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Seven 'red flags' in the Knoedler trial that should give dealers and sellers sleepless nights

Judge's findings reveal what to look out for in art transactions

by [RONALD SPENCER](#) | 27 October 2016



Forensic accountant Roger Siefert gave testimony on the profits Knoedler received from the sales of the Rosales Collection. Photo: Elizabeth Williams

Many art disputes involve transactions that simply did not work out as planned for the buyer, most often because they overpaid. If there is nothing in the invoice or terms of the contract to support a claim, the unhappy buyer will look for facts they claim were not disclosed, and use that missing information to claim fraud. Because sale agreements are often bare-bones and the art world tolerates a certain degree of confidentiality about sources and clients, it is usually not too difficult to find something that was not disclosed (in good faith or bad) to the buyer.

So while it is tempting to dismiss the Knoedler trial as a one-off event because it involved a number of fakes sold over many years, this would be a mistake. The judge's findings are destined to be cited in any number of future art fraud claims. Dealers and sellers should be concerned, therefore, that the Knoedler judge found a number of "red flags" that are not extraordinary when art is sold.

Red flag 1: undisclosed ownership history. Confidentiality is widely tolerated in the art world. Think of auction catalogues that list a work's source as simply "private collection". The fact of nondisclosure would be apparent to the buyer and presumably accepted at the time of the sale. Similarly, buyers of the disputed Old Masters currently in the news would have known that they were not provided with a documented provenance extending back to the artist's studio. A dealer could disclose whether they, too, are proceeding based on partial information, and what the information gaps are.

Red flag 2: dealer's low purchase price. The Knoedler judge also found the difference between the dealer's purchase and selling price to be troubling. But markups in art sales can be quite high, especially if a dealer has held the work for many years. There are many reasons why an owner might sell art well below current market value, including economic distress and faulty current market information.

Red flag 3: failure to agree to an express warranty of authenticity. In the Knoedler case, the owner's refusal to make an express warranty of authenticity was deemed a warning red flag. However, a limited warranty, based on current scholarship (such as a particular expert's opinion), is usual at auction and has been recognised as standard by New York courts. That is, if the dealer had a reasonable basis in fact for the warranty at the time of sale, the buyer of a work that turns out not to be authentic is not legally entitled to a refund. Theoretically, cautious dealers should expressly include caveat in their sale documents (as the auction houses do), but many private dealers do not delve into this issue for fear of alienating buyers.

Red flag 4: potentially negative undisclosed information. This is the most open-ended category of potential fraud claims, and the hardest for any dealer or other art seller to safeguard against. Any undisclosed information may come back to haunt a seller, even though they might well have answered a particular question or provided a particular document had the

buyer asked. Unfortunately, the more knowledgeable the seller about the art or the artist, the greater the risk that there are facts the seller knew that the buyer did not, and that the buyer can raise to un-do the transaction—and seek punitive damages to boot.

Red flag 5: verbal communications with experts. In Knoedler, there was a post-sale dispute about exactly what was said by the experts in verbal communications. Two parties to a conversation will often remember it differently. And, after a work is shown to be inauthentic, it is not surprising for experts to “recall” caveats expressed or implied. It would be ideal to have written opinions from experts to pass along, but many are worried about their potential liabilities or may be prohibited by their institutions from rendering opinions. The recent group of Old Masters forgeries demonstrates again that experts, even at the world’s most prestigious museums, can be fooled, and that dealers may be asked to pay the price for those mistakes.

Red flag 6: do not assume that a buyer’s art advisor will explain what seems obvious. It seems reasonable for a dealer communicating with an art advisor representing a collector to assume the advisor will inform their client of the risks obvious to anyone with extensive professional experience. But in Knoedler, the art advisor, unknown to the seller, was engaged by the buyer to advise solely on the fairness of the purchase price, notwithstanding that provenance and relative strength of opinions on authenticity from recognised authorities would obviously be very relevant to price.

Red flag 7: a higher standard for “prestigious” galleries. The Knoedler judge also seemed to give credence to the argument that the buyer should be excused from performing pre-sale due diligence to support their fraud claim, because they relied on the Knoedler Gallery’s sterling reputation. This opinion is odd, since the buyer was a Sotheby’s board member and, arguably, more sophisticated than many art dealers. It does suggest that well-known galleries should include stronger liability limitations in their sale documents, paradoxically, making art buyers worse off.

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