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Art Law on Protecting Expert Opinion

Judith Wallace, Sunday, February 14, 2016

Spencer's Art Law Journal

This essay addresses efforts to protect expert opinion about the authenticity of visual arts, thereby encouraging these opinions. In the past few years, there have been several proposals to amend New York law to provide protection for legal claims against

experts for their opinions. Currently, another proposal to amend the law is being considered. It attempts to protect expert opinion by stating that the opinion is not a warranty of authenticity upon which the expert could be subject to liability. This proposed legislative approach may not fully protect the expert and could have the nasty side-effect of reducing existing statutory warranty protection for the art.

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Opinions About Art–Why Are They in the Public Interest?

Recently there has been a renewed effort to promote a New York state law protecting art experts from lawsuits. But why it is more important to single out art experts—among all professionals—for protection? Why are their opinions more deserving of protection than those of bond rating agencies, restaurant reviewers or doctors?

Expert opinions about art are essential to the business of buying and selling art, which is a substantial contributor to the New York economy. Scholarship about art, expressed in articles, lectures, and exhibits, is also of great interest to many members of the public. But art experts are uniquely vulnerable to lawsuits because they are asked to provide yes or no opinions—not that the piece is “probably" by Picasso. There is also a First Amendment value at stake—the U.S. Supreme Court has recognized that opinions and other ideas are entitled to constitutional protection.[1]

Opinions about art arise in two ways. Experts may be asked for opinions when a work being offered for sale, especially if the work does not have an extensive history of public exhibition. In this situation, experts can demand a “no-sue" agreement as a condition of providing an opinion. But the same scholars also write books and articles, or volunteer their unsolicited views, and in those situations the expert cannot obtain a “no-sue" agreement in advance from either art owners or future readers.

Legal exposure for the expert can arise whether the expert's opinion about the art is positive or negative. If the expert's opinion is positive, and relied on by a buyer, but later turns out to be incorrect, the disgruntled buyer may seek to hold the expert accountable for the initial, positive opinion. If the expert's opinion is negative, the current owner may claim that the expert has improperly disparaged the property or interfered with a prospective sale. Most professionals need to be concerned principally with malpractice liability, which makes them responsible to their clients and requires them observe reasonable standards of due diligence, but art experts have faced claims from upstream or downstream owners who have wanted the experts to be required to prove that their opinions are correct, and not merely that they followed standard industry practices in their evaluation of the artwork.

Back to the Future

There is a perception that the reluctance of experts to voice negative opinions is a new problem created by an increase in art values, art fraud, or litigious owners. This mis-impression may be due to a few high-profile announcements by experts that they would cease giving opinions to avoid the possible expense of legal fees.

Yet the same need for legal reform was identified in 1966 by New York State Attorney General Louis J. Lefkowitz, who advocated a state law granting qualified immunity to “accredited" art experts who judge art works to be false, unless the disgruntled seller proved bad faith by the art expert. 50 years ago, there was the same perception that art fraud was on the rise, and that a law was needed to encourage experts to freely express negative opinions, because “[u]nder present conditions, many art experts are reluctant to give opinions."[2] Ironically, the Art Dealers Association of America opposed that proposal because it excluded dealers from the proposed accreditation and immunity.[3] Artists including Jacques Lipchitz testified in support of the Attorney General's proposal.[4]But the proposal failed, and the statute that is now the Arts and Cultural Affairs Law was enacted in 1966 without immunity for experts.

Unfortunately, as discussed below, the legislation now being proposed offers experts more limited protection than the 1966 proposal, and potentially undercuts fundamental protections for art buyers.[5]

Key Features of the New York Arts and Cultural Affairs Law

The “express warranty" provision is the key protection for non-dealer art buyers contained in the New York Arts and Cultural Affairs Law (“non-merchants," in the terminology of the statute). It provides that certificates of authenticity “or any similar written instrument" are deemed to be*express warranties* upon which buyers may rely as guarantees of authenticity (at least within the four-year statute of limitations). This protection was initially enacted by the legislature in 1966, and augmented in 1981 and 1990 with even more stringent warranties for multiples. The purpose was to address dealers who claimed that representations about art were mere “opinions" and not warranties, and to require sellers to be more explicit about disclaimers. As the legislative history explained, “[t]here is no doubt that the price paid is usually based upon the buyer's assumption that . . . words of description are intended as a representation or warranty. This bill would remove any doubt in this regard by putting the burden on the seller to make his intention clear."[6]

This express warranty applies only in sales from dealers to non-dealer collectors for unique works (for multiples, it applies to all sales). Dealer-to-dealer sales are governed by the generally applicable warranty in the Uniform Commercial Code for all sales of goods, which does not specifically address the role of certificates of authenticity for fine art.

Courts have recognized the practical reality that attributions are subject to change, and held that, at least for unique works of art (as opposed to multiples), a dealer that had a “reasonable basis in fact" at the time of sale is not liable under the New York Arts and Cultural Affairs Law for the warranty, even if the work is later shown to be inauthentic.[7] Some dealers also explicitly inform buyers at the time of sale that a change in expert opinion will not be grounds for a refund. But where there is no such disclaimer, buyers can often rely on expert opinions and still have warranty claims if the work is proven not to be as it was represented to be in all material respects.

Proposed Legislative Amendments (Purportedly to Protect Experts) Actually Undercut Key Protections for Art Buyers

Unfortunately, the proposed amendments to protect experts may destroy this valuable protection for art buyers.

The proposed legislative amendments to the warranty standard address situations where the expert provides a positive opinion or otherwise makes a statement of fact that turns out to be inaccurate. The proposed amendments state that certain warranty provisions in the Arts and Cultural Affairs Law “shall not apply to an authenticator's opinion or information concerning a visual art multiple or work of fine art."[8] In other words, statements made in these authenticators' expert opinions could not serve as the basis for a warranty claim.

That is a change that shields *dealers* as well as authenticating experts. The amendments do not merely create an exemption from the warranty for claims *against authenticating experts*, who are defined in the proposed amendment as recognized experts with no financial interest in the work of art at issue.[9] A simpler amendment proposed by the Art Law Committee of the New York City Bar Association in 2013 explicitly stated that it only raised the bar for claims against authenticating experts. Instead, the proposed amendments state that expert opinions do not give rise to a warranty—period. Thus, if a dealer sells a work, attributing it to a particular artist, based upon an expert's opinion, and three years later the work is discovered to be a fake, the purchaser will demand a refund from the dealer. But the proposed amendments seem to say (perhaps inadvertently) that the buyer would not have a warranty claim—against anyone—because the parties relied on an expert opinion. If that is not the intention of the proposed amendments, the proposal should be revised, and if it is the purpose, it needs to be disclosed and debated, because it is a significant change in the law. Under existing law, a disclaimer of warranties would need to be explicitly stated in sales documents.

It is fair to amend the law to make it clear that an opinion by an expert with no financial interest in the artwork is not a warranty backed up by the expert's bank

account. Experts who not receive any portion of the purchase price cannot be expected to provide a refund of the purchase price for the art if they turn out to be mistaken. No scholar could afford to create a catalogue raisonné if doing so constituted a warranty of authenticity for every work included. This clarification in the law of warranties would be especially helpful to artist-established or estate-established foundations and authentication boards, who are often attractive, but inappropriate, targets of lawsuits by disgruntled purchasers, especially if the seller who received the purchase price is overseas, out of business, or, years later, having paid taxes and business expenses, no longer has the sale proceeds.

If the proposed legislative changes are enacted, they will likely be cited by a seller in response to a claim, arguing that the parties relied on the expert opinion, and therefore there is no warranty. And when courts review the revised statutory language, they might not be aware of the legislative history, might not interpret the legislative history as establishing that the change is limited to claims against experts, or might not view the legislative history as appropriate for consideration at all if the statute appears clear on its face. A clarification that explicitly limits the proposed amendments to claims against expert authenticators with no financial interest in the sale needs to be restored to the proposed legislation.

It has been reported that the reason the simpler and more limited 2013 proposal did not pass is because it was opposed by the trial lawyers' lobby, which, it is said, opposes any obstacle to lawsuits. It would be ironic if the 2015 version passed instead.

Even with the issue of its unintended effects, the proposed amendments are still an imperfect shield for experts if their opinions turn out to be wrong. The amendment does not prohibit non-warranty claims such as negligence that might be made based on a positive but incorrect negligent opinion. It does not apply to warranty claims by dealers under the Uniform Commercial Code.

Nor is it even an unambiguous protection from warranty claims. The current version of the proposed amendments is a muddled string of cross-references shoehorned into in the section of the Arts and Cultural Affairs Law applicable to multiples, though it mentions and seems to disclaim the warranty for unique works of art as well.

If the proposed amendment does apply to the warranty for unique works, it disproportionately harms private collectors (as opposed to dealers). The proposed amendment cuts back on warranties in the New York Arts and Cultural Affairs Law.

But, as noted above, the Arts and Cultural Affairs Law warranty for unique works applies only to *non-dealers* buying from dealers. The warranty provision of the UCC, applicable to purchases by dealers, is not amended. The result will be that warranty claims over authenticity issues will likely devolve into factual disputes about who the actual buyer is, which can be difficult to determine if a sale involves nearly simultaneous back-to-back transactions, or if it is unclear whether parties are buying and selling on their own behalf or as agents.

Thus, the principal effect of the proposed amendments will likely be to complicate—rather than eliminate—warranty claims. And, since the protection envisaged by the proposed amendments may turn on future events unknown to the expert, such as who the buyer will be (dealer or collector) or how the deal will be structured, it might not do much to encourage experts to speak freely.

Failure to Immunize Negative Opinions

Nor do the proposed amendments provide a meaningful fix for *negative*statements about art.

The proposed amendments do not increase the burden of proof for plaintiffs, or add any new defenses for experts and scholars. Rather, the proposed changes merely require plaintiffs to make more detailed allegations in a complaint and state “specify with particularity" the “facts sufficient to support each element of the claim or claims asserted."[10] That might not be much of an obstacle for owners who can articulate exactly what they object to in the expert's opinion, and allege enough facts to survive a motion to dismiss.

Obviously, the “qualified immunity" for experts proposed in 1966 would be ideal. There are also potential models in other areas of New York law. Uncompensated not-for-profit directors and officers generally enjoy qualified immunity unless they are grossly negligent or intentionally caused harm.[11] And in certain claims involving architects and engineers, a plaintiff must show a “substantial basis in law" for a claim that negligence of the professional caused an injury to survive a motion to dismiss.[12]

Qualified immunity is also consistent with some federal case law on the First Amendment, recently considered in the case of bond-rating agencies, holding that pure opinion statements about a matter of public concern, made publicly, are not actionable unless made with actual malice. Qualified immunity of the type proposed in 1966 would codify that art expert opinions are statements in the public interest, and are statements of pure opinion, entitled to the most deferential level of constitutional analysis (even if some underlying “facts" play a role in forming that opinion), and could provide that the same standard applies to all opinions, whether in academic publications or advice in connection with sale transactions.[13]

Possibility of Recovering Legal Fees

Since it is extremely rare for an expert to be found liable and ordered to pay damages for a good-faith opinion, the main risk to the authenticator is the legal fees incurred in responding to a claim.

The general rule in U.S. litigation is that parties bear their own legal fees. A party can only recover legal fees if a statute or contract explicitly authorize it. The proposed amendments allow an expert to potentially recover fees, but it is not an automatic entitlement. The expert must both prevail in the lawsuit and convince the court that there is good and just cause it to be reimbursed for its fees.[14] That is not always necessary—some statutes, such as the federal racketeering law, require payment of fees to a prevailing party. The 2013 version of the proposed amendments to the Arts and Cultural Affairs Law did so as well.

Experts who are asked to volunteer opinions but who are deterred by the potential cost of litigation (or even the cost of consulting an attorney and responding to demand letters from owners) will not be comforted by the possibility that if they are sued and win, they will have a chance to recover their fees. Mounting a First Amendment defense or attempting to prove that the expert was correct involves substantial legal work. Without a change that substantially shifts burden of proof, such as the creation of a qualified immunity for good-faith and reasonably diligent opinions, and a guarantee that experts will obtain an award for their legal defense fees if they defeat a lawsuit, the proposed amendments will not encourage experts to more freely express their opinions.

Even so, qualified immunity is not a perfect fix. A careful plaintiff will be able to allege the disputed facts needed to prevent the case from being dismissed at an early stage—whether it is bad faith, gross negligence, or lack of recognition as an art expert. While the case is proceeding, the expert would still need to fund a defense. Werner Spies recently obtained a reversal on appeal of the French ruling ordering him to reimburse a collector who relied on a statement by Spies that he planned to include the work in his catalogue raisonné of Max Ernst, but most experts would not be able to (or want to) fund a defense through a trial and appeal. In contrast, professional liability insurance, with coverage for the cost of defending against a claim, is an option that can cover the expert's legal fees as they are being incurred.[15]

Are Flawed Amendments Better than Nothing?

A change in the law, by statute or by judicial decisions, could increase protections for experts and encourage them to issue unambiguous on-the-record opinions. “No-sue" agreements can help scholars when they are advising on art transactions, but not when they are volunteering opinions in lectures and scholarly work. Insurance can

cover the cost of a defense, but some experts may not be willing or able to comply with the formalized business procedures an insurer will require.

Unfortunately, the proposed amendments do more harm than good. For warranty claims, the change muddles and undercuts a key art buyer protection under the Arts and Cultural Affairs Law, and still might not provide a defense to experts in warranty disputes between dealers that are governed by the UCC. The remaining protections offered by the amendments to protect experts from objections to negative statements about art are exceedingly modest. As a practical matter, they are unlikely to inhibit lawsuits against art experts. On balance, these amendments would not accomplish much and will certainly squander the chance for comprehensive and effective state-level legislative reform protecting art experts.

New York, New York
January 2016
Judith Wallace, Esq.
Carter Ledyard & Milburn LLP

Notes

[1] *See Milkovich v. Lorain Journal*, 497 U.S. 1 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[2] Milton Esterow, *Lefkowitz Urges Art Fraud Curbs*, New York Times, November 19, 1965,.

[3] *Spokesman for Dealers Scores Lefkowitz's Art Fraud Proposal,* New York Times, March 16, 1966 (reporting that Ralph F. Colin, administrative vice president of the Art Dealers Association of America, resigned from the Attorney General's advisory committee in protest, and stated that it “will receive no further assistance or cooperation" from the association" because the exclusion of art dealers from qualified immunity.)

[4] Richard V. Shepard, *Artist or the Public: Who Needs the Protection?*, New York Times, December 29, 1965.

[5] Assembly Bill A1018A; Senate Bill S1129A.

[6] Legislative Annual 1966.

[7] *Dawson v. G. Malina, Inc.,* 463 F. Supp. 461, 467 (S.D.N.Y 1978); *Christie's Inc. v. SWCA, Inc.,* 11 Misc. 3d 380 (Sup. Ct. N.Y. County 2008) (in which the author, with Gary D. Sesser and Ronald D. Spencer, represented the defendant that prevailed on this issue).

[8] The proposed amendments would add to the express warranty in Section 15.11 text providing that “This section shall not apply to an authenticator's opinion or information concerning a visual art multiple or work of fine art, as set forth in subdivision 23 of Section 11.01 of this Chapter, Section 15.12 of this Article, and Subdivision 4 of Section 15.15 of this Article."
[9] Section 2, amending 15.11. The 2013 version of the proposed amendment was limited to claims against authenticators who did not have a financial interest in the work being sold.
[10] Section 3, adding 15.12
[11] New York Not-for-Profit Corp. Law Section 720-a.
[12] CPLR 3211(11)(h).
[13] *See* Judith Wallace, *Museums and Museum Curators: Caught in the Cross-Hairs of Authenticity Disputes*, *in* The Legal Guide for Museum Professionals (Julia Courtney, ed. 2015), at http://www.clm.com/docs/7612511_1.PDF; Ronald D. Spencer, Protection from Legal Claims for Opinions about the Authenticity of Art, Spencer's Art Law Journal, February 13, 2013, at http://www.clm.com/docs/7154982_1.pdf.
[14] Section 4, amending Section 15.15.
[15] Judith Wallace, *Liability of Art Experts: Is Insurance a Solution and Will Opinions Be Less Dangerous Things to Give?*, *Spencer's Art Law Journal*, March 12, 2015, at http://www.clm.com/docs/7591563_4.pdf.

This is Volume 6, Issue No. 1 of Spencer's Art Law Journal. This winter issue contains two essays, which will become available on Artnet, January 2016.

The first essay discusses problematic valuations of single artist collections which often result in substantially overvaluing the art.

The second essay examines legislation currently proposed to amend the New York Arts and Cultural Affairs Law, with the goal of protecting art experts and thereby encouraging these experts to express opinion about the authenticity of visual art.

Three times a year, this Journal addresses legal issues of practical significance for institutions, collectors, scholars, dealers, and the general art-minded public.

– RDS