



## Assessing the Risks of Appraising and Authenticating Art

Providing appraisals and authentications can be an important service for an art dealer to provide in order to facilitate sales and bring in additional revenue. However, appraising and authenticating art do not come without risks and potential liabilities, which must be weighed against any additional benefits that accrue from undertaking such opportunities.

Two areas of law often arise when authentication and appraisals take place: contract and tort law. Both federal and state laws can come into play during the course of authentication. An art dealer might sell an artwork he or she owns, or a piece consigned by a collector or artist. The statute that most commonly covers these types of transactions is called the Uniform Commercial Code (UCC). Although various state UCC laws are similar, there are important nuances in each. Art dealers must look to the jurisdiction(s) in which they do business in order to ascertain the particular details of the UCC that applies to them and their art transactions. Therefore, we will talk in generalities for the purposes of this article.

The main area to examine is the concept of *express warranties*. An express warranty can be created without even using the words *express warranties*, or *guarantee*, as long as the buyer reasonably understands the seller is affirming certain essential qualities of the work, and the buyer relied on these representations in good faith. Generally, we look to an express warranty as one that outlines the

core description of the goods being sold and understand this description to be a *basis of the bargain*. It is not necessary for a seller to intend to create an express warranty. Furthermore, stating that one acted in good faith is not a defense if the express warranty turns out to be false.

Express warranties can come from sales contracts, catalogs, brochures, advertisements, Web sites and other related types of sales or marketing materials. An express warranty is breached if the artwork does not conform to the affirmation or promise made. The most common way an express warranty arises is from an art dealer's description of the artwork, as long as that description becomes a basis of the bargain. If a gallery owner, art consultant or appraiser makes statements regarding an artwork's authenticity—whether it's by a specific artist, school, time period or provenance—he or she is providing an express warranty.

An express warranty is different from a statement of opinion. The line between an opinion and a statement of fact can be blurry at times. More often than not, when one talks about value or aesthetics, that can be considered opinion, or puffing, rather than an express warranty, which would lean more to the authenticity or provenance of a piece. The more knowledge the gallery or art dealer claims to have in a specific area, the higher the level of responsibility and exposure for being inaccurate. Therefore, one who deems him or herself an expert rather

than a generalist will be more likely to be found liable. A caveat is when one who has little-to-no expertise in the field gives warranties or representations about artworks and argues that the comment should not be considered an express warranty because there should not have been reliance. Such persons can be found liable for negligence because the dealer was remiss in giving an opinion on something they knew little or nothing about.

There is no obligation on an art buyer's part to examine purchased goods in order to ensure the accuracy of the seller's representations, unless there is some glaring error that would have caused a reasonable person to suspect the representations were wrong. Courts have held that low prices do not necessarily provide sufficient notice to deny a claim for breach of warranty. However, a price that is too good to be true might trigger an obligation on the part of the buyer to investigate. If a buyer purchases the work and gets a second opinion, that might alleviate some of the exposure of the original seller because it can be argued that the buyer depended on personal expertise or the expertise of someone else, rather than the dealer's expertise, thus negating the express warranty.

What about disclaimers? Generally, courts disfavor disclaimers because they create a contradiction. On one hand, the dealer is stating that a work was created by a certain artist and the provenance is accurate; and then, in the fine print,

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he or she turns around and disclaims the buyer's ability to rely on the veracity of those statements. If a warranty and a disclaimer are inconsistent, the disclaimer would probably be found to be inoperative.

Some states have laws specifically regarding what can be disclaimed in an art transaction and under what circumstances. There's a famous case from 1962, the Park Burnett/Weitz case, which upheld auction-house disclaimers in terms of their "as-is" language. Since that time, however, a number of states have passed specific auction-house laws limiting their ability of exposure when selling art. However, it would be incumbent on art buyers to make sure they understand any disclaimers, as they can certainly undermine or eliminate a dealer's exposure.

There are other warranties, such as "fitness for particular purposes" or "implied warranties of merchantability," which are outside the scope of this article but should be investigated in the event that art sold or purchased is not quite what it appears to be. Some states, including New York, Florida, Iowa and Michigan, have unique statutes for authenticity.

How long does an express warranty last? In this area, the UCC is probably the dealer's best friend if he or she has sold art that is not in accordance with the warranty made. There is a strict four-year statute of limitations from the time of the *sale*, not from the time of discovery that the art is not what it was represented to be.

Numerous cases and claims have come up after the four-year period and were dismissed. A few esoteric theories have been broached to avoid the four-year statute, generally without success. The problem created for collectors in this matter is one rarely discovers the work is not what it was represented to be within the four-year period. People generally buy the art, hang

it on their wall and find out it is not all it was claimed to be when they try to sell it. In more cases than not, an attempted sale will be more than four years after the initial purchase. That's not to say many dealers do not try to accommodate their customers, even after their four-year period has ended, but their legal exposure is limited.

Of course, there is also the risk of fraud, which is a very different cause of action than a breach of warranty. Fraud is found when one knowingly makes a material misrepresentation of a fact, or misrepresents a fact by willful nondisclosure, with the intent that the misrepresentation be relied upon by the buyer. Depending on your jurisdiction, the statute of limitations for fraud will be different. It often applies from the place where one uncovers the fraud, or should have uncovered the fraud, rather than the time the artwork was purchased.

There are two measures of damages that come into play when an express warranty is breached, and again, determining which test is appropriate will depend on the jurisdiction in which the cause of action is brought. Generally, the test favored by the gallery selling the art would be one in which the gallery would be responsible for refunding the sales price with, perhaps, some interest. The remedy buyers tend to seek, particularly if the art has appreciated in value, is the amount a replacement piece would have been worth. Therefore, if someone bought a work of art years ago that has appreciated significantly, the buyer would, of course, want the appreciated value of the work, and the dealer would only want to pay them back the purchase price. Again, the test used depends on the jurisdiction in which the case is heard.

Ultimately, a dealer needs to be extremely cautious when providing any

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kind of representation as to authenticity, provenance or value of a work to any collector or customer. [www.artlaw.com](http://www.artlaw.com)

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