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AUTHENTICITY OF AUTHORSHIP AND THE AUCTION MARKET

William W. Stuart

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AUTHENTICITY OF AUTHORSHIP AND THE AUCTION MARKET

William W. Stuart*

I. INTRODUCTION: THE AUCTION MARKET

Over the last twenty years, the art and auction market has been transformed from one where the prevalent bidders were experienced dealers and professional agents acting on the behalf of collectors and museums, into a market where many novice participants are engaged directly in bidding for themselves.¹ These new entrants to the art and antique auction market bid against each other, as well as against the dominant long-term experienced participants, dealers and gallery owners. With the population of buyers greatly expanding, another observable element is the establishment of new regional auction houses. Moreover, there has been an increase in the number of auctions held by long-existing auction houses. There has also been an increase in the quantity of fine art objects, antiquities, and antiques that are regularly made available at auction as a result of estate sales and high prices inducing owners to offer their valued possessions for sale.

The influx of a new class of participant bidders into the auction market has produced a group of individuals, sometimes naïve and very often inexperienced in the rules and conventions governing auction transactions.² This group of new bidders has provided motivation for increased deception and manipulation in the auction environment. Thus, these changes in the auction market have produced a burgeoning population of potential victims of traditional fraudulent practices in the auction market. In addition, the opportunity for gain has provided an incentive for the creation of new schemes involving misrepresentation of goods and the development of manipulative market practices devised to raise the ultimate price paid for those goods.³ Because many in the new class of auction bidders are relatively ignorant about the goods on which they are bidding, and because they are unaware of both the potential means for distorting the bidding process and the need and opportunity to obtain expert third party evaluations of goods offered at

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1. See ALICE GOLDFARB MARQUIS, *THE ART BIZ: THE COVERT WORLD OF COLLECTORS, DEALERS, AUCTION HOUSES, MUSEUMS, AND CRITICS* 250 (1991). Marquis notes: "[h]istorically, dealers comprised 70 or even 80 percent of auction house clients, but in recent years that percentage has dropped to around 40 percent. Between 1984 and 1987 alone, the percentage of sales at Sotheby's to private individuals went from 40 to 60 percent." *Id.*

2. See *Weisz v. Parke-Bernet Galleries, Inc.*, 325 N.Y.S.2d 576, 580 (N.Y. Civ. Ct. 1971) ("The most obvious characteristic of the two Parke-Bernet auctions is that they attracted people on the basis of their interest in owning works of art, not on the basis of their legal experience or business sophistication.").

3. MARQUIS, *supra* note 1, at 255.

At first blush the auction scene appears to illustrate the purest operation of a free market: a seller publicly offers an item; buyers openly bid on it; the highest bidder takes it home. But just as in the stock market, when large sums are at stake creative minds scheme to manipulate the system.

Id.

auction, there is a need to develop legal protections that will impose responsibility on auction houses to stand by the claims and assertions about the goods that are offered at auction. It is clear that because these bidders often are willing to expend large dollar amounts at auctions, there is both the means and reasons for expanding deceptive practices in the auction markets that justify the development of a more stringent basis for liability on auction houses for deceptive and misrepresentative practices.

Before this change in the auction environment, the established auction market in the United States was dominated by established firms whose reputation was a valued asset.⁴ These firms had a reason to police the bidding process and to exercise care in the characterization and presentation of goods for auction in ways that minimized deception. With the development of a new class of auction houses, a group of enterprises have entered the market, many with low capitalization and little hope of long-term operation, and which have no reputation to protect and little interest in competing with the national auction houses in the area of reputation for integrity. Consequently, these new firms have little interest in avoiding fraud and deception beyond the avoidance of litigation or criminal prosecution. Because states do not license auctioneers, or regulate auctions, entry into the auction business is open to anyone. There is no professional training or qualification established for the auctioneers in the area of appraisal; nevertheless, auctioneers regularly offer opinions as to the authenticity of items during the period that objects are available for inspection before bidding and at the time of bidding. Moreover, some of these auction house employees give estimations of value at the actual time of auction.

The major established auction houses provide a warranty of authenticity of the works of art, antiques, and antiquities in the written catalogues or printed conditions of sale, although these warranties may vary by type of merchandise according to the classifications and limitations adopted by the auction house.⁵ A warranty of authenticity of authorship is often provided that guarantees the identity of the creator or maker of an object, and the "period, culture, and source of origin" of a property offered at auction.⁶ Such warranties are also limited in duration.⁷ There is, however, a tremendous lessening of the extent of the warranty of authenticity, if one is provided at all, by the regional or local auction houses that are unwilling to take on the liability created by contracting to guarantee the authenticity of objects they sell at auction.

II. WARRANTY OF AUTHENTICITY OF AUTHORSHIP

A breach of warranty is the most common basis for a purchaser to claim that

4. See C. HUGH HILDESLEY, *THE COMPLETE GUIDE TO BUYING & SELLING AT AUCTION* 124 (1997). "The two principal auction houses, Sotheby's and Christie's, have both been in business since the eighteenth century. Both houses have a well-established reputation." *Id.*

5. See, e.g., Sotheby's, *19th Century Furniture & Decorative Arts*, Conditions of Sale 172-73 (Nov. 9, 2001); DuMouchelles Art Galleries Co., *Auction Catalog*, Conditions of Sale para. 1-11 (Oct. 2001); Sloan's, *20th Century Works of Art: Fine Furniture & Decorative Arts*, Conditions of Sale sec. 1-16 (Nov. 10 & 11, 2001); Neal Auction Co., *Louisiana Purchase Auction*, Conditions of Sale para. 1-6 (Oct. 13 & 14, 2001).

6. Sotheby's, *supra* note 5, at 174.

7. *Id.*

grounds exist for refusal to pay for goods or to rescind a purchase at auction.⁸ All auction houses, to some extent attempt to limit vulnerability to rescission by disclaiming or limiting implied warranties of authenticity of authorship.⁹ Such disclaimers of warranties are permitted under the Uniform Commercial Code by section 2-316(1).¹⁰ On the other hand, under section 2-313(1)(a), affirmative statements of fact about goods offered for sale can become the basis for an express warranty.¹¹ Auction catalogues, as well as statements by auctioneers, provide the basis both for assertions of disclaimers by auction sellers and for claims of express warranty by bidder purchasers.¹² Another basis of conflict between auction houses and their clientele include auction announcements, auction labels, and other postings, as well as statements by clerks and handlers.

An eighteenth century British case, *Jendwine v. Slade*,¹³ set down the general rule governing auction catalogue descriptions.¹⁴ At issue was the attribution of two paintings to named artists.¹⁵ The one was a seascape attributed to Claud Loraine and the other was attributed to Teniers.¹⁶ The successful bidder claimed the printing of the artists' names in the catalogue gave rise to a warranty of attribution or authorship, effectively claiming the catalogue listing provided a guarantee that the works were painted by the named artists.¹⁷ The auctioneer claimed the printing of the artists' names in the catalogue did not constitute an opinion that the works were painted by the named artists and did not provide a basis for the purchaser's reliance that the paintings were made by the named artists.¹⁸ The court held that the auction catalogue description did not give rise to a warranty of authenticity of authorship, because the court reasoned that the period of the artists' work was so far removed that it was not possible to reasonably assume that the auctioneer could determine whether the paintings were original and properly attributed to the named artists.¹⁹ According to the court, the catalogue merely indicated the seller's opinion and no more.²⁰

The *Jendwine* case dealt with statements of attribution made in an auction catalogue. Of course, statements of attribution can be made in other contexts. Differences in the context in which statements about works are made can be observed in a nineteenth century English case, *Power v. Barham*,²¹ involving a receipt provided by the seller specifying the name of the artist to which the purchased work was attributed.²² The court in *Power* held that the statement or description on a written receipt constituted an express warranty given at the time of

8. See, e.g., *Voitier v. Antique Art Gallery*, 524 So. 2d 80, 84 (La. 1988) (allowing the rescission of an auction sale of a painting when the painting was found not to be authentic).

9. See, e.g., *Sotheby's*, *supra* note 5, at 174.

10. U.C.C. § 2-316(1) (1999).

11. *Id.* § 2-313(1)(a).

12. See, e.g., *Sotheby's*, *supra* note 5, at 172-73.

13. 170 Eng. Rep. 459 (K.B. 1797).

14. *Id.* at 459-60.

15. *Id.* at 459.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 459-60.

21. 111 Eng. Rep. 865 (K.B. 1836).

22. *Id.*

sale and not merely a description or statement of opinion.²³

The warranties that are most often at issue in art and antique auctions involve questions of seller's title and authenticity of goods. The laws of contract and commercial law are generally hostile to disclaimers of warranty of title. Section 2-312 of the Uniform Commercial Code provides that a seller is obligated to insure that "the title conveyed shall be good, and its transfer rightful."²⁴ The conditions for a disclaimer of title are quite stringent. Section 2-312(2) provides a warranty of title "will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have."²⁵ Such statements are rarely made in the context of major public art and antique auctions. Consequently, there are seldom disputes as to liability for warranty of title. In the rare case of goods sold at auction being identified as stolen or otherwise not lawfully presented at auction, the good faith purchaser has little or no difficulty in obtaining recovery of the purchase price.

Auction houses usually invoke a disclaimer as to the physical condition of objects presented at auction by providing that such sales are on an "AS IS" basis.²⁶ Uniform Commercial Code section 2-316 permits the use of language like "AS IS" to disclaim implied warranties.²⁷ Consequently, there are only a few reported cases involving disputes over the condition of art works, antiques, or antiquities sold at auction.²⁸ Courts have generally imputed to the buyer the responsibility to inspect or determine the condition of an object presented for sale at an auction. Generally, courts view the "preview" period as providing ample opportunity for inspection.²⁹ Perhaps the claim for defective condition most likely to succeed is one that relates to breakage or change in condition between the time of a bid's acceptance and the time the buyer takes delivery of the object.

A typical opinion illustrating the significant effect of a disclaimer established by an "AS IS" clause in blocking a buyer's claim about the defective condition or misleading appearance of an art work, antique, or antiquity, is provided by a decision of the United States District Court for the Southern District of New York in *T.T. Exclusive Cars, Inc. v. Christies, Inc.*³⁰ The plaintiff, a wholesale car dealer, successfully bid at a Christie's auction on a vintage automobile, a 1962 Mercedes-Benz 300 SL Roadster.³¹ The auction catalogue description provided that the car's "total mileage was 24,000 miles, and that it had the original paint and chrome and factory fitted hose clips."³² After taking possession of the car, the purchaser obtained an appraisal that revealed the car's mileage was "in excess of 100,000 miles, had been repainted, had new hoses, screw clamps, brush touch-up under the hood, and a creased and dirty interior."³³ As a result of discovering the actual condition

23. *Id.* at 865-66.

24. U.C.C. § 2-312(1)(a) (1999).

25. *Id.* § 2-312(2).

26. *See, e.g.*, Sotheby's, *supra* note 5, at 172; DuMouchelle's, *supra* note 5, at para. 1.

27. U.C.C. § 2-316(3)(a).

28. *See, e.g.*, *T.T. Exclusive Cars, Inc. v. Christie's Inc.*, No. 96-CIV. 1650 LMM, 1996 WL 737204 (S.D.N.Y. Dec. 24, 1996).

29. *See, e.g.*, *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. 1968).

30. No. 96-CIV. 1650 LMM, 1996 WL 737204 (S.D.N.Y. Dec. 24, 1996).

31. *Id.* at *1.

32. *Id.*

33. *Id.*

of the car, the purchaser attempted to recover damages for breach of the sales contract.³⁴ The federal district court dismissed the purchaser's complaint concluding that, even if the catalogue description could be viewed as including specific representations of fact creating an express warranty as to the physical condition of the car, any such warranty was effectively disclaimed by the provision of Christie's Conditions of Sale stating that all property is sold at auction on an "AS IS" basis.³⁵

In 1990, the federal district court in Hawaii, in *Balog v. Center Art Gallery-Hawaii, Inc.*,³⁶ interpreted the express warranty provisions of Uniform Commercial Code section 2-313 to include a seller's express attribution of a work to a particular artist.³⁷ The buyers were art collectors who purchased a number of works attributed to Salvador Dali.³⁸ Beyond catalogues and printed announcements declaring that works by Salvador Dali were being offered for sale, the seller provided a "Confidential Appraisal—Certificate of Authenticity" for each work that stated "that the artworks were produced by Dali either as exclusive originals or as limited editions. . . ."³⁹ The buyers claimed the works were falsely attributed to Dali and that the seller breached an express warranty under the Uniform Commercial Code by selling them "fake artwork."⁴⁰ The seller maintained that "no warranties were made explicitly."⁴¹

The court in *Balog*, applying the Uniform Commercial Code, found a breach of an express warranty of authenticity of authorship.⁴² The court determined that paintings, prints, and sculpture were included within the definition of goods in Uniform Commercial Code section 2-105.⁴³ The court went on to determine that Uniform Commercial Code section 2-313 protects purchasers of counterfeit artworks by means of an express warranty.⁴⁴ The court reasoned that "[t]he foundation of every express warranty provision is the core description."⁴⁵ "The core description . . . provides a reference point for the level of performance to which the seller's performance must conform."⁴⁶ According to the court, "the core description is non-disclaimable by a seller, being the basic foundation upon which every sales contract is made."⁴⁷ The court acknowledged that Uniform Commercial Code section 2-313(2) "provides that 'any affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation

34. *See id.* at *2.

35. *Id.* at *3, *6.

36. 745 F. Supp. 1556 (D. Haw. 1990).

37. *Id.* at 1565.

38. *Id.* at 1558.

39. *Id.*

40. *Id.* at 1559.

41. *Id.*

42. *Id.* at 1565.

43. *Id.* at 1562 n.14 ("Hawaii's version of the Uniform Commercial Code . . . defines 'goods' as 'all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money which the price is to be paid, investment securities . . . and things in action. . . .").

44. *Id.* at 1563.

45. *Id.* "'A 1990 Toyota,' 'a pair of shoes,' or 'a Monet,' are all examples of core descriptions." *Id.* (citing U.C.C. 2-313 cmt. 1,4).

46. *Id.* at 1563-64.

47. *Id.* at 1564.

of the goods does not create a warranty.”⁴⁸ The court found that the sellers made strong claims of attribution that they reiterated in the “certificates” the seller issued with the intention of inducing the buyer’s reliance.⁴⁹ Moreover, the court found the buyers were reasonable in relying on the seller’s representations as the basis for information regarding the authenticity of the works.⁵⁰ Finally, the court concluded the sellers breached their duty under Uniform Commercial Code section 2-313 since their representations of authorship did not have “a reasonable basis in fact[] at the time” the representations were made.⁵¹ Thus, the court in *Balog* suggests that statements of attribution such as catalogue listings give rise to an express warranty under the Uniform Commercial Code.⁵² It should be recognized, however, that Uniform Commercial Code section 2-313(2), on its face, allows auctioneers and dealers to avoid liability under a theory of warranty of authenticity of authorship with a disclaimer asserting that their attributions are merely affirmations “of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods.”⁵³ It is significant that the court in *Balog* emphasized the disparity between a lay purchaser and a professional art dealer in determining liability.⁵⁴ The court agreed that “the requirements of fair dealing where there is a relationship between parties in which there is a basic inequality of knowledge, expertness, or economic power” provides the basis for the purchaser to “seek redress of damages based on a violation of the express warranties provided for by provisions of [Uniform Commercial Code] section 2-313.”⁵⁵

III. DISCLAIMER OF WARRANTY OF AUTHENTICITY

A decision from a New York federal district court, *Kelly v. Brooks*,⁵⁶ provides an example of applying the doctrine incorporated into Uniform Commercial Code section 2-316, which permits a disclaimer of warranty to include a disclaimer of warranty of authenticity of authorship.⁵⁷ The court understood that authorship generally refers to the creator of a work of fine art or to the period, culture, source or origin with which the creation of the work is identified in the description of the work.⁵⁸ The case involved the purchase at auction of seven works of art, including a painting by Glackens, that the purchaser claimed were not authentic.⁵⁹ The purchaser charged “breach of warranty, fraud, reckless misrepresentation, and breach of honesty and fair dealing.”⁶⁰ The seller auctioneer asserted a defense of disclaimer of warranty of authenticity based on the fact that the purchaser signed a

48. *Id.* at 1564 (quoting U.C.C. § 2-313(2)).

49. *Id.* at 1565.

50. *Id.* at 1565-66.

51. *Id.* at 1566.

52. *Id.*

53. U.C.C. § 2-313(2) (1999).

54. *Balog v. Center Art Gallery-Hawaii, Inc.*, 745 F. Supp. at 1565.

55. *Id.* (internal cite omitted).

56. No. 92 Civ. 729 (LAP), 1993 U.S. Dist. LEXIS 3385 (S.D.N.Y., Mar. 19, 1993).

57. *See id.* at *3. The opinion does not cite Uniform Commercial Code section 2-316; however, the case does provide that a disclaimer of warranty can include provisions disclaiming authenticity.

58. *Kelly v. Brooks*, 1993 U.S. Dist. LEXIS 3385 at *2 n.3, *2-*3.

59. *Id.* at *3.

60. *Id.*

bill of sale that included the following statement:

All property is sold "AS IS," and neither [named auction house] nor the Consignor(s) make any guarantees, warranties or representations, expressed or implied, with respect to property purchased, and in no event shall the seller nor the consignor be responsible for genuineness, nor deemed to have made any representation of genuineness, authorship, attribution, provenance, period, culture, source, origin, or condition of the purchased property and no verbal statements made regarding this property either before or after the sale of the stated property, or in this bill of sale, or invoice or catalogue or advertisement or elsewhere shall be deemed such a guarantee of genuineness.⁶¹

The court found this disclaimer of warranty of authenticity of authorship to be effective.⁶² The court reasoned that the purchaser signed the bill of sale with a disclaimer that "in very clear and unequivocal terms absolves defendants from any liability" and that no general provisions of contract law precluded such liability.⁶³ This approach to a specific disclaimer of liability has been recognized widely by the courts.⁶⁴

Disclaimers of express warranties of authenticity are viewed as contradictory and disfavored by the courts. Disclaimers of warranties of authenticity are not effective if they are found unreasonable under the Uniform Commercial Code.⁶⁵ Uniform Commercial Code section 2-316(1) provides:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.⁶⁶

Thus, any disclaimer language is to be construed in a manner consistent with the enforcement of an express warranty where possible. However, when a consistent reading is not possible, the disclaimer is to be held ineffective.

Several states, including Florida,⁶⁷ Iowa,⁶⁸ Michigan,⁶⁹ and New York,⁷⁰ have enacted legislation that provides assurance of authenticity that exceeds the consumer protection provided by Uniform Commercial Code section 2-316. These statutes hold art auctions liable to any non-merchant buyer for any statement relative to the authorship of a work of fine art, notwithstanding the seller's claim that the statement was merely the seller's opinion.⁷¹

An example of specific legislation providing for the establishment of an express warranty of authenticity is provided by the Michigan statute entitled, "An

61. *Id.* at *1 n.3.

62. *Id.* at *3-*4.

63. *Id.* at *3. The court stated: "A reasonable purchaser would have made a more thorough investigation of the paintings prior to their purchase. Caveat emptor—particularly when so advised by the seller." *Id.* at *5.

64. *See, e.g.*, *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, 509 F.2d 1043 (6th Cir. 1975).

65. U.C.C. § 2-316(1) (1999).

66. *Id.*

67. FLA. STAT. ANN. §§ 686.504-505 (West 1990).

68. IOWA CODE ANN. §§ 715 B.2-4 (West 1993).

69. MICH. COMP. LAWS ANN. §§ 442.321-325 (West 1989).

70. N.Y. ARTS & CULT. LAW § 13.01 (McKinney Supp. 2001).

71. *See supra* notes 67-70.

Act to provide for the creation and negation of express warranties in the sales of works of fine art.”⁷² The Michigan statute recognizes the following basis for creation of a warranty of authenticity of authorship:

If an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of the work who is not an art merchant, a written instrument which, in describing the work, identifies it with an author or authorship, the description is presumed to be part of the basis of the bargain and creates an express warranty of the authenticity of the authorship as of the date of the sale or exchange. . . . The warranty is not negated or limited because the art merchant in the written instrument did not use formal words such as “warrant” or “guarantee” because he or she did not have a specific intention or authorization to make a warranty, or because any statement relevant to authorship is, or purports to be, or is capable of being merely the art merchant’s opinion.⁷³

The Michigan statute requires that any disclaimer related to the subject of an express warranty must be read in a manner reasonably consistent with the terms of the express warranty.⁷⁴ Furthermore, the statute requires that any disclaimer must be clear and conspicuous to be effective.⁷⁵ The Michigan statute relating to construction of the terms of disclaimers of authenticity provides in part:

Words relevant to the creation of an express warranty of authenticity of authorship of a work of fine art and words tending to negate or limit warranty shall be construed where reasonable as consistent with each other . . . negation or limitation is inoperative to the extent that the construction is unreasonable. Subject to the limitations hereinafter set forth, the construction shall be deemed unreasonable in any of the following cases:

- (a) The language tending to negate or limit the warranty is not conspicuous, written and contained in a provision, separate and apart from any language relevant to the creation of the warranty, in words which would clearly and specifically apprise the buyer that the seller assumes no risk, liability or responsibility for the authenticity of the authorship of a work of fine art. Words of general disclaimer like “all warranties, express, or implied, are excluded” are not sufficient to negate or limit an express warranty of authenticity of the authorship of a work of fine art, created under section [§ 422.322] or otherwise.
- (b) The work of fine art is proved to be a counterfeit, and this was not clearly indicated in the description of the work.
- (c) The work of fine art is unqualifiedly stated to be the work of a named author or authorship and it is proved that, as of the date of sale or exchange, the statement was false, mistaken or erroneous.⁷⁶

The Michigan statute has the effect of requiring disclaimer language to be read as consistent with any express warranty, and when consistency is not possible, the disclaimer language is to be found ineffective or inoperative. The advantage of the Michigan statute over Uniform Commercial Code section 2-316 is that the standards for evaluating the reasonableness of a disclaimer are effectively delineated.⁷⁷ The statutes providing for enforcement of warranties of authorship have the effect

72. MICH. COMP. LAWS ANN. § 442.321-325 (West 1989).

73. *Id.* § 442.322(a).

74. *Id.* § 442.323.

75. *Id.* § 442.323(a).

76. *Id.* § 442.323.

77. Compare MICH. COMP. LAWS ANN. §§ 442.321-325 (West 1989) with U.C.C. § 2-316 (1999).

of ensuring that the identification of a work of fine art with any authorship in a written instrument is itself part of the basis of the bargain, and of eliminating, insofar as authorship is defined, the distinction between fact and the seller's opinion.

Under these state statutes specifically addressing the issue of the enforcement of the warranty of authenticity, the question often has arisen whether the representations by the seller had a reasonable basis in fact at the time the representation was made. In *Dawson v. G. Malina, Inc.*,⁷⁸ the plaintiff claimed a breach of warranty when he came to believe that antique Chinese jade and ceramic art objects he had purchased from an art gallery were forgeries.⁷⁹ The federal district court applied New York General Business Law section 219, the predecessor of the New York Arts and Cultural Affairs statute section 13.01, which provides in part:

Notwithstanding any provision of any other law to the contrary:

(1) Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it:

(a) Shall be presumed to be part of the basis of the bargain; and

(b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.⁸⁰

The court was presented with expert testimony with respect to the five objects that provided the basis for the suit.⁸¹ The court concluded that the purchaser was entitled to rescind the purchase of three of the objects because the defendant's representations regarding these objects lacked a reasonable basis in fact.⁸² The court found the seller had failed to engage in a sufficient investigation to substantiate the authenticity of three of the objects.⁸³ As to the other two objects, the court concluded that the gallery had a reasonable basis, in fact, for its representation; consequently, as to these objects, there was no breach of warranty.⁸⁴ In reaching its conclusion, the court provided a statement of its understanding of the standard for determining whether obligations under a warranty of authenticity have been met:

[I]t appears that the proper standard to be applied here in determining whether [sellers] are liable for breach of warranty [of authenticity] is whether the representations furnished [to buyer] by [the seller] with respect to each of these objects can be said to have had a reasonable basis in fact, at the time that these representations were made, with the question of whether there was such a reasonable basis in fact being measured by the expert testimony provided at trial.⁸⁵

The court went on to determine that to prevail, a purchaser need only show by a preponderance of the evidence that the buyer lacked a reasonable basis for claims of attribution or authenticity:

78. 463 F. Supp. 461 (S.D.N.Y. 1978).

79. *Id.* at 463.

80. N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney Supp. 2001).

81. *Dawson v. Malina, Inc.*, 463 F. Supp. at 464.

82. *Id.* at 468-71.

83. *Id.*

84. *Id.* at 468-70.

85. *Id.* at 467.

Since the plaintiff has the burden of proof on the issue of breach of warranty, the issue presented here, when reduced to its simplest terms, is whether [the buyer] has established by a fair preponderance of the evidence that the representations made by [the seller] were without a reasonable basis in fact at the time that these representations were made.⁸⁶

The protection provided to a buyer in a state with a statute providing for the enforceability of a warranty of authenticity is extensive. For example, in *Rogath v. Siebenmann*,⁸⁷ the buyer was able to sue for breach of warranty by establishing the existence of doubts about authenticity at the time of sale, rather than having to actually prove forgery or misattribution.⁸⁸ The painting involved was attributed to Francis Bacon.⁸⁹ The federal court concluded that the seller was aware of challenges to the authenticity of the painting because of comments about the shininess of the black paint used in the work being offered for sale in contrast to Bacon's usual use of matte black, and the presence of pink paint in the work offered for sale that is not observable in other works attributed to Bacon.⁹⁰ The court also regarded as significant that Sotheby's had declined to handle the sale of the painting; and that the Marlborough Gallery, which had been a dealer in Bacon's work, expressed doubts about the painting's authenticity.⁹¹ Significantly, the buyer was not required to establish that the painting was not created by Bacon, but was required only to establish that the defendant had made an express warrant of authenticity of authorship at a time when doubts of authorship existed.⁹²

Most states do not have statutes expressly dealing with express warranty of authenticity of authorship. Thus, in most jurisdictions, the courts are required to apply the general provision of commercial law in cases involving a claim of disclaimer of warranty of authenticity. The tendency of courts to uphold published disclaimers of authenticity in auction catalogues and printed conditions of sale is illustrated by the final decision of the New York courts in *Weisz v. Parke-Bernet Galleries*,⁹³ which noted that the lower court decision was decided before the adoption of a state statute directly dealing with warranties of authenticity.⁹⁴ The case arose out of two Parke-Bernet auctions in which two separate purchasers had acquired works listed in auction catalogues as paintings by Raoul Dufy.⁹⁵ Following reports of a criminal investigation of an art forger, the two purchasers learned that their paintings were inauthentic forgeries and commenced actions against the auction house, seeking to rescind their purchases.⁹⁶ The auction house maintained

86. *Id.*

87. 941 F. Supp. 416 (S.D.N.Y. 1996), *vacated by* 129 F.3d 261 (2d Cir. 1997).

88. *Id.* at 425. Judgment was vacated on other grounds. *Rogath v. Siebenmann*, 129 F.3d 261, 264-67 (2d Cir. 1997). Because of the possibility that buyer was aware when he bought the painting of the questions of authenticity, the court vacated the earlier ruling granting buyer's motion for summary judgment. *Id.* However, the principles of law cited from the original opinion remain unchanged.

89. *Rogath v. Siebenmann*, 941 F. Supp. at 417.

90. *Id.* at 422-23.

91. *Id.* at 423.

92. *Id.*

93. 351 N.Y.S. 2d 911 (N.Y. App. Term 1974) (per curium), *rev'd*, *Weisz v. Parke-Bernet Galleries*, 325 N.Y.S. 2d 576 (N.Y. Civ. Ct. 1971).

94. *Id.* at 912.

95. *Weisz v. Parke-Bernet Galleries*, 325 N.Y.S. 2d at 578.

96. *Id.*

that the sales were not subject to rescission in light of the provision in the printed conditions of sale providing that all works were offered for sale on an "as is" basis and disclaiming "the correctness of description, genuineness, authorship, provenience, or condition of the property."⁹⁷

The trial court found that one plaintiff, Weisz, did not know of the conditions of sale and could not be charged with knowledge of its contents.⁹⁸ However, the trial court found that the other plaintiff was chargeable with knowledge of the conditions of sale.⁹⁹ The court noted that the conditions of sale included the following language:

The [Parke-Bernet] Galleries has endeavored to catalogue and describe the property correctly, but all property is sold "as is" and neither the Galleries nor its consignor warrants or represents, and they shall in no event be responsible for, the correctness of description, genuineness, authorship, provenience or condition of the property, and no statement contained in the catalogue or made orally at the sale or elsewhere shall be deemed to be such a warranty or representation, or an assumption of liability.¹⁰⁰

The trial court went on to describe the nature of the catalogue listings and the court's view of the implied warranty that the form of the listing created.¹⁰¹

The next page in each catalogue is headed "List of Artists," and contains in alphabetical order, one under the other, a list of the artists with a catalogue number or numbers appearing on the same line with the named artist. *The implicit affirmation that the listed artists are represented in the auction and that the catalogue numbers appearing after their names represent their work could scarcely be clearer.*¹⁰²

Thus, the trial court was faced with the question of whether the language of the disclaimer set forth in the Conditions of Sale in the catalogue could be read consistently with the implied warranty of authorship.¹⁰³

The trial court concluded that the disclaimer was ineffective, finding that the auction house intended and expected that bidders at its auctions would rely on the accuracy of the descriptions appearing in the catalogue and on its reputation for expertise in art.¹⁰⁴ In an effort to insulate itself from liability created by this expectation on the part of potential bidders, the trial court found that the auction house placed language in its catalogue that contained "highly technical and legalistic words of disclaimer in a situation in which plain and emphatic words are required" and, moreover, that the disclaimer was "in no way given the special prominence that it clearly requires."¹⁰⁵ The court concluded that the language and organization of the auction catalogue were designed to emphasize the authorship and genuineness of the painting offered for sale, and that the disclaimer was worded in such a technical manner that the average purchaser would not understand that he was not being guaranteed an authentic work of art.¹⁰⁶

97. *Id.* at 578-79.

98. *Id.* at 580.

99. *Id.* at 581.

100. *Id.* at 579 (quoting Parke-Bernet Galleries' Conditions of Sale).

101. *Id.* at 579-83.

102. *Id.* at 579 (emphasis added).

103. *Id.* at 581.

104. *Id.*

105. *Id.* at 581-82.

106. *Id.* at 582.

Parke-Bernet Galleries appealed the trial court decision; in a brief per curiam opinion the appellate court reversed the judgments and dismissed the complaints of both purchasers of the falsely attributed Dufy paintings.¹⁰⁷ The appellate court found the disclaimer in the Conditions of Sale fully enforceable.¹⁰⁸ Disagreeing with the trial court's conclusion that the disclaimer was too technical and too inconspicuous to be enforced, the appellate court reasoned:

[D]efendant's auction-sale, catalogue listing, describing and illustrating these paintings gave leading and prominent place, in its prefatory terms of sale (explaining and regulating the conduct of the auction) to a clear, unequivocal disclaimer of any express or implied warranty or representation of genuineness of any paintings as products of the ascribed artist.¹⁰⁹

Abandoning an analysis based on express warranty of authenticity of authorship, the court identified one of the reasons for not finding any "implied" warranty of authenticity is the fact that the amount a person is willing to bid on paintings depends "upon the degree of certainty with which they could be authenticated and established as the works of the ascribed artist[s]."¹¹⁰ Absent fraud on the part of the sellers, the court concluded: "[T]he purchasers assumed the risk that in judging the paintings as readily-identifiable works of the named artist, and scaling their bids accordingly, they might be mistaken."¹¹¹

After the *Weisz* decision, the legislature in New York enacted new legislation to address this issue.¹¹² The effect of the statute is to forbid a warranty disclaimer that attempts to avoid liability for sale of counterfeit works unless the counterfeit is clearly indicated in the description of the work.¹¹³ Nevertheless, the *Weisz* opinion remains significant because without special legislation enforcing warranties of authenticity of authorship, courts are likely to view in a permissive manner statements about works of art offered at auction as mere opinions that are open to evaluation by potential buyers.

IV. STANDARDS FOR CONDITIONS OF SALE: SOTHEBY'S

Traditionally, purchasers at auction entered into transactions with an understanding of "buyer beware" in bidding on any item.¹¹⁴ There also was a broad understanding of the conditions of sale and of the limits or extent of any warranty provided by an auction house.¹¹⁵ However, the large population of new bidders includes many who are ignorant of the general rules governing auctions as evi-

107. *Weisz v. Parke-Bernet Galleries, Inc.*, 351 N.Y.S.2d at 912.

108. *Id.*

109. *Id.*

110. *See Id.*

111. *Id.* (citing RESTATEMENT OF CONTRACTS § 502 cmt. f., at 964).

112. *See* N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney 1984 & Supp. 2001).

113. *Id.* § 13.01(4)(b)(ii).

114. Ildiko P. DeAngelis, *Nuts and Bolts of Buying and Selling Collection Objects at Public Auction*, SB53 ALI-ABA 169, 174 (1997) (stating that under the maxim of "caveat emptor or 'buyer beware' . . . the auctioneer, being the seller's agent, owed duties solely to the seller, not the buyer"). *See also* BLACK'S LAW DICTIONARY 222 (6th ed. 1990) (noting the Latin phrase "caveat emptor" translates as "[l]et the buyer beware"). This maxim summarizes the principle that

purchasers must examine, evaluate, and test for themselves, and notes its applicability to auctions and judicial sales in contrast to sales of consumer goods because of statutory consumer protection. *Id.*

115. DeAngelis, *supra* note 114, at 175.

denced by the trial court's observations in the *Weisz* case.¹¹⁶ The trial court in *Weisz* gave great significance to the purchaser's naivete and lack of experience and understanding of the auction market. The trial judge observed:

I am satisfied that Dr. Weisz did not in fact know of the Conditions of Sale and may not properly be charged with knowledge of its contents. I accept as entirely accurate his testimony that on his prior appearances at Parke-Bernet auctions he had not made any bids, and that on the occasion of his purchase he did not observe the Conditions of Sale and was not aware of its existence.¹¹⁷

The trial court went on to make general observations about the experience and nature of the new population of auction bidders. The court noted that "[t]he most obvious characteristics of the two Parke-Bernet auctions is that they attracted people on the basis of their interest in owning works of art, not on the basis of their legal experience or business sophistication."¹¹⁸ The court went on to conclude the following:

Surely it is unrealistic to assume that people who bid at such auctions will ordinarily understand that a gallery catalogue overwhelmingly devoted to descriptions of works of art also includes on its preliminary pages conditions of sale. Even less reasonable does it seem to me to expect a bidder at such an auction to appreciate the possibility that the conditions of sale would include a disclaimer of liability for the accuracy of the basic information presented throughout the catalogue in unqualified form with every appearance of certainty and reliability.¹¹⁹

Not only are many members of the new class of auction bidders unaware of the technical rules and terms of auction practice, but many members of the general public seldom are aware of the vast differences among auction houses in the specific terms of sale employed at the specific auction house. Clearly, a comparison of the terms of the conditions for sale presented in the text of most auction house catalogues reveals strongly contrasting approaches to the guarantees or warranties provided by auction houses.¹²⁰

Sotheby's and Christie's are typical of auction houses providing significant protection to purchasers at auction. These auction houses make some effort to address the principal concerns of most purchasers about the authenticity of the objects purchased including such factors as age and source of the objects, which are often included in the term "authorship."¹²¹ Sotheby's, for example, defines "authorship" as the "creator, period, culture [or] source of origin" of an item.¹²² The Sotheby's approach to authorship in its statement of conditions of sale at its auctions sets out the following terms:

Goods auctioned are often of some age. The authenticity of the Authorship of property listed in the catalogue is guaranteed as stated in the Terms of Guarantee and except for the Limited Warranty contained therein, all property is sold "AS IS" without any representations or warranties by us or the Consignor as to mer-

116. See *Weisz v. Parke-Bernet Galleries*, 325 N.Y.S.2d at 580.

117. *Id.*

118. *Id.*

119. *Id.*

120. Compare the Statements of Conditions of Sale for Sotheby's, DuMouchelles, Sloan's and Neal. See *supra* note 5.

121. See e.g., Christie's, *The Collection of the Late André Meyer* 192-93 (Oct. 2001). See also Sotheby's, *supra* note 5, at 174.

122. Sotheby's, *supra* note 5, at 174.

chantability, fitness for a particular purpose, the correctness of the catalogue or other description of the physical condition, size, quality, rarity, importance, medium, provenance, exhibitions, literature or historical relevance of any property and no statement anywhere, whether oral or written, whether made in the catalogue, an advertisement, a bill of sale, a salesroom posting or announcement, or elsewhere, shall be deemed such a warranty, representation or assumption of liability. We and the Consignor make no representations and warranties, express or implied, as to whether the purchaser acquires any copyrights, including but not limited to, any reproduction rights in any property. We and the Consignor are not responsible for errors and omissions in the catalogue, glossary, or any supplemental material.¹²³

Under the Terms of Guarantee, Sotheby's limits its warranty of authenticity of authorship of an item or group of items, known as "a lot" at auction, to the description or terms used in the "bold type heading" describing the lot in the catalogue, subject to limitation or amendment made orally or by written salesroom announcements or notices.¹²⁴ The limitation of warranty is underscored: "Sotheby's makes no warranties whatsoever, whether express or implied, with respect to any material in the catalogue, other than that appearing in **BOLD TYPE HEADING** and subject [to the stated exclusions]."¹²⁵ Specific exclusions are set out as follows:

This warranty does not apply to: (i) Authorship of any paintings, drawings or sculpture created prior to 1870, unless the lot is determined to be a counterfeit (a modern forgery intended to deceive) which has a value at the date of the claim for rescission which is materially less than the purchase price paid for the lot; or (ii) any catalogue description where it was specifically mentioned that there is a conflict of specialist opinion on the Authorship of a lot; or (iii) Authorship which on the date of sale was in accordance with the then generally accepted opinion of scholars and specialists; or (iv) the identification of periods or dates of execution which may be proven inaccurate by means of scientific processes not generally accepted for use until after publication of the catalogue, or which were unreasonably expensive or impractical to use.¹²⁶

As is easily seen, Sotheby's guarantees authorship within a reasonable range of limitations. For example, since paintings before 1870, including works classified as "old masters" were often produced in a studio with help of assistants, and since the training of artists prior to the end of the nineteenth century involved imitation and copying of established artists, it is entirely fair for Sotheby's to place a limitation on liability for artist attribution of works prior to 1870. Certainly no one can seriously object to a limitation on liability that was qualifiedly expressed in the catalogue, or that was made according to established criteria at the time the attribution was made.

Sotheby's expressly excludes any implied warranties.¹²⁷ Specifically, the statement of Terms of Guarantee provides that "neither Sotheby's nor the Consignor makes any express or implied representations or warranties whatsoever concerning any property in the catalogue, including without limitation, any warranty of merchantability or fitness for a particular purpose, *except as specifically provided herein.*"¹²⁸ A warranty of merchantability or fitness for particular purpose relates

123. *Id.* at 172.

124. *See id.* at 174.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (emphasis added).

to how a purchaser plans to use a purchased item, which is beyond the knowledge of the auction house and a matter within the control of the purchaser.¹²⁹ Therefore, it should be reasonably expected by any purchaser at auction, given the usual lack of any specific discussion between auctioneer and purchaser, and given the lack of any special competence of an auctioneer to advise as to specific use of an item, that no warranties would be provided as to merchantability or fitness for particular use.

Within the statement of Conditions of Sale, Sotheby's specifically directs prospective bidders to carefully examine objects up for auction.¹³⁰ Sotheby's statement provides that: "Prospective bidders should inspect the property before bidding to determine its condition, size, and whether or not it has been repaired or restored."¹³¹ Clearly, a prospective buyer should have the right to inspect goods up at auction; it follows that any mistake following inspection, or failure to discover obvious aspects about an item, rightly falls on the purchaser. Thus, Sotheby's fairly forecloses liability for any incorrectness in the catalogue description of the physical condition, size or quality of the items placed at auction.¹³²

While providing for a guarantee of authenticity in the Terms of Guarantee set out in the catalogue, in a separate statement of Conditions of Sale, Sotheby's specifically disclaims any liability: "[N]o statement anywhere, whether oral or written, whether made in the catalogue, an advertisement, a bill of sale, a salesroom posting or announcement, or elsewhere, shall be deemed such a warranty, representation or assumption of liability."¹³³ While such a general disclaimer might be found to involve overreaching in the retail market, it is not so clear that such a disclaimer is unfair when dealing with "wholesale" transactions involving individual items that may be regarded as "used goods." Here, what may be regarded as "puffing," has long been regarded as providing no basis for liability.¹³⁴ Purchasers at auction are fairly put on notice by specific disclaimers in catalogues. Such purchasers otherwise may be denied the ability to invoke such statements about value or authenticity by auctioneers as creating a basis for liability given the nature of auctions as occasions for somewhat freewheeling statements by auctioneers that the courts view as mere statements of opinion. When one considers all the materials and persons involved in an auction—statements by clerks, handlers and auctioneers, fliers, announcements, catalogues, labels, and other postings—if any and all of these could give rise to warranties and related liability, the current auction house industry would need to be transformed into an industry that met the standards of the retail market. In other words, we would need to end auctions as we know them.

129. U.C.C. § 2-314(1),(2)(c) (1999). A warranty of merchantability is implied in certain contracts for the sale of goods "if the seller is a merchant with respect to goods of that kind." *Id.* § 2-314(1). Uniform Commercial Code section 2-316(2) permits disclaimer of implied warranties. *Id.* § 2-316(2).

130. Sotheby's, *supra* note 5, at 172.

131. *Id.*

132. *See id.*

133. *Id.*

134. *Compare* U.C.C. § 2-313(2) (1999) stating: "[B]ut an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty" with U.C.C. § 2-313(1) (1999), which sets out standards for when express warranties are created by the seller.

Sotheby's disclaimer of liability also includes a disavowal of any effect given to the use of such terms as "rarity" or "importance" in relating to the actual character of an item up for auction.¹³⁵ This disclaimer of liability may be seen as a reasonable way of dealing with aspects of opinion about an item, which are subjective. However, there is some basis for questioning the reasonableness of disclaimers regarding "provenance, [placement in prior] exhibitions, [or discussion in the] literature or historical relevance of any property . . ."¹³⁶ Certainly Sotheby's is in a better position than most prospective purchasers to engage in any appropriate determination of such facts. Perhaps in an earlier period, connoisseurs and dealers were equally situated to make such determinations. Today, these disclaimers can be seen as an aspect of the "buyer beware" policy that underlines much of auction history and that is captured in Sotheby's statement that "all property is sold 'AS IS'."¹³⁷ It should be understood that for many purchases, "provenance" is an aspect of an item purchased that plays a large role in establishing its value. For instance, the high price paid for Jackie Kennedy's faux pearl necklace was primarily based on the fact that Jacqueline Kennedy Onassis owned and wore the necklace.¹³⁸ If Sotheby's could not guarantee that the specific necklace was owned and worn by Mrs. Onassis, it should not have auctioned it as such.

Sotheby's sets out specific remedies for breach of the provided warranties.¹³⁹ The express warranties run "for a period of five years from the date of sale."¹⁴⁰ The original purchaser is the only person with standing to recover for breach of warranty.¹⁴¹ Rescission is the remedy "provided the lot is returned to Sotheby's at the original selling location in the same condition in which it was at the time of sale."¹⁴² Sotheby's does have a right to the opinion of two experts, obtained at the purchaser's expense, before determining to rescind because of breach of warranty.¹⁴³ Sotheby's provides a liberal period for rescission since long before the expiration of the five year period provided, the auction house would have paid the consignor and in many cases would have little likelihood of recovery of that payment after rescission.¹⁴⁴ It is also noteworthy that the statute of limitations under the Uniform Commercial Code section 2-725(1) is limited to four years from the date of delivery.¹⁴⁵

V. LIMITING LIABILITY TO COUNTERFEITS: DUMOUCHELLES

DuMouchelles, a fine arts auctioneer in Detroit, Michigan provides an example of an auction house limiting its liability to counterfeits. DuMouchelles states its Conditions of Sale in a way that seeks to avoid any liability for authenticity short of actual forgery: "The Galleries and the Consignor assume no risk, liability or responsibility for the authenticity of the authorship of any property

135. Sotheby's, *supra* note 5, at 172.

136. *Id.*

137. *See id.*

138. *See* Patricia Volk, *Oh, for Those Pearls*, N.Y. TIMES, Mar. 10, 1996, at 15.

139. Sotheby's, *supra* note 5, at 174.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.*

145. U.C.C. § 2-725(1) (1999).

identified in this catalogue.”¹⁴⁶ This policy is in strong contrast to the extended treatment of the subject of “authorship” by Sotheby’s.¹⁴⁷ DuMouchelles is explicit in its disclaimer of all warranties, except for forgery. The disclaimer states:

All property is sold “as is” and neither the Galleries nor the Consignor makes any warranties or representations of any kind or nature with respect to the property, and no statement in the catalog or made at the sale, or in the bill of sale or invoice or elsewhere shall be deemed an[] assumption of liability or a warrant or representation as to the description, genuineness, attributions, provenance or condition of the property.¹⁴⁸

An exception to DuMouchelles’s disclaimer is made for forgeries.¹⁴⁹ DuMouchelles provides for rescission if the purchaser can show that an item is “counterfeit.”¹⁵⁰ The provision providing for rescission does not have the limitations set out by Sotheby’s restricting coverage to art produced after 1870, or to determinations made with methodologies available to the auction house at the time of attribution.¹⁵¹ The relevant provision provides:

[I]f within twenty-one days of the sale of any lot, the purchaser gives notice in writing to the Galleries that the lot so sold is a counterfeit and, if within fourteen days of such notice the purchaser returns the lot to the Galleries in the same condition as when sold, and proves beyond a reasonable doubt that the returned lot is in fact a counterfeit and that this was not indicated by a fair reading of the catalog, the sale will be rescinded and the purchase price refunded. Consignor agrees to refund to Galleries any payments made to Consignor for any counterfeit property returned to Galleries.¹⁵²

With regard to the physical condition of items up for auction, DuMouchelles not only disclaims any basis for liability, but, similar to Sotheby’s, DuMouchelles attempts to place responsibility on the purchaser.¹⁵³ According to the DuMouchelles statement on Conditions of Sale: “Prospective bidders should inspect the property before bidding to determine its condition, size and whether or not it has been repaired or restored.”¹⁵⁴ Again given the nature of the auction market in dealing with unique or individual items, in a wholesale contract, such placement of responsibility for inspection is fairly placed on the purchaser.

The approach of DuMouchelles seems to set a bright line for the auction house’s responsibility; that is, a guarantee against fakes and forgeries. There is, however, a potential for much dispute about the meaning of “counterfeit.” Disputable issues include the signature on a painting arguably painted by the artist but whose signature is subsequently affixed by someone other than the artist to whom the work is attributed. Of course, there is always the possibility of differences among experts as to attribution. Thus, there is reason for objecting to limiting the denial of liability for actual authorship where the warranty is ostensibly a guarantee against “counterfeit” objects. Moreover, there are many areas where DuMouchelles has an ex-

146. DuMouchelles, *supra* note 5, at para. 1.

147. Compare DuMouchelles, *supra* note 5, at para. 1 and Sotheby’s, *supra* note 5, at 172, 174.

148. DuMouchelles, *supra* note 5, at para. 1.

149. *Id.* at para 5.

150. *Id.*

151. Compare Sotheby’s, *supra* note 5, at 174 and DuMouchelles, *supra* note 5, at para. 5.

152. DuMouchelles, *supra* note 5, at para. 5.

153. *Id.* at para. 1.

154. *Id.*

pertise or ability to determine aspects about the origin or provenance of objects presented at auction that are beyond the capacity of most bidders to independently determine. For example, if an auction house is not going to guarantee provenance, prior ownership should not be a part of the information that is attached to a work. As to issues about conditions, repairs, or restoration, it would seem that most prospective bidders are as equally situated as the auction house to make such determinations.

VI. LIMITING LIABILITY TO FRAUD AND NEGLIGENCE: SLOAN'S

Most auction houses either explicitly or implicitly obligate themselves to conform to the general law of contracts and sales. The "model" statement of Conditions of Sale provided by Sotheby's incorporates the contractual terms or the commercial law aspects of the relationship between purchaser at auction and the auction seller.¹⁵⁵ These contractual terms, of course, are subject to the general rules set out in the Uniform Commercial Code such as section 2-302 dealing with unconscionability and section 1-203 dealing with obligations to deal in good faith.¹⁵⁶ Of course, there are also general principles of tort law to which transactions involving auction sales are subject such as fraud or negligence resulting in misleading a purchaser.¹⁵⁷ Some auction houses attempt to limit the applicability of general terms of sales and contract law. For example, Sloan's Auction Galleries, a national auction house primarily based in Washington, D.C., has adopted a complete disclaimer of any contractual warranties limiting the right to rescission due to fraud or gross negligence in the writing of any of their catalogue descriptions.¹⁵⁸

While Sloan's warrants good title to the purchaser as agent for the consignor, this guarantees not much more than that the goods are not stolen; otherwise, all the property is sold "AS IS."¹⁵⁹ The terms of Conditions of Sale disclaim all warranties based on claims related to the correctness of the catalogue description regarding the "condition, size, . . . quality, . . . rarity, importance, provenance, exhibitions, literature or historical relevance of the [p]roperty."¹⁶⁰ The terms of Sloan's conditions of sale provide:

No . . . statement . . . [in the catalogue or at sale, or in the bill of sale, invoice, addenda, other publication or elsewhere,] orally or in writing, shall be deemed a legally binding representation or warranty (or assumption of liability) with respect [thereto]. . . . No representation, express or implied, is made by Sloan's or the consignor as to whether or not a purchaser will acquire any reproduction rights, copyrights, or other intellectual property rights in . . . the [p]roperty.¹⁶¹

155. See Sotheby's, *supra* note 5, at 172-74.

156. U.C.C. §§ 2-302, 1-203, 2-103(1)(b) (1999).

157. Fraud may be a possible basis for rescission when a seller has sold a fake, forged or misattributed work with the intent to deceive, when the plaintiff reasonably relied on the representation, and when the plaintiff was damaged as a result. See *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 599 (2d Cir. 1991). Negligence may provide a basis for rescission based on the seller's failure to provide a reasonable level of care when a duty exists to determine facts about a good offered for sale. However, the proper standard of care depends in part on the extent of the auction house's responsibility in a given situation. See *City of Amsterdam v. Daniel Goldreyer, Ltd.*, 882 F. Supp. 1273, 1283 (E.D.N.Y. 1995).

158. Sloan's, *supra* note 5, at sec. 2, 11.

159. *Id.* at sec. 2.

160. *Id.*

161. *Id.*

This disclaimer amounts to a total disavowal of any contractual warranties; nevertheless, such a disclaimer does not preclude liability for violation of general provisions of the commercial code or of the law of torts.¹⁶²

Despite these broad efforts to limit Sloan's warranty liability, Sloan's Conditions of Sale appear to provide the purchaser with a right of rescission in a subsequent provision of the conditions of sale dealing with inaccurate catalogue descriptions.¹⁶³ In fact, Sloan's is simply acknowledging their liability under general legal principles dealing with fraud or gross negligence. Sloan's Conditions of Sale acknowledge such liability but, at the same time, attempt to limit the nature of their own exposure. Sloan's recognizes the right of an original purchaser to rescind within twenty-one days after sale if the purchaser:

(a) gives written notice to Sloan's by certified mail . . . alleging that the description, condition, weight, size, title, origin, [or] provenance . . . of a lot . . . as set forth in the catalogue were grossly and materially inaccurate and misleading and substantially overstated [its] value [and thereby materially misled the purchaser;] and (b) within five calendar days . . . after such written notice, returns . . . the lot to Sloan's in the same condition it was in at the time of sale, and (c) [establishes the] allegations to Sloan's satisfaction, the sale of such lot will be rescinded . . . [and the full purchase price refunded to the purchaser, provided, that] Sloan's has not yet paid the consignor the amounts due as a result of the sale. . . .¹⁶⁴

While this statement conforms to the general principles of law dealing with the standards for fraud and gross negligence, Sloan's goes on to attempt to limit their exposure in those situations where it has already paid the consignor.¹⁶⁵ In such situations, Sloan's attempts to limit its liability to its commission, and to leave it to the purchaser to recover the remainder of the purchase price from the consignor.¹⁶⁶ Sloan's statement of the Conditions of Sale provides:

If [prior to receiving such notice described above] Sloan's has paid the consignor the amounts due consignor as a result of the sale, Sloan's will . . . refund to the purchaser the amount of the buyer's premium and taxes received from the purchaser. . . . [Sloan's shall then] make written demand upon the consignor for the payment of the balance of the purchase price [to the original purchaser]. If the consignor fails to honor the written demand for a refund of the balance of the purchase price, Sloan's shall immediately [make known to the original] purchaser the name and address of the consignor, and shall assign to the purchaser all . . . [rights against the consignor with respect to the lot, the sale of which has been rescinded]. Upon this disclosure and assignment, Sloan's will have no further liability to purchaser or responsibility to pursue the purchaser's claim.¹⁶⁷

While this is an effort to limit exposure, if it could be shown that Sloan's itself was grossly negligent in describing the property, or had intentionally provided a materially misleading description, this attempt to limit liability would be totally ineffective. A claim based on a negligence theory (or claim of intentional misdoing) resulting in statements grossly and materially inaccurate and misleading provides

162. See *supra* notes 156-57 and accompanying text.

163. Sloan's, *supra* note 5, at sec. 2, 11.

164. *Id.* at sec. 11.

165. See *id.*

166. *Id.*

167. *Id.*

a basis for damages that cannot be limited by a unilateral contract provision.¹⁶⁸

VII. TOTAL DISCLAIMERS: NEAL/SUSANIN'S

Some recently established auction houses, that are characteristically local or regional firms, eschew the more complex statements on conditions for sale as exemplified by the Sotheby's statement of Conditions of Sale and opt for the simple policy of disclaiming all warranties and any basis for liability or rescission.¹⁶⁹ For example, Neal Auction Company in New Orleans, established in 1983, disclaims all basis for liability.¹⁷⁰ Neal's Conditions of Sale provides:

All lots are sold "AS IS". No statement regarding condition, kind, value, or quality of a lot, whether it is made orally at the auction or at any other time, or in writing in this catalogue or elsewhere, shall be construed to be an express or implied warranty, representation, or assumption of liability.¹⁷¹

No mention is made of any liability regarding counterfeit or forgery, much less any statement as to authenticity of authorship, and no basis for rescission is set out in the Condition of Sale.¹⁷²

Susanin's Auction in Chicago, established in 1994, is even more succinct and to the point in its total disclaimer of any basis for liability or right of rescission. Susanin's Conditions of Sale provide: "All lots are sold 'AS IS' and all sales are final. Neither we, nor the consignor are responsible for the accuracy of any printed or verbal descriptions."¹⁷³

Despite these disclaimers, auction houses such as Neal Auction Company and Susanin's Auctions remain subject to the general provisions of the commercial law such as Uniform Commercial Code section 2-302 dealing with unconscionability, section 1-203 imposing "an obligation of good faith", and section 2-103(b), which defines "good faith" in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing. . . ."¹⁷⁴ Moreover, these auction houses are subject to the general tort prohibitions against fraud and negligence.¹⁷⁵ For example, if the auction house itself affixed signatures to works of art and then described these works as signed by the artist, knowing the signatures to be forgeries, the purchaser could not only rescind but obtain damages including punitive damages.¹⁷⁶ Even mere failure to detect an obvious deception perpetu-

168. The Uniform Commercial Code prevents a seller from disclaiming all liability to the extent the seller has attempted to impose a contract of adhesion. See U.C.C. § 2-719(2) (1999) (providing "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."). See also U.C.C. § 2-302 (1999) dealing with unconscionability and U.C.C. § 2-103(b) (1999) defining good faith.

169. Compare Sotheby's, *supra* note 5, at 172-74, and Susanin's, *AuctionSmart.com, Sale #99* Conditions of Sale, at para. 2 (October 28, 2001).

170. Neal, *supra* note 5, at para. 1.

171. *Id.*

172. *Id.*

173. Susanin's, *supra* note 169, at para. 2.

174. U.C.C. §§ 2-302, 1-203, 2-103(b).

175. See *supra* note 157 and accompanying text.

176. See, e.g., *City of Amsterdam v. Daniel Goldreyer, Ltd.*, 882 F. Supp. 1273, 1284-85 (E.D.N.Y. 1995).

ated by a consignor could provide a basis for negligence and subsequent recovery by a purchaser.¹⁷⁷

VIII. CONTRACTUAL TIME LIMIT FOR GUARANTEE COVERAGE VERSUS STATUTE OF LIMITATIONS

There often is confusion about the time limit on a warranty provided by an auction house and the procedural time limit for filing a lawsuit. The contractual time provided to a buyer to notify the auction house of a breach of warranty of authenticity of authorship or that an object purchased at auction is a counterfeit is an option within the control of the auction houses. For instance, Sotheby's provides in its Terms of Guarantee that "Sotheby's warrants the Authorship (as defined above) of a lot for a period of five years from the date of sale of such lot"¹⁷⁸ Many auction houses provide a much shorter period for a purchaser to make a claim of breach of warranty of authenticity or a claim that an object purchased at auction is counterfeit. For example, DuMouchelles provides in its Conditions of Sale:

[I]f within twenty-one days of the sale of any lot, the purchaser gives notice in writing to the Galleries that the lot so sold is a counterfeit and, if within fourteen days of such notice the purchaser returns the lot to the Galleries in the same condition as when sold, and proves beyond a reasonable doubt that the returned lot is in fact a counterfeit and that this was not indicated by a fair reading of the catalog, the sale will be rescinded and the purchase price refunded.¹⁷⁹

The statute of limitations for bringing a timely lawsuit for breach of warranty for authenticity is governed by the Uniform Commercial Code. Uniform Commercial Code section 2-725 provides that an action must be brought within four years of the date of delivery unless the parties have contractually limited the period, but in no case can the period be less than one year nor may it be extended beyond four years.¹⁸⁰ One way that purchasers at auction have attempted to extend the statute of limitations is to invoke the exception in Uniform Commercial Code section 2-725(2), which provides that if the "warranty explicitly extends to future performance . . . and [the] discovery of the breach of warranty must await the time of such performance[, the statutory period begins to run] when the breach is or should have been discovered," in contrast to the general rule that the statute begins to run "when tender of delivery is made."¹⁸¹

The explicit promise for "future performance" is understood to mean that the guarantee runs for a specific period of time. However, a warranty of authenticity relates to a characteristic of an object that is not limited to or dictated by an explicit time limit or period of time. For example, a painting by Pablo Picasso will always be a painting by Picasso so long as the painting exists. A guarantee that the paint or finish on a car will not crack or peel for five years means that after the period of stated years there is no basis for expecting that the paint will not crack or peel.

177. *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1187 (7th Cir. 1996) (holding that auctioneer Hindman met the standard of good faith when it rescinded the sale of a painting alleged to be a work of Theodore Rousseau by the consignor after an outside expert determined it to be a forgery).

178. Sotheby's, *supra* note 5, at 174.

179. DuMouchelles, *supra* note 5, at para. 5.

180. U.C.C. § 2-725(1)-(2).

181. *Id.* § 2-725(2).

Courts have generally held that guarantees relating to works of art are not a matter of future performance; and, consequently, any breach of the guarantee accrues at the time of the sale or delivery, regardless of whether the purchaser was aware at that time that the work was not authentic.¹⁸²

The decision by the United States Circuit Court of Appeals for the Second Circuit in *Rosen v. Spanierman*,¹⁸³ provides an example of the courts construing the applicability of Uniform Commercial Code section 2-725(2) to cases involving a claim of breach of warranty of authenticity.¹⁸⁴ In 1968, the buyer purchased a painting that the gallery guaranteed was an original work by John Singer Sargent.¹⁸⁵ Nineteen years later, the purchaser attempted to sell the painting at a Christie's auction, but the auction house determined the painting was not done by Sargent.¹⁸⁶ The buyer brought suit on a breach of warranty and other claims; the gallery sought dismissal pursuant to New York's Uniform Commercial Code section 2-725(2).¹⁸⁷ The buyer sought to extend the statute of limitations claiming that a warranty of authenticity extends to future performance.¹⁸⁸ The Second Circuit rejected the buyer's contention holding that authorship involves an "immutable quality" that cannot be the basis of a claim of future performance.¹⁸⁹ The court also found that it was not unreasonable to expect a purchaser of valuable art to obtain a second opinion on authenticity at the time of purchase. The court reasoned:

[S]ection 2-725(2) makes clear that it only applies where discovery of a defect necessarily awaits future performance. If the defect is discoverable as soon as the good is purchased, section 2-725(2) simply does not apply. While we would hesitate to deem the alleged defect here readily discoverable if extraordinary measures were required to detect the flaw, a painting's lack of authenticity is readily apparent to the trained eye of an art expert. A purchaser who spends a considerable sum of money for a painting undoubtedly will, as the [purchasers] did here, obtain appraisals for insurance purposes. Requiring a purchaser to obtain that appraisal from an expert other than the seller is not an onerous burden.¹⁹⁰

The court's decision in *Rosen* suggests that auction houses should not be understood as providing a guarantee of authenticity for an indefinite period of time, but rather are limited by the explicit statement of the applicable period of the guarantee.

IX. CONCLUSION

With the influx of a new group of auction bidders who lack experience and sophistication in the functioning of the art market, auction houses have been confronted with claims of liability relating to statements and catalogue descriptions about the maker, the period and the origin of works of art, antiques, and antiquities

182. See, e.g., *Wilson v. Hammers Holdings, Inc.*, 850 F.2d 3, 7 (1st Cir. 1988).

183. 894 F.2d 28 (2nd Cir. 1990).

184. *Id.* at 29-31 (construing N.Y. U.C.C. § 2-725(2)).

185. *Id.* at 30.

186. *Id.*

187. *Id.* at 30-31.

188. *Id.* at 31.

189. *Id.*

190. *Id.* at 32 (internal citations omitted).

that are offered for sale. The traditional attitude of buyer beware has given rise to legislation and judicial opinion placing liability on auction houses for warranties of authenticity of authorship. Nevertheless, some courts have been reluctant to impose liability and have recognized disclaimers in the absence of specific legislation directed at the enforcement of warranty of authenticity of authorship. The major national auction houses have willingly committed themselves to warranties of authenticity; however, many regional and local houses have continued to limit their liability by restricted terms placed in their statements of conditions of sale published in their auction catalogues. With a recognition of the limited knowledge about the works offered at auction, the enactment of specific legislation enforcing warranties of authenticity of authorship represents a desirable trend in consumer protection.