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The Protection of Visual Artists Through Consignment of Art Statutes

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THE PROTECTION OF VISUAL ARTISTS THROUGH CONSIGNMENT OF ART STATUTES

Lisa Moore & Liz Wheeler***

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I. INTRODUCTION

Visual artists have historically been vulnerable to exploitation.¹ Recent headline news regarding the collapse of major art-world players, such as the Salander-O'Reilly Gallery in New York, due to unscrupulous practices illuminate the unfortunate fact that artists remain susceptible to deceptive practices perpetrated by art dealers and galleries.² It is an unfortunate truth that, especially in today's economy, "many art galleries are notoriously poorly financed corporations that often use today's sales to pay yesterday's debts."³ The pervasive lack of knowledge about an artist's rights, coupled with the inherent power imbalance between artists, especially younger artists, and art galleries (who can be the gateway to wealthy collectors, solo exhibitions, reviews in prestigious publications, and the corresponding stature and financial success of these milestones) often force an artist to accept an inequitable arrangement with a gallery for the sale of their works. The unfortunate but all-too-common result is that a gallery or dealer in financial difficulty may use tactics of delay and deception to forestall the artist, or in extreme cases, to abscond with inventory of the artist's work and proceeds due to the artist.

This Practice Point will examine the protection available to artists in the form of little-known and rarely litigated consignment of art statutes. Part II will focus on how the recent economic decline has impacted the historically symbiotic relationship between artists and galleries. Part III will discuss the history and current relevance of state consignment of art statutes. Part IV describes the general structure and requirements of the statutes, and will examine the Georgia Consignment of Art Act as an example of the legislation in place to protect visual artists. Part V is dedicated to strategies for the utilization of consignment of art statutes for the protection of an artist.

II. THE CURRENT LANDSCAPE OF THE ARTIST-GALLERY RELATIONSHIP

The typical relationship between a visual artist and an art gallery is a consignment relationship.⁴ The artist delivers work into the physical possession of the gallery, which markets, promotes, and sells the work to collectors,

¹ See SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, at ch. XI, pp. 12–13; 1 RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 35 (2d ed. 1992); DANIEL GRANT, THE BUSINESS OF BEING AN ARTIST 23–26 (1991); CAROLL MICHAELS, HOW TO SURVIVE AND PROSPER AS AN ARTIST 123–24 (3d ed. 1992).

² Karen Zraick, *New Charges Brought in Art Fraud Case*, N.Y. TIMES, July 14, 2009, available at <http://www.nytimes.com/2009/07/15/nyregion/15gallery.html>.

³ GRANT, *supra* note 1, at 26.

⁴ WILLIAM GIGNILLIAT & LISA KINCHELOE, ART LAW IN GEORGIA, A GUIDE FOR ARTISTS AND ARTS ORGANIZATIONS 2 (2002) (stating that the only way for an artist or art dealer to avoid consignment classification would be through an outright sale of the artwork to the gallery).

investors, designers, and other art lovers, and compensates the artist for his or her portion of the proceeds received in connection with such sales, based upon the agreed-upon terms. Historically, this arrangement has been profitable both for the gallery, which obtains inventory for its collectors and buyers and the prestige pursuant to representing a particularly “hot” artist, and for the artist, who correspondingly has the privilege of being represented, a potential source of income from sales, and opportunities for openings and exhibitions and the press coverage, publicity, and reviews in connection with these events.

However, the artist-gallery relationship only continues to be fruitful for the artist as long as the gallery is able to sell the artist’s works, and, most importantly, as long as the gallery remits payment to the artist as required. Thus, in the art boom of the 1990s through mid-2000s, when artwork was selling for record-breaking prices,⁵ artists were receiving substantial amounts of money for sales, and were generally willing to overlook the occasional late payment. During the recent economic downturn, art galleries were faced with the unfortunate realities of marked downturns in sales and purchasers who failed to follow through on payment obligations. As the inflow of available cash and accounts receivables to galleries dramatically declined, galleries began to dip into the funds rightfully and legally belonging to their artists pursuant to sales of artists’ works in order to keep their doors open, their lights on, and their staff paid. Many galleries found themselves (and many still find themselves) in the uncomfortable position of making excuses to artists for late or partial payments, and there have been reports that some of the more unscrupulous galleries have falsely reported some artworks as missing in order to retain the full benefit of a sale. Thus, the formerly mutually beneficial artist–gallery relationship began to crumble.

III. THE HISTORY AND RELEVANCE OF CONSIGNMENT OF ART ACTS

The artist-gallery relationship is unique, in that the artist-consignor is forced to rely upon the honesty and fair dealing of his gallery and the principals of that gallery, with respect to the timely and full payment from the sales of such works, as well as the safekeeping of the consigned works while in the gallery’s custody.⁶ Importantly, galleries generally do not make advance payments to artists upon delivery of the consigned works, but rather split the proceeds from

⁵ Roberta Smith, *After the Roar of the Crowd, an Auction Post-Mortem*, N.Y. TIMES, Sept. 20, 2008, at B7, available at <http://www.nytimes.com/2008/09/20/arts/design/20hirs.html> (stating that Damien Hirst, currently one of the most bankable living artists with pieces regularly fetching upwards of \$10 million, found an interesting way to circumvent the artist-gallery relationship in his record-breaking Sotheby’s auction in 2008, “Beautiful Inside My Head For Ever.” The auction, a rare occurrence as it included solely Hirst’s own works, took in \$200.7 million, setting a new Sotheby’s record for sales of work by a single artist.)

⁶ TAD CRAWFORD & SUSAN MELLON, *THE ARTIST-GALLERY PARTNERSHIP: A PRACTICAL GUIDE TO CONSIGNING ART* 23 (1998).

the sale price with the artist at the time payment is received from the purchaser.⁷ The art gallery or art dealer accepting works on consignment from an artist thus has a fiduciary obligation to the artist he represents.⁸

State lawmakers recognized the need to protect artists from unscrupulous dealers who “attempt to undermine the principal-agent relationship between artist and dealer and the fiduciary obligations inherent in that relationship by means of disguised purchase agreements and contractual waivers.”⁹ As a result, the country’s first artist-dealer legislation was passed in New York in 1966.¹⁰ Numerous states followed suit, using the New York statute as a model for legislation to protect visual artists from fraudulent and devious practices by galleries and art dealers.¹¹ Although very few galleries, and even fewer artists, are aware of their existence, more than thirty states and the District of Columbia have now implemented consignment statutes governing the artist-dealer relationship.¹²

In addition to concerns about protecting artists from abusive practices by art dealers and galleries, the policies underpinning the passage of these laws were (1) concern about the inadequacy of existing civil and criminal remedies for misappropriation of proceeds or consigned artwork and (2) the failure of the

⁷ See GIGNILLIAT & KINCHELOE, *supra* note 4, at 3 (explaining that this presents an interesting challenge for an artist who fails to recognize the potential for abuse inherent here). It is important for the visual arts practitioner representing an artist to specify exactly what receipt of payment means, i.e., does the artist receive his or her share on installment payments, or only a lump sum once the full balance is paid? There is also a less favorable payment arrangement for artists that practitioners should be aware of, whereby artists are paid a previously designated “artist price,” regardless of the final sale price.

⁸ LERNER & BRESLER, *supra* note 1, at xlv (“When an artist delivers works of art to a dealer for sale, the dealer becomes the artist’s agent and the law of agency, with its attendant fiduciary duties, applies.”).

⁹ Ralph E. Lerner, *Agreements for the Visual Arts*, 16 ENT. & SPORTS LAW, Fall 1998, at 19, 21.

¹⁰ N.Y. ARTS & CULT. AFF. LAW § 12.01–03.

¹¹ CRAWFORD & MELLON, *supra* note 6, at 81 (“State lawmakers have recognized that artists and original artworks needed to be better protected.”).

¹² ALASKA STAT. §§ 45.65.200–250 (2011); ARIZ. REV. STAT. §§ 44-1771 to -1778 (2011); A.C.A. §§ 4-73-201 to -207 (2011); CAL. CIV. CODE §§ 1738.5–9 (2011); COLO. REV. STAT. §§ 6-15-101 to -104 (2010); CONN. GEN. STAT. §§ 42-116k to -116m (2010); FLA. STAT. ANN. §§ 686.501–506 (2011); O.C.G.A. §§ 10-1-520 to -529 (2011); IDAHO CODE ANN. §§ 28-11-101 to -106 (2011); 815 ILL. COMP. STAT. ANN. 320/0.01–.8 (2011); IOWA CODE ANN. §§ 556D.1–556D.5 (2010); KY. REV. STAT. ANN. §§ 365.850–875 (2010); MD. CODE ANN., COM. LAW § 11-8A-01 to -04 (2011); MASS. ANN. LAWS ch. 104a, § 1–6 (2010); MICH. COMP. LAWS § 442.311–.315 (2011); MINN. STAT. ANN. §§ 324.01–.10 (2010); MO. REV. STAT. §§ 407.900–910 (2011); MONT. CODE ANN., §§ 22-2-501 to -505 (2010); NEV. REV. STAT. ANN. § 597.720–760 (2011); N.H. REV. STAT. ANN. §§ 352:3–12 (2011); N.J. STAT. ANN. §§ 12A:2-329 to -336 (2011); N.M. STAT. ANN. §§ 56-11-1 to -3 (2010); N.Y. ARTS & CULT. AFF. LAW § 12.01–03 (2011); N.C. GEN. STAT. ANN. §§ 25C-1 to -9 (2010); OHIO REV. CODE ANN. §§ 5815.41–48 (2011); OR. REV. STAT. §§ 359.200–.255 (2009); 73 PA. CONS. STAT. ANN. §§ 2121–2130 (2010); TENN. CODE ANN. §§ 47-25-1001 to -1006 (2011); TEX. OCC. CODE ANN. §§ 2101.001–003 (2010); WASH. REV. CODE § 18.110.010–900 (2011); WIS. STAT. ANN. § 129.01–08 (2011).

Uniform Commercial Code (U.C.C.) to protect artists' consigned works from being seized by gallery creditors notwithstanding the fact that these works were the property of the artist and title had not passed to the gallery.¹³ The absence of a consignment statute would result in gallery consignments being subject to the U.C.C.¹⁴ Thus, the majority of consignment acts explicitly exempt gallery consignments from conflicting provisions of the U.C.C. Additionally, these state statutes offer important (although as yet largely untested) protections for the artists in the event of a gallery's bankruptcy, preventing the artist-consignor's works from being considered part of the gallery's assets subject to seizure by the gallery's creditors.¹⁵

These state consignment acts explicitly require the gallery to hold the art, as well as proceeds from any sales, in trust for the artist, along with a statutory obligation to pay the artist in full before such proceeds can be made available to creditors or otherwise expended in any way, thus making it clear that a gallery, as the agent of the artist, has the fiduciary duty to act in the artist's best interest.¹⁶ Further, as the agent acting on behalf of the artist and holding the artwork and proceeds resulting from sales in trust for the artist, many of the consignment statutes establish a strict liability standard for any loss or damage to artworks entrusted to the gallery while in the gallery's possession.¹⁷

IV. THE GEORGIA CONSIGNMENT OF ART ACT

Georgia's Consignment of Art Act (Act), O.C.G.A. §§ 10-1-520 to -529, was passed in 1995 based on the New York model, and thus provides a good model for more specific review. The Act was instituted to regulate the relationship between artists and art dealers and to establish the rights of artists when consigning artworks to art dealers.¹⁸ The Act, in keeping with other consignment of art acts in the nation, establishes the following: (1) an art dealer is an agent of the artist;¹⁹ (2) a written contract reciting minimum price and

¹³ LERNER & BRESLER, *supra* note 1, at 34–62 (explaining that when a work is consigned to a gallery, title does not pass to the gallery, but instead passes directly from the artist to the purchaser upon full payment).

¹⁴ U.C.C. § 2-326 (2005).

¹⁵ GRANT, *supra* note 1, at 26.

¹⁶ Cathryn Mitchell Heise, *Florida's Art Consignment Statute: A Trap for the Unwary Artist?*, 14 NOVA L. REV. 473, 482 (1989–1990) (discussing the New York Attorney General's specific statement in a memorandum, in response to complaints that art dealers were wrongfully withholding proceeds from artists, that an art dealer is not relieved of his fiduciary obligations regarding consigned artwork until proceeds from the sale have been delivered to the artist-consignor, reiterating that the legislative intent behind these consignment of art acts was to require the art dealer to handle both the artworks themselves and the proceeds derived from their sale as a fiduciary).

¹⁷ CRAWFORD & MELLON, *supra* note 6, at 9.

¹⁸ GIGNILLIAT & KINCHELOE, *supra* note 4, at 2.

¹⁹ O.C.G.A. § 10-1-524(1) (2011).

value of the work and time for payment is required prior to or at the time of delivery of consigned artworks;²⁰ (3) the art dealer is strictly liable to the artist for the full value of the work upon any loss or damage;²¹ (4) the consigned artworks and proceeds from sales are to be held in trust by the dealer for the benefit of the artist and are to be paid over to the artist prior to the satisfaction of any of the gallery's debts;²² and, most importantly, (5) violation of any provision of the Act will void the obligations of the artist to the dealer.²³ In addition to voiding the artist's obligation to the dealer, any art dealer who violates the Act is liable for all actual damages including consequential and incidental damages and attorney's fees.²⁴ To ensure that galleries are unable to force the artist to contract around and thus, circumvent, the protections afforded to them, the Act cannot be waived by artists.²⁵

The Act states:

- (a) An art dealer may accept a work of art on a fee, commission, or other compensation basis on consignment from the artist who created the work of art only if prior to or at the time of acceptance the art dealer enters into a written contract with the artist establishing:
 - (1) The value of the work of art;
 - (2) The time within which the proceeds of the sale are to be paid to the artist if the work of art is sold; and
 - (3) The minimum price for the sale of the work of art.
- (b) If an art dealer violates this Code section, a court may, at the request of the artist, void the obligation of the artist to that art dealer. . . .²⁶

Thus, pursuant to the express provisions of the Act, not later than the time of acceptance of consigned artwork, the gallery and artist must enter into a written contract specifying the value and minimum price of each artwork consigned thereunder, along with the time for payment to the artist of the proceeds from the sale of such artworks. Violation of this section authorizes the artist to void his obligations to the dealer, thus allowing the artist to seek a

²⁰ *Id.* § 10-1-523(a).

²¹ *Id.* § 10-1-524(3).

²² *Id.* § 10-1-524(4).

²³ *Id.* § 10-1-523(b).

²⁴ *Id.* § 10-1-529.

²⁵ *Id.* § 10-1-526 (“Any other provision of a contract or an agreement whereby the consignor purports to waive any provision of this article is void.”).

²⁶ *Id.* § 10-1-523.

damage award for a breach of the Act for the full amount of the proceeds in connection with sales of the artist's work, rather than the artist's percentage under a void consignment agreement.

As the agent of the artist, the art gallery or dealer must exercise the "utmost loyalty and good faith to his principal," the artist.²⁷ Thus, in Georgia, upon consignment, the gallery is statutorily considered the agent of the artist and must accord itself with the highest standards of good faith and fair dealing. Under the Act, art received on consignment remains trust property and is not subject or subordinate to claims, liens, or security interests. O.C.G.A. § 10-1-525 states in pertinent part: "[n]o such trust property or trust funds shall be or become subject or subordinate to any claims, liens or security interests of any kind or nature whatsoever of the consignee's creditors"

The Act further mandates:

- (2) The work of art shall constitute property held in trust by the consignee for the benefit of the consignor and shall not be subject to claim by a creditor of the consignee;
- (3) The consignee shall be responsible for the loss of, or damage to, the work of art; and
- (4) The proceeds from the sale of the work shall constitute funds held in trust by the consignee for the benefit of the consignor. Such proceeds shall first be applied to pay any balance due to the consignor, unless the consignor expressly agrees otherwise in writing.²⁸

As evidenced by the language above, the Act imposes substantial trust obligations upon the dealer with respect to both the artwork and the proceeds from the sales of any such artworks. Namely, these sales proceeds must be held in trust for the artist, and cannot be paid to creditors or any other third party before the artist receives full payment.²⁹

²⁷ Koch v. Cochran, 307 S.E.2d 918, 919 (Ga. 1983); Harrison v. Harrison, 105 S.E.2d 214, 218 (Ga. 1958); Boyce v. Murray, 395 S.E.2d 255, 257 (Ga. Ct. App. 1990).

²⁸ O.C.G.A. § 10-1-524 (2011).

²⁹ CRAWFORD & MELLON, *supra* note 6, at 10, 28 ("As a trustee, the gallery is held to particularly high standards of fair dealing. It must act in ways to benefit and protect the artist. The money that the gallery receives for the sale of the artworks, for example, is trust property until the artist has been paid in full. Until that time it, should be kept separately from the gallery's general funds. Money owed to the artist may not be applied to other uses, and it cannot be made subject to claims by creditors of the gallery [M]oney the gallery has received for sales of the artist's work may not be used for other purposes (as, for example, paying the rent, paying for advertising, or paying other artists) until the artist has been paid.").

V. USE OF THE CONSIGNMENT OF ART STATUTES FOR THE PROTECTION OF ARTISTS

Although these consignment of art statutes offer critically important protections for visual artists, there are very few cases arising under these statutes.³⁰ Despite the dearth of case law on point, it is important that practitioners working on behalf of visual artists be aware of the existence of their state's consignment statute, if any.³¹ Initially, practitioners should not only fully understand the required provisions for inclusion in the consignment agreement, but should also understand the potential implications of these provisions, so that the obligations of both the artist and art gallery are fully codified and clear for all concerned. For example, while the Georgia Consignment of Art Act requires the value of the work, minimum sale price, and time for payment to be specified in the consignment agreement, there may be remaining confusion over whether the consignment agreement is an artist's price agreement (where the artist receives a specified amount regardless of the amount of a sale) or a sale price agreement (where the artist receives his or her 50% share on the final sale price of a work, which is far more favorable to an artist).³² Additionally, the practitioner should require the inclusion of an exhibit or addendum setting forth the artworks delivered to the art gallery on consignment (as well as a provision for the inclusion of additional entries in the event there are multiple deliveries over the course of a long-term consignment relationship). This will allow the artist to keep clear and accurate records—in comparison to inventory statements received from the gallery—of the inventory still in the gallery's possession, minimum sales amounts, and the condition of the works upon delivery.

In the event an artist–client approaches a practitioner subsequent to entering a consignment relationship and delivering artwork into the hands of a gallery, due to the failure of the gallery to make timely or full payment, the loss or

³⁰ For a sampling of the rare cases that have been brought, see *Pelletier v. Eisenberg*, 223 Cal. Rptr. 84 (Ca. Ct. App. 1986) (holding that an artist was entitled to the full value of damaged works consigned to gallery after the works were destroyed by a fire in the gallery); *Indemnity Ins. Co. of N. Am. v. Art Students League of N.Y.*, 640 N.Y.S.2d 8 (N.Y. App. Div. 1996) (holding that an artist was entitled to the full value of consigned artwork upon theft of work while in gallery's possession); *Zucker v. Hirschl & Adler Galleries*, 648 N.Y.S.2d 521 (N.Y. Sup. Ct. 1996) (holding that an art dealer cannot take a security interest in works on the basis that consignor-artist borrowed money from dealer to complete works); *Eboigbe v. Zoological Soc. of Cincinnati*, 644 N.E.2d 693 (Ohio Ct. App. 1994) (holding that a zoo receiving artwork is not an art dealer).

³¹ Additionally, although it is outside of the scope of this Article, it is crucial for the representatives working on behalf of galleries to fully understand the relevant consignment statutes to ensure that they are not putting at risk their entire proceeds obtained in connection with the sales of an artist's work, in addition to the other damages and remedies available to the artist.

³² While 50% is a common consignment split, the parties may certainly negotiate and contract for a different percentage.

damage of artworks, or other breaches of the gallery's fiduciary obligations, consignment statutes present causes of action available for the artist's protection in settlement discussions or litigation. Potential causes of action include breach of the relevant consignment statute, breach of the gallery's fiduciary duties, and conversion. The lack of a consignment agreement can void the artist's obligations to the gallery with respect to the consignment relationship, thus allowing the artist to request that the gallery disgorge 100% of the profits and proceeds received in connection with the sale of the artist's works.

VI. CONCLUSION

While consignment of art statutes offer important protections to artists entering into fraught consignment relationships with art galleries or art dealers, they remain relatively unknown among the arts community and intellectual property practitioners at large. It is the goal of this Article to provide basic information regarding the history and use of these statutes in order to safeguard the rights of artists.

