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Warranty of authenticity

By **Armen R. Vartian** | 12-20-10

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A New York court will soon be trying a case involving a painting purchased from a leading auction house, a case that has ramifications also for coin collectors buying at auction.

The issue is whether an auction house's warranty of authenticity of an item extends to subsequent buyers of that item and if so, what damages those buyers may obtain if the item turns out to be a fake.

Tony Shafrazi, a Manhattan gallery owner, bought a painting attributed to Jean-Michel Basquiat at a Christie's auction in 1990. Basquiat had died in 1988.

The Christie's catalog provided a limited warranty of authenticity and the lot description stated that the painting was "acquired directly from the artist." Shafrazi sold the painting a year later, at a loss, to Guido Orsi.

When Orsi attempted to have the painting authenticated by a committee set up by Basquiat's estate to identify forgeries, he found out not only that the committee would not authenticate the item, but that two members of the committee (including Basquiat's father) had told Christie's of their doubts before the 1990 auction, and had asked Christie's to remove the painting from the auction.

Shafrazi and Orsi sued Christie's for fraud, negligent misrepresentation, breach of contract, and deceptive and misleading practices. The court dismissed Shafrazi's claims in their entirety because he sold the painting without knowing there was any issue as to its authenticity, and because Orsi was not seeking to rescind his purchase. All of Orsi's claims other than fraud were also dismissed on statute of limitations grounds.

However, the court allowed Orsi's fraud claims against Christie's to proceed to trial, despite Christie's argument that it made no representations to Orsi, who didn't bid in the auction, and the auction terms and conditions specifically limit warranties to actual purchasers.

The court, relying on expert testimony that Christie's is a "market maker" whose opinions as to authenticity are widely respected and relied upon, stated: "If as plaintiffs alleged, Christie's fraudulently misrepresented the Painting's provenance, and published that misrepresentation in its catalogue, which Christie's could reasonably anticipate would be relied upon by bidders at its auction, as well as subsequent purchasers, it may be liable to those who relied upon its misrepresentation."

Perhaps even more important than the concept that subsequent buyers of an item – perhaps decades after an auction – might have a claim, is the court's consideration of what damages would be available.

While observing that the measure of damages for fraud generally is limited to "out-of-pocket" damages, or "losses proximately caused by reliance upon the misrepresentation," the court applied Uniform Commercial Code §2-721 to allow recovery in the same amounts as would be available for a "non-fraudulent breach."

That meant that the court would allow Orsi to argue that he was entitled to the difference between what he paid for the painting (approximately \$185,000) and

“the current value of an authentic Basquiat painting,” which experts have estimated as approximately \$2 million. This is a novel application of the UCC that has caused some controversy in the art world.

The judge even went so far as to say that Orsi could be entitled to punitive damages if he prevails, while noting that “Whether Christie’s conduct was so reprehensible as to warrant [punitive] damages is a question for the trier of fact, to be determined at trial.”

I disagree with this decision, but nevertheless it must be considered in any discussion of auction house liabilities.

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