Genuine Dispute" originally appeared in the April 2010 issue of Art+Auction.