

IT'S ALL IN THE DETAILS: LEGAL TIPS FOR PROTECTING YOUR COLLECTION

Would you pay cash for a Maserati and drive away without receiving a certificate of title? Let your uninsured nineteen-year old cousin drive it to New Orleans for Mardi Gras? Or leave it at a used-car lot hoping the dealer will sell it for you at a good cost? These are silly questions, of course. No sensible person would take such risks; a sensible person would demand proof of title, keep the keys far away from risky drivers, and have a clear, written agreement with the dealer.

But what if we're not talking about a Maserati; what if, instead, we're talking about an ancient Chinese vase or a painting by Jackson Pollock? Such questions aren't so silly then, because in the business of art, transactions have traditionally occurred on a handshake, with little attention given to details—details like provenance, insurance, or the precise terms of a consignment agreement. The lack of attention to such details can cause serious problems.

Consider, for example, the following recent cases: (1) the owner of a painting by Sandro Botticelli that was on loan to a gallery found himself in a dispute over his rights in the painting when the gallery entered into bankruptcy proceedings; (2) a family in New York acquired a still life by the Dutch painter Adriaen Coorte and later received a demand letter claiming the work had been stolen and demanding restitution; and (3) a rare 19th-century English porcelain was destroyed during transit and the shipper refused to pay for the damage. These cases are not unique. On the contrary, stories about disputes involving art are all too common. The question is, what can you do to avoid them? The answer: treat transactions involving art with the same attention to detail that you give to transactions involving other valuable objects.

Secure Your Interest

The example of the collector and his Botticelli is instructive. In that case, the collector placed the painting on consignment at a gallery, but the gallery was unable to sell it for the desired price. Worse, the gallery entered into bankruptcy and the Bankruptcy Trustee took possession of the work and refused to return it to the collector. As unfair as this may sound, the Trustee was acting properly on behalf of the gallery's creditors. In particular, a bank had established a "secured interest" in the gallery's inventory, including the Botticelli, which made the painting collateral in support of a loan. Because the bank had a secured interest, the Trustee could sell the Botticelli to pay back the loan—*unless the collector's interest in the Botticelli was also secured*. Thus, in cases like this, the issue is whether the collector's interest is secured. If not, the Trustee wins and the work may be sold to pay the creditors.

Fortunately for owners, it is easy to avoid that outcome. First, consignment agreements should be written, and they should include a provision stating that the owner retains a security interest in the work until it is sold. Second, before delivering the work to the gallery, the owner should file a standardized Form UCC-1 Financing Statement in the Department of State where the gallery is located (for example, in Texas, it would be filed with the Texas Secretary of State; *see* www.sos.state.tx.us/ucc/forms/UCC1.pdf). Taking these two simple steps gives the owner

priority over the claims of any potential creditors. More to the point, it ensures that the work will remain part of the owner's collection and not, like the Botticelli, the subject of expensive bankruptcy litigation.

Review the Provenance

In restitution cases, the legal rule at issue is that you cannot acquire title to a work from a thief. No matter how many times a stolen work may be bought and sold, the person from whom it was taken remains the true owner and can demand its return. In the case involving the Adriaen Coorte still life, a German collector claims that the work was stolen from his family by the Stasi, the East German secret police, under the pretext of unpaid back taxes. The question is whether the Stasi's tax claim was legitimate or fabricated. If it was fabricated, title to the painting remains with the German collector, and the family currently in possession will have to return it.

Although you cannot completely eliminate the risk of future title claims against works in your collection, it is possible to minimize that risk. Exercising due diligence when purchasing art is especially important. Always request a full provenance report and look for significant gaps in the ownership history. Gaps during the 1940s, for example, should raise particular concern as they may indicate the work was one of the estimated 600,000 art objects that were stolen from museums and private collections by the Nazis. The Art Loss Register provides another tool for minimizing the risk of acquiring stolen art. The Art Loss Register is a vast database of stolen art that can be searched before a purchase to determine whether it includes the desired object. This can be done online for a fairly nominal fee and is certainly worth the minimal time and effort required, especially before purchasing a work of high value. Due diligence, however, will not guarantee that a work is free of all title claims, so a collector may also want to consider purchasing title insurance. Title insurance covers the legal costs incurred in a dispute over title and pays the agreed value of the art if the insured collector loses ownership.

Allocate the Risk

Art works face the greatest risk of damage when they are in transit. This is particularly true when they are shipped by common carrier, so working with a shipper experienced in packing and transporting fine art is essential. But hiring a qualified fine-art shipper is not enough. It is also important to specify who bears the risk if the art is lost or damaged. All too often, works are shipped from an owner to a gallery or from a gallery to a buyer with no thought given to this issue. The price of such inattention can be quite substantial when a work is damaged, as it includes not only the diminished value of the work, but frequently also legal expenses incurred in fighting about who must pay for it. The threat of such loss can easily be mitigated, however, by a written agreement that sets forth who bears the risk—the owner, the gallery, or the purchaser—and requires that person to obtain insurance covering the replacement value of the work. Further, you need to look carefully at the relevant insurance policy. The shipper's standard insurance is likely insufficient, and a standard homeowner's policy almost certainly will not cover loss or damage to art during transit. So it is important to verify that the policy (1) covers artworks in transit and (2) has limits high enough to cover the specific work being shipped. Finally, in the unfortunate

event the work is damaged, do not wait to report the damage to the insurer. Many policies require that losses be reported within a certain time, and if there is a delay in reporting, you may lose the right to recovery.

In sum, while there might be a theoretical difference between the nature of a Maserati and a painting by Jackson Pollock, on a practical level, they are both valuable objects. And on that level, the law treats them equally. Thus, from a legal standpoint, the easiest and most effective way to protect your art collection is to deal with the objects in it as you would any other valuable objects. Spending a little time and effort attending to details is the surest way to guard against potential loss and heartache.