

Art Crimes and Misdemeanors: Managing Risk in Estate Administration and in Appraisals of Stigmatized Art

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INTRODUCTION

Art collectors and their estates can experience disastrous outcomes when art is acquired without proper due diligence and when art is incorrectly valued. At the root of these problems are various types of stigmatized art that commonly lurk in estate collections, including forgeries, stolen art, mistakenly attributed or unidentified works, and art that is illegal to own or trade. Failure to properly identify and value stigmatized works can result in avoidable excess tax liability, unequal distributions to heirs, overpayment of insurance premiums, family disputes, and increased vulnerability to IRS challenge.

This article provides guidance to appraisers, trust and estate attorneys, and wealth managers on how to identify stigmatized art that may complicate estate administration. It discusses the associated legal and monetary risks can be managed through advanced strategies and diligence in the selection of relevantly qualified experts.

PART ONE — TYPES OF STIGMATIZED ART

FORGED ART

Over the past decade the international art market has been deeply challenged by forgery scandals, with no segment of the art world left immune. The discovery of forgeries brokered at premiere levels of the gallery and auction markets has resulted in shifting standards and expected practices for collectors and advisors. Collectors should no longer rely solely on the vetting of their eminent gallery or auction house to confirm authorship, as the following examples show.

Galleries: Knoedler & Company forgery scandal

In 2011, Knoedler & Company — one of New York's oldest and most revered art galleries — abruptly shuttered its doors in the wake of an \$80 million forgery scandal. Since its opening in 1846, Knoedler had been a leading supplier of Old Master paintings to barons of the Gilded Age, including Cornelius Vanderbilt and J.P. Morgan.

In 1994, a previously unknown art dealer, Glafira Rosales, visited Knoedler gallery director Ann Freedman. Rosales claimed to represent the reclusive heir of a private collector, who had built a world-class American abstract expressionist collection by purchasing directly from then-living artists including Robert Motherwell, Richard Diebenkorn, Jackson Pollock, and Mark Rothko. Rosales reportedly represented to Ms. Freedman that the heir refused to allow the collector's identity to be revealed, and that provenance (history of ownership), including original sale documentation, could not be supplied. These works, passed off as originals, were later discovered to have been expertly painted by Chinese immigrant Pei-Shen Qian in his Brooklyn garage.

Over the next 14 years, Rosales worked in tandem with her boyfriend and his brother to place dozens of fakes in the collections of Knoedler's prominent and sophisticated clientele. In promoting the works, Freedman reportedly represented to buyers that the unidentified collector was known to the gallery.¹

One victim, Domenico De Sole, a board member of Sotheby's and former CEO of the Gucci Group, purchased a fake Mark Rothko from Knoedler for a reported \$8.3 million. The De Soles sued Knoedler under the federal RICO Act as running a racketeering operation and settled after a full trial. Many other victims settled out of court.²

Allegations raised by plaintiffs include that Freedman failed to exercise diligence in confirming provenance and that early warnings from authenticators had been ignored.³ John Elderfield, an eminent art historian, and Gretchen Diebenkorn Grant, the daughter of painter Richard Diebenkorn, both testified that, as early as the mid-1990s, they'd indicated to Freedman that works represented as Diebenkorns were dubious. Jack Flam, president of the Dedalus Foundation, dedicated to the legacy of artist Robert Motherwell, also testified that in 2008 he'd disputed two works attributed to Motherwell.

Despite a lack of confirmed provenance and early authenticity concerns voiced by recognized authorities, Freedman continued to represent works from this collection for another decade. Commentators also point to the unusually high differential between Knoedler's cost and sale prices as another obvious cause for concern. These factors suggest, that at the very least, Freedman acted with a reckless lack of due diligence.

The Knoedler scandal deeply undermined buyers' trust in the vetting process of prominent galleries and other eminent sources and highlights the need for buyers of significant works to exercise more diligence in advance of purchase. The scandal also brought into sharp focus the professional appraiser's responsibility to confirm authorship with recognized authentication experts before concluding value.

Auction: Old Master forgery scandal

As the art world was still reeling from the Knoedler scandal, European art collector Giuliano Ruffini emerged as a common link in an Old Master forgery scandal involving an estimated \$250 million in forged art.

In 2010, Ruffini sold a work attributed to artist Frans Hals to London-based art dealer Mark Weiss, and Weiss sold the work through Sotheby's in 2011 for \$10.8 million. When authenticity suspicions arose after the sale, Sotheby's employed forensic analysis and discovered the work contained synthetic pigments not invented until the 20th century. Sotheby's reimbursed the buyer and sued Mark Weiss for breach of contract.⁴

Sotheby's traced back chains of title for other works originating with Ruffini, identifying a work titled "St. Jerome" attributed to 16th century Italian artist Parmigianino, that had been consigned by a collector who'd also purchased from Ruffini. Through forensic analysis, Sotheby's also determined this work to be a fake and

¹ Cahill, John R., "An Update on the Knoedler Gallery Lawsuits," Sothebys.com News (May 4, 2014).

² Miller, M.H., "The Big Fake: Behind the Scenes of Knoedler Gallery's Downfall," *Art News* (April 25, 2016).

³ Kinsella, Eileen, "Richard Diebenkorn's Daughter Challenges Ann Freedman's Story at Knoedler Forgery Trial," *ArtNet News* (January 28, 2016).

⁴ Boucher, Brian, "Sotheby's Sues London Dealer Mark Weiss Over Frans Hals Forgery," *ArtNet News* (February 7, 2017).

refunded the buyer. The painting had been displayed in prominent museums and endorsed by independent specialists as either by or in the “circle of” Parmigianino.

Ruffini is also connected to “Venus with a Veil,” attributed by experts to Lucas Cranach the Elder and sold to Hans-Adam II, the Prince of Liechtenstein, for €7 million (approximately \$7.95 million). The image of the ancient Greek goddess was seized by the French authorities in March 2016.⁵ Ruffini is currently being investigated by the French police and says he never claimed any of the works were authentic.

The Terrus Museum forgery scandal

The Terrus Museum in Elne, France, dedicated more than 20 years to collecting the works of Étienne Terrus, a local artist best known for his landscapes of the Roussillon region. As the museum was expanding to house its growing collection, it discovered 82 of its 140 works were counterfeits. Smaller museums are particularly vulnerable to forgeries because they often lack the budget to hire professional curators or to conduct proper diligence.⁶

The Palazzo Ducale museum scandal: Modigliani fakes

In the summer of 2017, a major Amedeo Modigliani exhibition at the Palazzo Ducale in Genoa, Italy, was shut down amid authenticity concerns. Of the exhibition’s 30 works, 20 were later confirmed to be forgeries.

Modigliani is one of the most forged artists in the world. Modigliani scholar Marc Restellini reports there are at least 1,000 Modigliani fakes in circulation.⁷ Modigliani originals are particularly difficult to confirm as a result of the artist’s penchant for trading art for drinks, an incomplete catalogue raisonné, and various experts jockeying for positioning as the recognized authority, often issuing contrary opinions.

UNATTRIBUTED AND MISATTRIBUTED ART

Reassignment of a work’s authorship can lead to dramatic changes in value. Lack of diligence in confirming authenticity, or in fully exploring authorship for unidentified works, can present greater valuation risks than outright bad intent. Although appraisers are rarely qualified to authenticate, a critical part of the appraisal process is identifying and consulting with the recognized authentication authorities.

Misattributed: Chinese art in the collection of the Pacific Boychoir Academy

The Washington Post recently covered a story where misattributed art donated to a small but prestigious music academy undermined the school’s financial solvency. A patron had recently donated Chinese artworks at an appraised value of \$2.8 million.⁸ The struggling school viewed the well-intentioned gift as the seeds of an endowment and long-term security.

When the school took steps to sell the art, it was informed the paintings were copies of little value. However, relying on the appraisal, the school had already borrowed against the art for program and staff development,

⁵ Watson, Leon, “Vividly-Colourful ‘Renaissance’ Masterpiece Ruled a Fake,” *The Telegraph* (January 19, 2017).

⁶ Peltier, Elian and Codrea-Rado, Anna, “French Museum Discovers More Than Half Its Collection Is Fake,” *The New York Times* (April 30, 2018).

⁷ Esterow, Milton, “The Art Market’s Modigliani Forgery Epidemic,” *Vanity Fair* (May 2017).

⁸ Brice-Saddler, Michael, “A school bet its future on paintings worth \$2.8 million — then learned their real value,” *The Washington Post* (March 4, 2019).

and now owed significant debt against a relatively worthless asset. Consequently, the school has had to lay off staff and is struggling to continue its operations. This story highlights a range of serious financial consequences that can result from a less-than-diligent appraisal, in addition to the elevated risk of an IRS challenge and embarrassment for the institution and donor.

The continuing controversy surrounding “Salvator Mundi”

In 2005, a painting later identified as Leonardo DaVinci's “Salvator Mundi” sold at a Louisiana estate auction for approximately \$10,000. Over the next 12 years, the painting was the subject of painstaking restoration and exhaustive provenance research.

In 2017, Christie’s set a record price for an artwork at auction, with “Salvator Mundi” achieving \$450 million. The attribution and/or degree of originality of the artwork continue to be the subject of controversy, although expert consensus seems to support the attribution to DaVinci. Nevertheless, Oxford University art historian Matthew Landrus has publicly stated his opinion that the work was mostly executed by Leonardo’s assistant, Bernardino Luini, whose auction record is approximately \$650,000.⁹ Landrus is not the only expert to express uncertainty on the painting’s authorship. University of Leipzig art historian Frank Zöllner, Michael Daley of ArtWatch UK, and *New York* magazine critic Jerry Saltz have also expressed doubts. Without explanation, the Louvre Abu Dhabi indefinitely postponed an exhibition of the work that was planned in 2018.

The history of the “Salvator Mundi” illustrates the risk of value loss when authorship of estate art is not recognized. Here, there were two instances of potential lost value: the original estate auction sale at far less than the painting was worth (regardless of whether it was painted by DaVinci or one of his assistants), and the high purchase price at Christie’s auction (should DaVinci prove not to be the original author).

Unattributed: John Constable in the collection of Lady Hambleton

In 2013, Lady Hambleton, the former wife of Viscount Hambleton held an auction sale at Christie’s London. One of the items auctioned was an oil sketch similar to “Salisbury Cathedral from the Meadows,” one of the best-known works of 19th century British landscape artist John Constable. Listed for auction sale as the work of a Constable “follower,” the oil sketch sold for approximately \$5,200. Anne Lyles, a leading Constable expert at the Tate museum in London later confirmed the work to be by Constable. The painting subsequently sold at Sotheby’s New York for \$5.2 million.¹⁰ Lady Hambleton decided not to take action against Christie’s.

Unattributed: Caravaggio

Sotheby’s was sued by the consigner of a work listed for sale by the auction house as copy of Caravaggio’s “The Cardsharps”. The work was purchased at auction by prominent British art historian Denis Mahon for approximately \$83,000. After the sale, leading Caravaggio scholar Mina Gregori confirmed the work is indeed by Caravaggio, and this attribution has been widely accepted.¹¹ In 2015, Sotheby’s successfully defended the

⁹ Neuendorf, Henri, “Who Really Painted ‘Salvator Mundi’?,” *ArtNet News* (August 7, 2018).

¹⁰ Manly, Lorne, “\$5,200 or \$5.2 Million? It’s All in How It’s Framed,” *The New York Times* (March 7, 2015).

¹¹ *Id.*

suit on the basis of the right of the auction house to depend on its own in-house experts. The work is currently on loan to a London museum, insured at £10 million.

STOLEN ART

Art theft produces estimated losses in the billions of dollars annually.¹² The Federal Bureau of Investigation (FBI) has an Art Crime Team dedicated to the recovery of stolen works and bringing criminals to justice. The Art Crime Team has recovered more than 14,850 items since its inception, valued at over \$165 million. According to the FBI, only about 5 percent of stolen art is recovered.

Despite the high-profile art theft that is the subject of movies and breaking news, art theft commonly occurs on a less grand scale, where buyers may not consider purchase prices high enough to warrant due diligence and provenance is not as critical a consideration.

To help determine if a questionable work of art is stolen, the following resources may be consulted:

- Art Loss Register is the world's largest database of stolen art. It is maintained by a private company and is used as a resource by insurance companies and law enforcement.
- National Stolen Art File (NSAF) is a database of stolen art and cultural property maintained by the FBI. Law enforcement agencies in the U.S. and abroad may submit stolen works for entry in the database.
- Interpol is the world's largest international police organization, with 192 member countries. It also maintains a database of stolen works that is accessible to law enforcement agencies and other authorized users across the world.

Nazi-confiscated art

The restitution of Nazi-looted art during World War II remains an ongoing, worldwide problem. While the publicly-stated aim is to return works to the heirs of the rightful owner, the reality is far more complicated and litigious.

The Nazi government had a practice of searching Jewish homes to purchase valuable works at distressed prices. The owners knew that they would face dire consequences if they did not agree to the sale, and so the looting was given an air of legitimacy through forced "legal" transactions.¹³

The US has emerged as the forum of preference for heirs of Nazi-looted art to bring suit to recover works. Under Anglo-American law, a thief cannot pass good title, no matter how many times a work is subsequently sold to good faith purchasers. U.S. courts have relied on this well-settled principle to order the return of Nazi-looted art to the heirs of the rightful owners.

Although the Foreign Sovereign Immunities Act (FSIA) prevents U.S. courts from exercising jurisdiction over foreign sovereign governments, there is an exception if the taking of property by a government is in violation of international law, such as genocide.

¹² "What We Investigate," Federal Bureau of Investigation, March 20, 2019, www.fbi.gov/investigate/violent-crime/art-theft#Art-Crime%20Team.

¹³ Kaplan, Isaac, "Three Cases That Explain Why Restituting Nazi-Looted Art Is So Difficult," *Artsy.net* (July 5, 2017).

The museum community argued that this exception had a chilling effect on loans of international collections to U.S. museums, as various U.S. district attorneys and attorneys general have used the exception to FSIA to seize works of art transported to the U.S. through intra-museum loans.¹⁴

On December 16, 2016, a new amendment to FSIA was signed into law, meant to protect works of art sent to the U.S. for temporary exhibit. The amendment contains an exception for artworks taken by the government of Germany or any government in Europe occupied by Germany from 1933 to 1945.¹⁵

After World War II, each country was entrusted to return the stolen art to its citizens, but many of these governments were still anti-Semitic. France received 61,000 stolen artworks and quickly returned some 45,000 of these to the rightful owners, but thousands more were sold to replenish post-war coffers. For decades, the Louvre and other museums throughout France have willingly displayed the remaining 2,000 or so unreturned works.¹⁶ Experts disagree on whether the country is doing enough to reunite the works with their owners.

At a December 3, 1998, conference in Washington, D.C., 44 nations agreed on the “Washington Principles on Nazi-Confiscated Art” (sometimes referred to as the “Washington Declaration”) and established protocols for the identification and return of stolen art.

Nevertheless, some foreign governments continue to fight to retain works known to be stolen by Germany on theories such as adverse possession and statutes of limitation.¹⁷

Gallery conversion of consigned art

Whether by accident or fraud, conversion occurs when an art dealer sells art consigned to it by an artist or collector for less than or without an agreed price, or when galleries fail to pay the consignor following a sale. “Conversion” is treating someone else’s property as one’s own and is a form of theft.

In 2011, Pennsylvania art collector George Ball consigned eleven modernist works by artists such as Paul Klee, Henri Matisse, and Pablo Picasso to his long-trusted Madison Avenue art dealer, Scott Cook. The value of the works was estimated to be in excess of \$5 million. Cook told Ball the works would be included in Christie’s London auction that summer. Ball trusted Cook and never asked to see the Christie’s catalog or look for his consignments on the Christie’s website. Later that summer, Cook sold the paintings without Ball’s knowledge and fled the country.¹⁸ Ball later received an \$18 million judgment against Cook for breach of contract, conversion, and breach of fiduciary duty,¹⁹ and Cook was criminally prosecuted at the federal level.²⁰

Typically, when conversion occurs, a claim is filed with the property insurer, and the insurance company litigates with the dealer or gallery.

¹⁴ *Id.*

¹⁵ FSIA §1605(h)(2).

¹⁶ McAuley, James, “The Louvre Is Showing Nazi-Looted Art in a Bid to Find Its Owners,” *The Washington Post* (February 2, 2018).

¹⁷ See Kaplan, *supra* at note 13 (explaining that Spain successfully argued against the U.S. to keep a Camille Pissarro painting known to have been stolen by Germany by applying its adverse possession laws).

¹⁸ Grant, Daniel, “‘Conversion’ Presents Thorny Issues for Art Owners,” *Art News* (September 7, 2011).

¹⁹ Ball v. Cook, 2012 U.S. Dist. LEXIS 147380.

²⁰ FBI Press Release, “Manhattan-Based Art Dealer Charged in Manhattan Federal Court with \$4 Million Fraud” (Jan. 26, 2012).

WORKS DISCLAIMED BY ARTISTS UNDER THE VISUAL ARTISTS RIGHTS ACT

Works created after 1990 have specific protections under the Visual Artists Rights Act (VARA), which allows living artists to disclaim works deemed to have been so altered or modified by damage that the original work, even if properly conserved, would no longer retain original integrity or meet their original intent.

A few high-profile actions have been brought by or against living artists evoking VARA protections to disclaim authorship. Cady Noland disclaimed authorship for "Cowboys Milking," a slightly damaged screen print on aluminum, persuading Sotheby's to withdraw the work from a 2011 sale, triggering a \$26 million claim from the consigner.²¹ Sotheby's successfully defended the suit based on their contractual right to withdraw works with authenticity concerns. Works disclaimed under VARA are sometimes referred to as "zombie art." It is prudent to consult with living artists in advance of conservation efforts.

VARA creates a set of enforceable "moral rights" for artists akin to copyright law. The Act recognizes two causes of action for visual artists: attribution and integrity.²² Attribution allows an artist to both claim authorship of a work and to disclaim a work when their name is inappropriately applied to it. Integrity allows the artist to disclaim authorship and to prevent identification of their name with a work that has been subsequently distorted, mutilated, or modified in a way that is prejudicial to the artist's honor or reputation.

The protections provided by VARA cover only limited, fine art categories of "works of visual art": paintings, sculptures, drawings, prints, and still photographs produced for exhibition. Within this group, only single copies or signed and numbered limited editions of 200 or less are protected.²³ VARA grants these moral rights to the artist, but only for the duration of the artist's life.

The legal remedies available under VARA are the same as for copyright infringement. Damages can range from \$200 for innocent infringements to \$100,000 for willful infringements.

COLLATERALIZED ART

The major private banks and private client divisions of large banks have been promoting art lending as a business line; U.S. Trust, J.P. Morgan, Northern Trust, and others have art-lending teams.

If an estate contains art that has been pledged as collateral for a loan, the executor will either need to have the lender file a claim against the estate and sell the work or use other estate assets to pay the debt. The standard provision in a will or revocable trust stating that assets pass subject to secured debt will also need to be examined.

ILLEGAL TO TRADE ART

Illegal art is art that cannot legally be sold, either because it contains materials that may have once been legal but are now illegal to sell, or because the content or origin of the work renders it illegal to trade. Examples include works incorporating ivory or other endangered species, objects subject to cultural appropriation

²¹ Swick, Tracy, (2013, June 7). "Sotheby's and Jancou Battle in Appeals Court over Cady Noland Artwork," *Art in America* (June 7, 2013).

²² Esworthy, Cynthia, "A Guide to the Visual Artists Rights Act," Harvard Law School (www.law.harvard.edu/faculty/martin/art_law/esworthy.htm).

²³ *Id.*

protections, and/or copyright and intellectual property infringement claims. Estate art that is illegal to trade can complicate both the appraisal and estate administration processes.

In the widely-reported IRS audit of the Estate of Ileana Sonnabend, the valuation risks posed by illegal art were seen first-hand. Sonnabend was a prominent dealer of modern American art who died in 2007 at the age of 92. Her estate tax return assigned a value of \$0 to a mixed media work titled “Canyon” by Robert Rauschenberg, as it included an illegal stuffed bald eagle.

Under the 1940 Bald and Golden Eagle Protection Act and the 1918 Migratory Bird Treaty Act, it is a crime to buy, sell, barter, or possess a bald eagle in the United States, alive or dead. Thus, the Rauschenberg work could no longer be sold.

The IRS insisted the masterwork was worth \$65 million and assessed additional estate taxes of \$29.2 million and penalties of \$11.7 million. The taxes and penalties were waived in a settlement with the IRS when the Sonnabend children donated the work to the Museum of Modern Art (MoMA) in New York City for a \$0 donation credit.²⁴

PART TWO – RISKS ASSOCIATED WITH STIGMATIZED ART

VALUATION RISK

As seen in the stories above, forged and misattributed art can create unexpected estate tax liability, can cause unnecessary overpayment of estate or gift taxes, and can deprive charitable organizations of relied-upon funds.

The taxpayer in *Doherty v. Commissioner*²⁵ donated a painting by Charles M. Russell to the C.M. Russell Museum. The taxpayer’s claimed value was \$350,000 and the Service’s expert claimed the painting was a forgery with a value of \$100. The case pitted the two foremost authorities on Russell against one another. The U.S. Tax Court agreed that the dispute over the painting’s authenticity reduced the value, as did the poor quality of the painting and materials, settling on a value of \$30,000. As a result of the reduction in value, the taxpayer’s charitable contribution was reduced, and the taxpayer had to pay additional income tax and interest.

LOSS OF POSSESSION AND TITLE RISKS

Stolen art presents an ethical quandary, as there are often two innocent parties and a third guilty party. Assuming the criminal no longer has possession of the stolen work, the innocents are the original owner who was the victim of the theft, and the good faith purchaser who was the victim of fraud. The rightful owner of the stolen work can vary depending on whether the case is heard in a common law or a civil law country.

Stolen art implicates the jurisdictions of the thief, purchaser, seller, and the location of the work of art itself, and these jurisdictions often cross international borders and apply different laws. The result is that participants in the art market are understandably unsure of their legal rights and responsibilities.

²⁴ Cohen, Patricia, “MoMA Gains Treasure that Met Also Coveted,” *The New York Times* (November 28, 2012).

²⁵ *Doherty v. Comm’r*, TC Memo 1992-98.

***Nemo dat* versus market overt**

In the U.S. and the UK, the legal principle of *nemo dat quod non habet* applies, which means that an owner can never transfer more legal rights than what he actually has. If an object has been stolen at any point in its chain of title, it remains a stolen object.

The expiration of a statute of limitations only means that the original owner's ability to bring suit for the object's return is barred. It does not vest title to the stolen object in the current possessor, although if the statute of limitations deprives the original owner of an actionable claim, the practical result may be to vest title in the good faith purchaser. Nevertheless, in some circumstances the fact that the artwork was stolen may mean that if it is sold or transferred to another person, the statute of limitations begins to run anew against that subsequent transferee.²⁶

Some countries still apply the theory of “market overt” as an exception to the *nemo dat* rule. The market overt exception originates from the Middle Ages when markets were held in walled cities, and puts the burden on the victim of the theft to search the vendors’ stalls to recover the stolen property. The rule in market overt jurisdictions is that if a buyer makes a purchase in good faith from a vendor who has displayed the goods openly for sale, the good faith buyer is protected.²⁷ Jurisdictions that apply some form of the market overt rule include Brazil, Spain, France, Italy, China, and Japan.²⁸

Statutes of limitation and replevin

In the U.S., an owner who sues in a timely manner almost always recovers stolen goods. The action in replevin must be brought within the state’s statute of limitations period. A replevin action is an action to recover personal property that was wrongfully taken or detained and can also include damages for resulting loss.²⁹ The statutes of limitations periods for such actions vary across the states, which generally fall into three categories:³⁰

- Demand and refusal rule: The statute of limitations for a suit in replevin begins to run only when the owner finds her goods and demands their return, and the buyer refuses her, which provides the greatest protection to the original owner.
- Time of theft or purchase: At the other extreme of protecting the good faith purchaser are states where the statute of limitations begins to run at the time of the theft, or at the time of the fraudulent purchase by the merchant-seller, so long as the buyer can establish an open, notorious, and continuous adverse possession.
- Discovery rule: A number of states have adopted a middle-ground position where the statute of limitations begins to run at the time the original owner discovers or should have discovered the location of her stolen goods.

²⁶ Ray, Kevin, “(In)security — Secured Transactions in Art and Cultural Property,” 13 *DePaul Bus. and Com. L.J.* 515, 519 (2015).

²⁷ Lian Yap, Ji, “Appraising the Market Overt Exception,” 3 *J. Int’l Com. Law & Tech.* 254, 256 (2008).

²⁸ Schwartz, Alan and Scott, Robert E., “Rethinking the Laws of Good Faith Purchase,” *Yale Law School Faculty Scholarship Series*, Paper 4166 (2011) and 111 *Colum. L. Rev.* 1332, 1335 (2011).

²⁹ See, e.g., D.C. Code § 16-3701.

³⁰ Schwartz and Scott, *supra* note 22, at 1336-1337.

Uniform Commercial Code

While replevin actions are usually brought against the thief, good faith buyers forced to return a stolen work to the original owner often bring breach of contract actions against the seller, which may be governed by the Uniform Commercial Code (UCC). UCC Section 2-725 states any action for breach of contract for sale must be commenced within four years after the cause of action has accrued.

A cause of action under the UCC accrues when the breach occurs, “regardless of the aggrieved party’s lack of knowledge of the breach.”³¹

PART THREE –MITIGATING THE RISKS OF STIGMATIZED ART

VETTING APPRAISER QUALIFICATIONS

In the *Estate of Kollsman v. Commissioner*³², the U.S. Tax Court rejected a premiere auction house appraisal for bias and absence of objective support. The opinion in *Kollsman* illustrates that preeminence in the auction business, or in another art-related profession, is not adequate assurance of appraisal expertise or even competency. In rejecting the appraisal offered by the estate in *Kollsman* as “unreliable and unpersuasive,” the court found profound deficiencies in the competency as well as the independence of the auction house appraiser.

In the wake of *Kollsman*, it is clear that preeminence in the art industry does not by itself ensure appraisal expertise. The involvement of the auction house or dealer in the sale and purchase of the subject artwork can undermine the Service’s (or court’s) confidence in the appraisal. In fact, in certain cases, IRS Treasury Regulations prohibit the appraiser from also being the broker of the donated work.

When a donor claims a charitable deduction in excess of \$5,000, Treasury Regulations require a qualified appraisal, made not more than 60 days before the date of contribution, to be attached to the income tax return.³³ A “qualified appraisal” is one prepared by a “qualified appraiser.” The Treasury Regulations explicitly state that to be “qualified,” the appraiser must be “completely independent of the donor.”³⁴ The authors interpret this to mean that the dealer who sold the donor the work of art should not be the appraiser, nor should an employee of the dealer appraise the donated item.

While the same “qualified appraiser” rule does not apply to estate and gift tax returns, the appraiser for estate and gift tax purposes must still “be reputable and of recognized competency to appraise the particular class of property involved.”³⁵ The estate’s attorney should engage appraisers who meet recognized professional standards for qualification and competency in order to best protect the interests of the estate.

³¹ U.C.C. § 2-725(2).

³² *Kollsman v. Comm’r*, TC Memo 2017-40.

³³ Ray, Kevin, “(In)security — Secured Transactions in Art and Cultural Property,” 13 *DePaul Bus. and Com. L.J.* 515, 519 (2015).

³⁴ Treas. Reg. 1.170A-13(c).

³⁵ Treas. Reg. 1.170A-13(c)(5)(i).

³⁶ Treas. Reg. 20.2031-6(b).

The Appraisal Foundation's 2018 *Personal Property Appraiser Qualification Criteria*

The appraisal of art is a recognized professional discipline, distinct from other types of art market expertise, with clearly defined credentialing standards. In the United States, The Appraisal Foundation (TAF) is the foremost authority on the valuation profession.

Under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Congress authorized TAF as the source of appraisal practice standards and qualifications. TAF's Appraiser Qualifications Board is responsible for developing appraiser qualification standards, and TAF's Appraisal Standards Board issues and updates "The Uniform Standards of Professional Appraisal Practice (USPAP)." These standards and practices help ensure a trustworthy level of professional competency.

Effective as of January 1, 2018, TAF issued an updated and more stringent "Personal Property Appraiser Qualification Criteria." If an appraiser is credentialed by one of the TAF sponsoring professional personal property organizations, the appraiser will meet the stringent criteria set forth by TAF. Those organizations are:

- The International Society of Appraisers;
- The Appraisers Association of America; and
- The American Society of Appraisers.

Each of these organizations maintains public online registries where an expert's specialization, level of credentialing, and current USPAP compliance may be confirmed.

To become accredited by a TAF sponsoring organization, the appraiser must go through a rigorous admissions, training, and testing process. They are required to comply with IRS guidelines, adhere to a code of ethics, and are subject to oversight and continuing education requirements.

Appraisal Reports

Every appraisal submitted to assist in determining tax liability has the potential to become the subject of litigation. Appraisals over \$50,000 are subject to review by the IRS Art Appraisal Services.³⁶

The appraisal report should be supported by comparable sales data, relevant expert opinions, and a well-reasoned objective justification for value conclusions. All appraisal reports should disclose the approach to valuation and methodology employed, intended use, definition of value, markets explored, any conditions limiting the results, extraordinary assumptions, and scope of work.

IRS Publication 561, *Determining the Value of Donated Property*, outlines a preferred identification format for art valued over \$50,000. The appraisal should include professional quality photographs, and contain a complete physical description of the object, including size, materials or medium, subject matter, name, nationality and life dates of the artist, signatures or other identifying inscriptions or markings, date of creation, provenance, condition, literature references, and exhibition history. The IRS also expects the appraiser to exercise due diligence in confirming authenticity.

³⁶ The IRS Art Appraisal Services is distinct from the IRS Art Advisory Panel. The members of the Art Advisory Panel are renowned art experts, scholars, and gallerists who serve without compensation. The IRS Art Appraisal Services is part of the Office of Appeals, staffed by TAF-qualified appraisers.

The appraisal report should also address how the appraiser meets the IRS appraiser qualification criteria, and the appraiser should acknowledge the civil liabilities associated with a grossly inaccurate valuation. Finally, the appraisal report should include a signed and dated certificate of compliance with USPAP. This certification must disclose conflicts or bias to the subject property or parties and confirm that the assignment was not predicated on a predetermined result.

USPAP prohibits appraisals that are subject to a contingency fee. An appraiser must not accept an assignment, or have a compensation arrangement for an assignment, that is contingent on a predetermined value result, based on a percentage of value, or attainment of any advantage (e.g., the appraiser will broker or sell the subject property).

BEST PRACTICES AND DUE DILIGENCE IN MANAGING A COLLECTION

Advisors are often surprised to discover the lack of due diligence commonly exercised by passionate collectors both in the acquisition process and in retaining critical records and documents. Following are steps an advisor can recommend to art collector clients and the executors administering the estates of deceased art collectors.

At the point of purchase

Buyers of art should exercise caution before purchasing significant works of art, even when purchasing through a dealer who represents and warrants that the art is authentic, is free and clear of all liens, and will remain so in the future. Buyers should take the following precautions:

- Hire an independent qualified appraiser to assist in the authentication process and to confirm value and provenance.
- Obtain strong representations and written warranties from the dealer or seller with regard to clear title and authenticity.
- Check with the Art Loss Register, FBI, and Interpol to ensure the work was not stolen.
- Search the U.C.C. database to ensure the work does not secure the debt of a former owner.
- Consider if the purchase of art title insurance is warranted.

Keep a detailed inventory

Collectors should keep a detailed inventory that includes a complete physical description of the object consistent with the IRS appraisal reporting standard discussed previously; the location of the object; detailed records of each purchase, including the name of the seller, the date and place of the purchase; and the consideration paid. If the collection is appraised for insurance purposes, the appraised values should also be noted in the inventory.

If the work has been exhibited, loaned, leased, sold, pledged, gifted, or otherwise transferred, the inventory should be updated to reflect this, together with information on when, where, and to or with whom the work has been transferred or placed.

If the collector has scholarly publications or reference materials documenting or publicizing the work, such as catalogs in which the work was offered for sale, these should be kept with the inventory.

If the work is missing due to loss or theft, the inventory should document the known circumstances of the loss or theft.

If a work was produced in a limited edition of multiple copies, the inventory should state how many copies were produced and whether the plate or cast was destroyed.

Protecting the art collection

The first steps for administering an estate with an art collection are the same as with the other assets of the estate: secure and inventory the assets and assess their value.

To prevent lost and stolen art, immediately ensure art is securely stored. The court in *In re Warhol Est.*, 629 N.Y.S.2d 621, 627 (N.Y. Surr. 1995) commended the executor for securing Warhol's home on the day of his death and not losing a single object to theft or misplacement, noting that the home contained over \$100 million of valuable objects and people were seeking entry to claim ownership of objects from the day of Warhol's death forward.

If the decedent kept an inventory of works, locate it and ensure it is current. If an inventory does not exist, engage a qualified art advisor or appraiser to catalog the collection.

The executor should make sure all works are insured and obtain a rider to any existing insurance policy covering the interests of the estate and the beneficiaries.

Enforce rights before statutes of limitation expire

If works of art are on loan to a museum or have been consigned to a gallery, the executor should notify the current possessor of the estate's intent to preserve its interest in the works and, if appropriate, demand return of the works.

Ascertain proper ownership of artwork

The executor should ascertain whether anyone besides the decedent owned an interest in the works; whether the works are owned by an LLC, partnership, or other entity; and whether the decedent gave fractional interests in the works to children, friends, or museums.

Examine chain of title and investigate weaknesses

If the decedent collector's inventory reveals weaknesses in the chain of title of works, the executor should investigate, particularly if the work was purchased in the last four years. If more than four years have passed from the date the decedent bought stolen art that is later reclaimed by the owner, the estate's claim against the dealer from whom the art was purchased may be time-barred under the UCC.

Stale loan statutes

If the decedent lives in, or the art is located in, a state that has a "stale loan" statute, under some circumstances title in the loaned object may pass to the borrower as a deemed gift.

New York enacted an abandoned loan statute in 2008 that allows nonprofit museums located in the state to acquire title to abandoned works of art and, if they choose, to deaccession (or sell) the works.

“Stale loan” legislation has been passed or is pending in other states (including Alaska, Arkansas, Florida, Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New Mexico, Ohio, Texas, Vermont, and Wisconsin), but only a limited number of states have included provisions directed at the issue of Nazi-looted art. New York’s statute is unique in that it protects the interest of Holocaust victims by requiring the museum to notify the Art Loss Register whenever they attempt to acquire title to abandoned artworks that were created before 1945 and that changed hands in Europe between 1933 and 1945.

These statutes generally apply to an indefinite loan or a loan with a defined term that has expired.

Art stolen or missing from the estate

If a work of art was stolen prior to the collector’s death or in the course of administration of the estate, the executor should take steps to locate it. The theft should be reported to the police, the FBI, and Interpol. If a work is stolen while it is in the estate, the FBI offers the following advice:³⁷

- Protect the scene of the crime and do not let staff or visitors into the area, lest they disturb evidence.
- Determine the last time the objects were seen and what happened in the area, or to the objects, since that time.
- Gather documents, descriptions, and images of the missing objects and provide this to the police.
- Follow up on police actions and investigations to ensure that everything possible is being done.

In addition, the theft should also be reported to stolen art archives such as the NSAF, Interpol, and Art Loss Register, and assistance should be sought from experts who deal with the type of art involved, who can put galleries and other dealers on notice through the Art Dealers Association of America.

Efforts to locate the works should be continuous, even though they may seem futile. If the work is located, the cause of action to recover it could be time-barred in states that apply a discovery rule or extinguished by laches in states that apply the demand and refusal rule.

The “discovery rule” permits the artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession until the identity of the current possessor is known. Registering the stolen works with the law enforcement databases and private registries should put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.³⁸

APPOINTING AN ART EXECUTOR

Often, the artist’s or collector’s spouse or children do not have the requisite knowledge, experience, or interest to plan for the disposition of the decedent’s art at death. In this case, the client should consider appointing an art executor who will assemble the works; develop, exhibit, market, or otherwise promote the works as appropriate; and determine which could be donated or sold for a reasonable price in the short term, held to generate interest, or discarded if appropriate.

³⁷ What We Investigate,” Federal Bureau of Investigation, March 20, 2019, www.fbi.gov/investigate/violent-crime/art-theft#Art-Crime%20Team.

³⁸ See, e.g., *O’Keeffe v. Snyder*, 416 A.2d. 862 (N.J. 1980).

The will or trust should state whether the residuary beneficiaries or the recipients of the works bear the expense of the art executor's fee. The trust or will should make clear whether or not the art executor is simply an advisor or an actual executor. If the art executor is to be an actual executor, it should be made clear that the art executor has the power to act in his or her sole and absolute discretion with respect to the property at issue, even if over the objections of the other fiduciaries.

Ideally, the will or trust will provide for compensation to the art executor, which is a deductible expense of administration. If the person named as art executor would otherwise have been paid a commission for selling the collection, naming that person as art executor and paying compensation instead will save estate taxes, as sales commissions are not deductible unless the artworks were required to be sold to pay taxes or by the terms of the trust instrument or will.

If an art dealer is to be appointed as executor or trustee, the will or trust should excuse possible conflicts of interest (but only if the client trusts the conflicted fiduciary).³⁹ The art executor should not be the valuation expert. As seen in the *Estate of Kollsman*, the U.S. Tax Court found that the Sotheby's appraiser had a "significant conflict of interest" that called into question his objectivity, as Sotheby's was also trying to sell the Old Master works for the estate.⁴⁰

CONCLUSION

The art authentication process is often non-absolute and subject to alteration as new information, scholarship, and technologies become available. The role of interested or less-than-relevantly-credentialed valuation experts, together with careless acquisition by collectors, can elevate estate administration risks. Advisors and appraisers should be alert to stigmatized art in estate collections to avoid gross over- or undervaluation and associated legal and financial consequences. A team of the client, the attorney, and a qualified, independent appraiser is the best protection against the risks of stigmatized art.

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Cindy Charleston-Rosenberg ISA CAPP, President of the Art Appraisal Firm, brings more than twenty-five years of art market experience to the appraisal and management of important collections of American art. A member of the Appraisal Foundation's Board of Trustees, and a past President and Certified Member of the International Society of Appraisers (ISA), Cindy is active in industry activities to raise awareness of the critical importance of appraiser qualification criteria, and in collaboration with allied professionals to advance diligent art collection and succession planning practices. She is an experienced expert witness, writes and presents widely on advanced appraisal methodology issues and has won numerous awards for her thought leadership in the personal property appraisal profession.

Sarah Moore Johnson is a founding partner of Birchstone Moore LLC, a boutique law firm focusing on estate planning and estate administration. Mrs. Johnson is a leader in the Washington, DC estate planning community, serving in leadership roles within the DC Bar and as a Board Member and now President-Elect of the Washington, D.C. Estate Planning Council. Mrs. Johnson has given numerous presentations at the national level on planning for artists and collectors among other topics and has twice served on the faculty of the

³⁹ For a cautionary example, see *in re Rothko*, 43 N.Y.2d 305, 372 N.E.2d 291, 140 N.Y.S.2d 449 (1977) (gallery executive serving as executor of Rothko's estate hired himself to sell 798 of Rothko's works to a corporation owned by the executor).

⁴⁰ Ray, Kevin, "(In)security – Secured Transactions

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