PROTECTING ART PURCHASERS: ANALYSIS AND APPLICATION OF WARRANTIES OF QUALITY

DREW N. LANIER*

As a service to lay purchasers of art works at auction houses, the following article revisits this area's common law foundations. Profiling the protections afforded to art purchasers, the author concludes that the inadequacy of these protections demands reform in order to stimulate commerce and create equity.

-Ed.

I. INTRODUCTION

Recent auction house sales of artworks for great sums of money have captured great media attention.[1] This trend provokes consideration of protections that the common law affords to art purchasers[2] as to the quality of the artwork. Quality in this context contemplates attribution, the attributing of an artwork to a particular artist,[3] and the purchaser's satisfaction with an acquisition.

Three centuries of jurisprudence have been devoted to protecting art purchasers. These protections have taken two forms: contracts and tort actions. However, because of the common law's inherent bias in favor of auction houses, the substance of these protections is minute.

This Article examines the current common law protections af-

 B.A., University of North Texas, 1986; J.D., DePaul University, 1990. Mr. Lanier practices in Denton, Texas. The author is greatly indebted to Daniel Massey and Robert C. Beasley for their editorial assistance with this Article. Mr. Lanier submitted a previous version of this Article to partially fulfill the requirements for his senior research seminar (taught by Prof. Patty Gerstenblith) at DePaul University.

[1] *See, e.g.*, Robert Hughes, *SOLD!—It Went Crazy, It Stays Crazy, But Don't Ask What the Art Market is Doing to Museums and the Public*, TIME, Nov. 27, 1989, at 60 (detailing the trend in the late 1980s of persons purchasing purportedly great works of art for great sums of money only to discover later that the work was a fake); *Sixty Minutes: Genuine Fakes* (CBS television broadcast, Mar. 1990) (as the selling prices of the works of impressionists and the post-impressionists have greatly increased, the practice of selling copies of the works has developed with the attendant difficulties in distinguishing an original from a good copy); Alexandra Peers, *Suddenly East Bloc Art is Red Hot, but Beware of Forgeries*, WALL ST. J., Mar. 23, 1990, at C1 (due to the warming of East-West relations, the Western art world has recently been flooded with Soviet art works, some of which are genuine and some of which are not).

[2] The terms "buyer" and "purchaser" are herein used interchangeably as are the terms "seller" and "vendor."

[3] *See, e.g.*, Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 504 (1988).

forded to art purchasers and analyzes their effectiveness.[4] Section II of this Article profiles the existing warranties[5] in the context of auctions, secondary-buyer purchases, disclaimers, warranty preclusions, and the remedies available to the aggrieved purchaser of nonauthentic artwork. Section III analyzes and critiques these common law rules from the perspective of a novice, unwary buyer.

II. The Common Law's Use of Warranty and Fraud to Protect Art Buyers

> The seller's warranty is a curious hybrid, born of the illicit intercourse between tort and contract, which is unique in the law.[6]

The buyer of a good may bring a warranty action against the seller if the good failed to satisfy a factual representation made by the seller. The buyer can plead a cause of action in one of two areas: contract (for a breach of warranty) or tort (for fraud or deceit). In both of these areas, the law of art sales is generally a simple application of the rules regulating the sale of chattel. However, in certain contexts, the law of art sales has developed somewhat differently. These differences are worthy of examination.

A. *The Law of Warranties Relating to Art Sales*

Two forms of warranties exist: express and implied. A *prima facie* case for an express warranty demands that the buyer show five elements: a statement of facts by the seller; the buyer's reliance upon this statement; the seller's making this statement when the bargain was struck; proximate cause; and injury suffered as a result of the buyer's reliance on the seller's statement.[7]

1. The Fact-Opinion Dichotomy

First, the buyer must show that the seller represented a fact to

---

[4] This Article will focus exclusively on the common law rules as they relate to the sales of artwork because the Uniform Commercial Code was largely a codification of the common law. *See* Note, *U.C.C. Warranty Solutions to Art Fraud and Forgery*, 14 Wm. & Mary L. Rev. 409 (1972). Accordingly, to fully understand and appreciate the import and scope of the U.C.C. protections, both the English and the American common law decisions are considered herein.

[5] By virtue of the warranty, a seller promises the buyer that the seller will account for any defect in the good and thereby gives the buyer the right to rely on the seller's warranty. Dale Constr. Co. v. United States, 168 Ct. Cl. 692, 699 (1964).

[6] Alphonse M. Squillante & John R. Fonesca, Williston on Sales § 15-4, at 334 (4th ed. 1974) (quoting William L. Prosser, Hornbook of the Law of Torts § 95, at 651 (3d ed. 1964)).

[7] The fourth and fifth elements, proximate cause and injury, will not be discussed in this Article because there is not a great deal of debate as to their meaning in this context.

the buyer, as opposed to an opinion, regarding some aspect of the goods sold. Distinguishing fact from opinion is quite difficult. Whether a certain statement by the seller is factual or mere opinion is a question of fact. If the statement is capable of being confirmed, then the fact-finder will most likely rule that it was a statement of fact. Thus, the seller will be considered to have warranted the goods.[8]

The law of warranties as it is now understood in American jurisprudence has its roots in English common law. *Jendwine v. Slade*, decided in 1797, is the first case relating to art sales.[9] In *Jendwine*, the defendant sold the plaintiff two paintings, both represented as being originals, which were actually copies.[10] Although the buyer sued in tort, his complaint sounded in contract. The buyer claimed that the juxtaposition in the seller's catalog of the artist's name with a depiction of the work constituted a warranty.[11] The court disagreed, reasoning that the catalog listing was an opinion because the works were "some centuries back,"[12] and, therefore, no one could determine conclusively whether they were originals or copies.[13] Any statement as to authenticity, then, could only be opinion. The decision leaves a buyer to determine if a work is authentic or not.

An English court in *Power v. Barham*[14] also decided whether a seller's representation amounted to a warranty or was mere opinion. In *Power*, the buyer sued in assumpsit to prove that the seller gave him a "bill of parcels and receipt" for "[f]our pictures, [v]iews in Venice, Canaletto, 1601."[15] The court considered the seller's actions to have constituted a warranty as opposed to an opinion.[16] The court distinguished *Jendwine* from the instant facts by noting that in *Jendwine* the artists had died more than a century before the sale, whereas in *Power* the artist had died only 68 years before the

---

[8] *See, e.g.*, Gordon v. American Tankers Corp., 191 N.E. 51 (Mass. 1934) (the location of the goods sold held to be fact); Williams v. McClain, 176 So. 717 (Miss. 1937) (the model year of a car sold held to be fact). *See also* Budd v. Fairmaner, 131 Eng. Rep. 318 (1831) (holding that the seller expressed no warranty as to the precise age of a horse when he described the animal as "a gray, four year old colt, warranted sound in every respect" because the age was a mere statement of belief and because the positioning of the word "warranted" in the sale's receipt indicated that the parties intended that the seller only warrant the general soundness of the animal and not its age).

[9] 170 Eng. Rep. 459 (1797).

[10] One piece was by Claud Lorraine; the other was by Teniers. *Jendwine*, 170 Eng. Rep. at 459.

[11] *Id.*

[12] *Id.* (Lorraine had died in 1682; Teniers had died in 1692).

[13] *Id.*

[14] 111 Eng. Rep. 865 (1836).

[15] *Id.*

[16] *Id.* at 866.

sale. Under this reasoning, the disparity in years imbued more certainty to the seller's attribution in *Power*.[17] However, the disparity does not seem sufficient to explain the contrary decisions.

Descriptions by sellers may also be warranties since this type of description is a factual statement.[18] In *Lomi v. Tucker*,[19] the plaintiff pleaded in assumpsit[20] that the seller expressly warranted that the two pictures sold to the buyer as painted by Poussin[21] were actually only very good copies. The court held that it was a question of fact for the jury to decide whether the seller had expressly warranted the paintings as originals. If the seller had done so, then the buyer could either rescind the sale or keep the paintings and pay the seller what the jury considered to be a reasonable value for the copies.[22]

2. Buyer Reliance

The second element that a buyer must prove in a breach of an express warranty suit is reliance on the seller's affirmations of fact about the particular work. This element requires the fact-finder to determine whether a reasonable person would have relied on the statements, as some statements are not intended to be taken literally.[23]

---

[17] Gerstenblith, *supra* note 3, at 507 n.26. *See also* note 12.

[18] *E.g.*, Smith v. Zimbalist, 38 P.2d 170 (Cal. 1934) (one violin had been described as a Stradivarius and the other a Guarnerius); Rocky Mountain Seed Co. v. Knorr, 20 P.2d 304 (Colo. 1933) (the seed contained in the package was in fact the type that the package stated it was); Wallis v. Pratt, App. Cas. 394 (1911) (common English sainfoin).

[19] 172 Eng. Rep. 586 (1829).

[20] Historically, anyone pleading seller misrepresentation to recover damages had to plead the cause in the form of a trespass or tort. SQUILLANTE & FONESCA, *supra* note 6, § 15-1, at 322. From this traditional manner of pleading developed the action of assumpsit, which arose, for the most part, out of the self-interested attempts by King's Court Judges to expand their jurisdiction; they thus merely created a cause of action to quench their new-found thirst for authority. *Id.* § 15-1, at 323.

To be successful in a warranty action, a buyer had to show that the seller had expressly warranted the goods' quality. Otherwise, the doctrine of *caveat emptor* applied, and the court would dismiss the cause of action. In addition, the early forms of warranty actions required that the pleadings be drafted according to strict procedural rules: the complaint had to include the words *warrantizando vendidit* (the warranty the seller gives) or *warrantizando barganizasset* (the warranty the buyer receives in the bargain) to properly plead a cause of action for breach of warranty. SQUILLANTE & FONESCA, *supra* note 6, § 15-1, at 324.

In *Chandelor v. Lopus*, for example, the Court of the Exchequer disallowed the buyer's cause of action against a seller who told him the stone he bought was bezoar stone when it was not, because the pleadings did not contain the word "warranty." 79 Eng. Rep. 3 (1603). *See also* R.C. Murtrie, *Chandelor v. Lopus*, 1 HARV. L. REV. 191 (1887) (summarizing the facts of the case and analyzing the rule of law the court stated).

[21] 172 Eng. Rep. at 586.

[22] *Id.* at 587.

[23] SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 205a, at 531 (rev. ed. 1948). *See* Swett v. Shumway, 102 Mass. 365 (1869) (holding that the seller's description of goods as horn chains did not

Similarly, a seller will not be held to warrant against defects which the buyer could have easily observed.[24] For example, if the seller attributes a work to a specific artist, when it is obviously not authentic, the buyer will not be able to sue on the warranty.[25] However, if the seller induces the buyer to buy the work by promising to subsequently provide the buyer with evidence of the work's authenticity, the buyer has relied on the seller's affirmations to his detriment, and the seller cannot elude liability.[26]

Furthermore, the context of the seller's statements may be examined to determine whether a buyer's reliance was reasonable. For example, if the seller makes an alleged warranty during a general advertisement, rather than in a specific statement about a particular sale, the seller's statement will be considered to be merely opinion because such a statement is inherently nonspecific.[27]

3. Timing of Seller's Statements

The third element the buyer must prove is that the statements on which the buyer relied were made contemporaneously by the seller with formation of the contract. Ingrained in contract law is the principle that contract formation demands that a buyer accept a seller's offer.[28] To be part of this offer, the seller's representations must be part of the sale negotiations. Affirmations will most likely not be part of the bargain if they precede the sale by too

---

amount to a literal warranty when the buyer discovered they were made of both horn and hoof).

[24] *See, e.g.*, WILLISTON, *supra* note 23, § 207, at 535-36.

[25] *But see infra* note 111 and accompanying text (regarding some art experts' inability to make fine distinctions between originals and very good copies).

[26] *E.g.*, Thompson v. Harvey, 5 So. 825 (Ala. 1889) (a seller's additional warranty that a horse was sound after the buyer complained to the seller about the thickness of the horse's withers did not prevent the buyer from later rescinding the contract); Williams v. Ingram, 21 Tex. 300 (1858) (holding that the seller did not expressly warrant the soundness of a slave who was obviously ill, when the buyer had consulted a physician regarding the practicability of a cure for the slave's malady); Pinney v. Andrus, 41 Vt. 631 (1869) (holding that a buyer could proceed under a warranty cause of action when the seller specifically warranted to the buyer that the flock of sheep to be sold was disease-free, after the buyer had pointed out to the seller that the flock had footroot, but before the sale was consummated).

[27] WILLISTON, *supra* note 23, § 203, at 518. However, merely because the seller has stated an opinion does not sound the death knell for the buyer's warranty action. Even if the seller states mere opinion or puffs, the seller will be held liable for those statements if he was a fiduciary or an expert on the subject at hand because of the enhanced reasonableness of the buyer's reliance in these situations. *Id.* § 204, at 526. Also, the seller can be held liable if he expressly warrants his opinion to be correct, because this is a statement that his opinion is factually true. *Id.*

[28] *See, e.g.*, Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1892) (holding that the seller warranted the efficacy of a smoke ball to the buyer by offering to pay anyone 100 pounds who contracted influenza while using the ball, because the buyer had accepted the seller's offer implicitly by her use of the ball).

lengthy a period.[29]

B. *The Tort Cause of Action: Fraud or Deceit?*[30]

A buyer may have a cause of action in tort law for a seller's misrepresentations.[31] In this area, a buyer will most likely predicate the action on fraud.[32]

---

[29] Leavitt v. Fiberloid Co., 82 N.E. 682 (Mass. 1907) (correspondence from January 20 to March 14 of the same year were properly admissible); A.S. Cameron Steam Pump Works v. Lubbock Light & Ice Co., 147 S.W. 717 (Tex. Ct. App. 1912) (holding that a delay of four months did not make the seller's representations too remote to be a part of the sale negotiations); San Antonio Machine Co. v. Josey, 91 S.W. 598 (Tex. Ct. App. 1906) (holding that where the buyer represented cable to be the very best Manilla hemp and where the plaintiff some ten days later accepted the seller's offer for it, the continuity of the sale was not so disjunctive as to cause the buyer's reliance on the seller's representations in the earlier negotiations to be unreasonable). *But see, e.g.*, Ransberger v. Ing, 55 Mo. App. 621 (1894) (looking only to the representations of the seller at the time of sale and dismissing any claims contained in a flyer as merely inducing the buyer to attend the sale).

The buyer can justly rely on these after-stated representations if the buyer gives the seller additional consideration for them. William A. Davis Co. v. Bertrand Seed Co., 271 P. 123 (Cal. 1928) (seller's representations made after the sale and unsupported by new or additional consideraiton held not to be a warranty).

[30] One of the very first cases to sound exclusively in tort was Pasley v. Freeman, 100 Eng. Rep. 450 (1789). In *Pasley*, the defendant was held liable for knowingly misrepresenting to the plaintiff that the plaintiff could trust a third person sufficiently to sell the third person certain goods on credit when the defendant knew that the third person was unable to repay the debt. Rather than labeling the cause of action as "fraud," the court employed the term "deceit." *Id.*

[31] The offense of art fraud did not appear in England until 1562. The punishments were harsh, including: "having both ears cut off[,] standing in the pillory, slitting and searing the nostrils, forfeiting land, or even imposing perpetual imprisonment. In the seventeenth century, capital punishment was included." *See* Peter Barry Skolnik, Comment, *Art Forgery: The Art Market and Legal Considerations*, 7 NOVA L.J. 315, 320 (1983) (quoting J. MILLS & J. MANSFIELD, THE GENUINE ARTICLE 12 (1979)).

[32] The elements for a *prima facie* cause of action for a breach of warranty based in fraud are that: (1) the seller represented a material fact on which the seller intends to cause the buyer to rely, and which does in fact cause the buyer to rely; (2) such representation was in fact false; (3) the seller did not actually believe such representation to be accurate; (4) the seller made the false representation intending that the buyer rely thereon; (5) the buyer relied on the seller's representations to the buyer's detriment; and (6) the buyer, in relying on the seller's representations, was unaware that the representations were in fact false. *See, e.g.*, Gee v. CBS, Inc., 471 F. Supp. 600, 622 (E.D. Pa. 1979).

Unless proven otherwise, a court will presume that the buyer relied on the seller's statements if the statements were both material and the buyer affirmatively acted upon them. *E.g.*, Hicks v. Stevens, 11 N.E. 241 (Ill. 1887); White Sewing Machine Co. v. Gilmore Furniture Co., 105 S.E. 134 (Va. 1920). The seller cannot successfully plead as a defense that the fraud action is barred because the buyer failed to use means within her power to rectify her knowledge. *See, e.g.*, Graham v. Thompson, 18 S.W. 58 (Ark. 1892); Severson v. Kock, 140 N.W. 220 (Ia. 1913); Graves v. Haynes, 231 S.W. 383 (Tex. 1921); Niles v. Danforth, 122 A. 498 (Vt. 1923). Furthermore, the buyer will have a stronger case if the failure to investigate the situation was due in part to a fiduciary relationship than if there were no such relationship and if the seller did not intentionally make the misrepresentation misleading. *See* Gray v. Reeves, 125 P. 162 (Wash. 1912).

When a seller makes a fraudulent statement to induce the buyer to complete the transaction, courts tend to hold the seller liable even for a statement of mere opinion, provided that a *reasonable person* would naturally rely on such a statement. *See, e.g.*, Noyes v. Meharry, 100 N.E. 1090 (Mass. 1913) (seller held liable for buyer's reliance on the seller's fraudulent statement regarding past monthly theater receipts).

1. The Buyer's Misconception and the Seller's Resultant Duty

Within the general law of fraud and misrepresentation, in the course of striking a bargain a seller has no duty to correct a buyer's independently misconceived notions, provided that the seller does not actively misrepresent a fact to the buyer.[33] Whether the seller actively misrepresented a fact or the buyer misunderstood the seller often turns upon fine distinctions of fact. Courts have generally construed the slightest gesture by the seller, including a change in facial expression, as a misrepresentation.[34]

An exception to this rule is when the seller knows that the work is latently defective. If a seller fails to correct or tacitly agrees to fraudulent misrepresentations made by a third person to the buyer, the seller will most likely be liable to the buyer for fraud, since such actions imply a belief that the facts, as stated, are true.[35]

In addition, a seller owes a duty to not encourage a buyer's misconceptions about the work, provided that the seller is aware of them. For example, in *Hill v. Gray*[36] the seller's agent caused the buyer to conclude erroneously that Sir Felix Agar owned a painting the buyer was considering.[37] Because the agent allowed the buyer to consummate the bargain while the buyer acted under this misunderstanding, the court held the contract void.[38] Thus, although a seller need not inform a buyer of a misconception, a seller cannot affirmatively foster a buyer's delusion.

2. The Seller's Known False Statements

In addition, a fraud cause of action demands the buyer's proof that the seller intentionally made false statements.

---

[33] *See* Phinney v. Friedman, 113 N.E. 285 (Mass. 1916). The converse is also true. Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817) (holding that a buyer did not have a duty to affirmatively answer a seller of tobacco when the seller asked whether the buyer knew if the Treaty of Ghent terminated the War of 1812 even though this fact could well have affected the price of the tobacco). The law condemns as fraud, however, actions tending to conceal actively the misrepresentations. *See* Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383 (1888) (holding that the concealing is tantamount to misrepresentation because the concealment is in effect a representation that what is discussed is the whole truth).

[34] *See* RESTATEMENT (FIRST) OF CONTRACTS § 471, cmt. d.

[35] *E.g.*, Swartz v. Will Starkey Theaters Co., 290 P. 708 (Wash. 1930) (seller of a theater held liable because he acquiesced to third parties' known misrepresentations to the buyer as to why the theater was not financially successful and as to the amount of debt under which the theater operated).

[36] 171 Eng. Rep. 521 (1816).

[37] *Id.*

[38] *Id.*

a. Jendwine v. Slade

In *Jendwine v. Slade*,[39] the seller sold the buyer two paintings that the buyer later discovered were fakes. The seller's catalog featured specific artists' name with depictions of the works to be sold.[40] The court held that since the defendant subjectively believed that he had attributed the artists' names to the paintings truthfully, he had not fraudulently misrepresented the quality of the paintings.[41] As a result, the court found that the buyer was left to determine the authenticity of the paintings.[42]

b. Plimpton v. Friedberg

In *Plimpton v. Friedberg*,[43] the defendant represented himself as operating an established, prestigious art gallery on Atlantic City's famous boardwalk.[44] After the buyer entered the gallery, the defendant showed her two paintings, one of which he claimed was painted by Gainsborough, the other by Reynolds.[45] The buyer believed them to be genuine. The defendant then said he had an even greater painting to show the buyer and brought out what he described as a genuine Romney.[46] The buyer purchased the painting for $18,000 from the defendant, who had paid only $3,500 for it. The seller gave the buyer documents, which the seller's gallery signed, allegedly certifying the Romney's authenticity.[47] The plaintiff also bought the two paintings which the defendant had attributed to Reynolds and Gainsborough.

The certificate for the Reynolds paintings described it as "'Portrait of Lady Bancroft Burton by Sir Joshua Reynolds.'"[48] The document explained that the painting had been at the family seat at Seaton Hall Thorne and was sold by the family along with furniture and personal effects. The seller offered similar information on the certificate for the Gainsborough.[49]

At the trial, an expert testified as to the paintings' worth and artistic merit. His testimony revealed that, at the time of sale, the paintings were worth between $500 to $1,000 and that none of

---

39 170 Eng. Rep. 459 (1797).
40 *Id.*
41 *Id.* at 460.
42 *Id.*
43 166 A. 295 (N.J. 1933).
44 *Id.* at 296.
45 *Id.*
46 *Id.*
47 *Id.* at 297.
48 *Id.*
49 *Id.*

them were genuine or showed great artistic merit. That the paintings were not genuine was an ascertainable fact, the expert testified, not mere opinion.[50]

The defendant argued that when he sold the paintings to the plaintiff, he did not have personal knowledge of the authenticity of the paintings. He said he had the paintings on consignment from the owner, who had not directly communicated with him; rather, it was the defendant's wife who had informed the defendant of the paintings' questionable lineage. Neither the consignor nor the defendant's wife testified at the trial. Nevertheless, the defendant did not proceed cautiously when he began to sell them to the plaintiff. In the course of selling the paintings, the defendant did not describe the paintings as "'attributed' or 'assigned' to, or 'said to be by' this or that artist;" rather, he represented them as originals.[51]

The *Plimpton* court found that the defendant's representations were necessarily false when he made them without personal knowledge of their truth and when his actions implicitly affirmed the authenticity of the paintings.[52] Thus, a seller that makes representations without knowledge of their truth and affirms that the representations are in fact true may be held to have falsely represented the facts.

C. *Auction*

Many of the commercial transactions involving works of art are consummated at auctions. This context raises two areas of concern: duties the auctioneer owes the seller and duties the buyer owes the auctioneer.

1. The Auctioneer's Duty to the Owner/Seller

The auctioneer owes a fiduciary duty to the principal—the owner/seller of the goods to be auctioned.[53] The auctioneer that violates that duty will be liable to the seller.[54]

---

50 *Id.*

51 *Id.*

52 *Id.* at 296.

53 *E.g.*, Moon v. Phipps, 411 P.2d 157 (Wash. 1966). Among other duties included in the fiduciary duty is the duty of loyalty. Under this duty, the agent cannot gain a personal interest in the transaction which the agent is bound to perform. *See* Randall v. Lautenberger, 13 A. 100 (R.I. 1888).

54 *Id. See also* Bexwell v. Christie, 98 Eng. Rep. 1150 (1776) (holding that an action does not lie where an auctioneer sold a horse at the highest price possible when the seller had specified a higher price).

2. The Buyer's Duty to the Auctioneer

A buyer can lose the right to sue a seller on a breach of warranty by waiting longer than a reasonable time after discovering a defect. In *Hindle v. Brown*,[55] an auctioneer sued a buyer for nonpayment for oil paintings that the seller had attributed to certain artists. The sale was conducted on June 26, 1906, and the buyer paid for the paintings with a check dated June 28th of that same year.[56] The buyer stopped payment on his check on July 1st when he discovered the paintings were fakes. The court held that the buyer was obligated to pay the auctioneer because the buyer had not acted to stop payment on his check in a reasonable period of time. The court reasoned that the auctioneer was obligated to pay the seller/principal his share of the auction proceeds shortly after the auction and that the buyer knew this fact.[57] Thus, the buyer has a right to rescind a contract of sale but must act expeditiously when aware that the auctioneer is required to pay the seller.

D. *The Special Case of the Secondary Buyer*

If an original buyer resells a work to another buyer, restating the affirmations the seller made to the original buyer regarding the quality of the work, the secondary buyer does not have the right to sue the original seller for a defect in the work's quality since privity is lacking between the parties. The original buyer, however, can assign to the secondary buyer the right to sue the seller on the breach of warranty claim.[58]

Pennell v. Woodburn involved a buyer who sold a painting to a secondary buyer, who subsequently discovered it was not the work of Claude, as the original seller had claimed, but a fake.[59] The secondary buyer sued the original buyer, because the original buyer had represented, as the original seller had, that the work was attributable to Claude.[60] The court held that the original buyer could recover from the original seller the costs he had expended in litigating the secondary buyer's suit on the warranty.[61]

---

55 98 L.T.R. 791 (1908), *rev'g* 98 L.T.R. 44 (1907).

56 *Id.*

57 *Id.* at 792.

58 *E.g.*, Boyd v. Whitefield, 19 Ark. 447 (1856) (holding that the assignee's payment of the price for the buyer indicates an assignment of the buyer's right to sue on the warranty because this establishes privity between the secondary buyer and the original seller). *Contra* Walrus Mfg. Co. v. McMehen, 136 P. 772 (Okla. 1913) (holding that purchase of a chattel is not necessarily synonymous with purchase of the the buyer's right to sue the seller under the warranty).

59 173 Eng. Rep. 52 (1835).

60 *Id.*

61 *Id.*

E. *Disclaimer*

Much like the early English decisions discussed above, there are very few American decisions predicated on the common law relating to breaches of warranties and fraudulent misrepresentations regarding a work of art, because most states have codified the Uniform Commercial Code as regulating commercial transactions in goods.[62] However, in one significant case, *Weisz v. Parke-Bernet Galleries, Inc.*,[63] a New York court considered, at least in part, the plaintiff's claim based on the common law. The plaintiff-buyer had bought two paintings from the defendant-auction house on two separate occasions.[64] The auction house's catalog had attributed both works to Raoul Dufy.[65] Later, the buyer discovered that these paintings were fakes and sued the auction house for the purchase price.[66]

In its defense, the auction house asserted that its catalog disclaimed[67] all warranties of attribution in the portion of the catalog which listed the conditions of sale.[68] These conditions of sale, the defendant argued, put the buyer on notice that the defendant was not warranting the authenticity of the works. However, the conditions of sale appeared in smaller print than that contained in the balance of the catalog and covered two pages.[69]

The page in the catalog after the conditions of sale contained a list of artists whose works were to be auctioned that day and a catalog number for each work, appearing on the same line.[70] The *Weisz* court stated that this positioning implicitly affirmed that the listed artists' works were included in the auction and that the cata-

---

[62] Most states did so in the mid-1950's. SELECTED COMMERCIAL STATUTES 21 (West 1989).

[63] 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 351 N.Y.S.2d 911 (N.Y. App. Term. 1974).

[64] 325 N.Y.S.2d at 578.

[65] *Id.*

[66] *Id.*

[67] For the disclaimer to be effective, the buyer must have notice of the disclaimer before the bargain is complete. Otherwise, the buyer could reasonably rely on the fact that the goods were defect-free. Kennedy v. Cornhusker Hybrid Co., 19 N.W.2d 51 (Neb. 1945) (holding that it is irrelevant whether the buyer actually knew of the disclaimer so long as the notice was reasonable under the circumstances). If the seller attempts to disclaim liability after being bound by a warranty, the seller cannot elude liability because the bargain, including the warranty, was already complete. *E.g.*, Ingraham v. Associated Oil Co., 6 P.2d 645 (Wash. 1932) (holding that a seller of oil spray for an orchard could not later disclaim the warranty he gave the buyer at the sale). Such a disclaimer will block the buyer's cause of action, however, if the buyer fails to notify the seller of a breach of the warranty within a reasonable amount of time after the defect is discoverable. WILLISTON, *supra* note 23, § 239(c), at 631.

[68] *Weisz*, 325 N.Y.S.2d at 578.

[69] *Id.* at 579.

[70] *Id.*

log numbers referred specifically to works of the artists' creation.[71]

A black-and-white photograph of each work along with its catalog number and the artist's name and period followed the list.[72] The catalog described the painting the buyer purchased along with the painting's name and the words "Signed at lower right RAOUL DUFY."[73] The description also stated that the auction house would give the buyer a certificate by M. Andre Pacitti.[74]

As to the first of the two sales, the court held that the buyer did not have notice of the defendant's conditions of sale. This was the first auction at which the buyer had bid, and he had no knowledge of the above-stated conditions. In adition, the court held that the disclaimer was invalid since the wording in the catalog emphasized the genuineness of the works and induced the buyer's reliance of the auction house's expertise as to authenticity.[75] The court, citing Williston's treatise on contracts, stated that the proper standard in situations such as this is the "reasonable person" standard—that is, whether a reasonable person would understand that the contract contains terms requiring that the buyer assume the risk to read and, more importantly, to understand.[76]

The court held that: (1) it was unreasonable to assume that buyers actually read the disclaimer; and (2) it was even less reasonable to conclude that the lay buyers appreciated the legal significance of the disclaimers, because buyers attend an auction based on their interest in owning art, not because of their legal acumen. The court's note that the auction house devoted only a few preliminary pages of the catalog to the sale conditions while dedicating the far greater balance of the catalog's pages to describing the works to be auctioned that day, reinforces the court's second holding.

Furthermore, the court stated that the auction house expected potential bidders to rely on the descriptions in its catalog.[77] The court perceptively noted that this expectation was imminently reasonable, because Parke-Bernet was an "exceedingly well-known gallery, linked in the minds of people with the handling, exhibition and sale of valuable artistic works and invested with an aura of expertness and reliability."[78] Potential buyers would reasonably infer

---

71 *Id.*
72 *Id.*
73 *Id.* at 580.
74 *Id.*
75 *Id.* at 581.
76 *Id.*
77 *Id.*
78 *Id.* at 581.

that the works to be auctioned were authentic, based on the auction house's standing in the art community.[79]

Additionally, the court looked to the relationship between the buyer and the auction house to determine whether the defendant's disclaimer was effective to disclaim any warranty of authenticity. The auction house had more knowledge about the authenticity of works of art than did the novice buyer. This superior knowledge, the court stated, fostered the buyer's justifiable reliance on the auction house's attribution. In this situation, the law requires a more apparent disclaimer of warranty than was present in the *Weisz* context.[80] Thus, the court held the disclaimer invalid, because a reasonable person would not view it as diluting the auction house's attribution of the work.[81]

Nonetheless, the appellate court reversed the lower court's ruling in a *per curiam* opinion.[82] The court characterized the auction house's practice of matching artists' names with catalog numbers as only opinion; stated conditions of sale were a clear and unequivocal disclaimer of any express or implied warranties.[83] The buyer assumed the risk of the work not being authentic absent a showing that he had not assumed the risk.[84] Therefore, the buyer assumed the risk that the work would be a fake.[85] By placing the risk of loss on the buyer, and ignoring the buyer's lack of bargaining power and expertise, the *Weisz* court retreated to the formalistic days of Edwardian England, where the philosophy of *caveat emptor* ruled, or tyrannized as some would say, the commercial transactions of the period.

F. *The Standard of Quality for Commissioned Works*

As stated in this Article's introduction, the definition of quality not only can mean attributing a specific artist's name to a specific work of art, but it can also reflect the buyer's satisfaction with a commissioned work. Usually, the buyer and the seller, who is the artist in this context, agree that the buyer will not be obligated to pay for the work if the buyer is not satisfied with it. The courts

---

79 *Id.*

80 *Id.* In making its decision, the court looked to the requirements of equity in light of the unequal bargaining positions of the parties and the disparate breadth of knowledge and expertise between the lay buyer and the auction house. *Id.* at 582.

81 *Id.*

82 Weisz v. Parke-Bernet Galleries, Inc., 351 N.Y.S.2d 911 (N.Y. App. Term. 1974).

83 *Id.* at 912.

84 *Id.*

85 *Id.* Another distinction between the Court of Appeals' and the lower court's decision is that the Court of Appeals relied on New York's General Business Law § 219 and not the common law.

generally have held that buyers do not have to accept a work if they are not genuinely satisfied with the artists' creation.[86] Further, the reasons the buyers give for their dissatisfaction do not have to be reasonable.[87] However, the buyer must act in good faith or be in breach of contract.

G. *Warranty Preclusion*

Some courts have held that buyers that accept a work waive their right to sue on the warranty, because they tacitly acknowledge that the work conforms to the terms of the contract.[88] On the other hand, a buyer that does not physically accept the work when the seller tenders it could be held liable for breach of contract, since legal title to the work vested when the parties signed the contract. In such a situation, however, the buyer can plead as an affirmative defense that the seller breached the warranty of quality with respect to the work.[89]

Relevancy for the purpose of waiver depends upon the type of warranty the seller gives the buyer as well as the difficulty that the buyer would encounter in discovering the defect in the goods.[90] It is generally more difficult for a buyer to waive the right to sue the seller on an express warranty than on an implied warranty. To waive an express warranty, the buyer must have actually discovered the defect, because after such a discovery the buyer cannot claim to have relied on the seller's representations. With an implied warranty, the buyer can lose the right to sue if the defect could have been discovered through a reasonable inspection.[91]

---

86 *E.g.*, Zaleski v. Clark, 44 Conn. 218 (1876); Gibson v. Cranage, 39 Mich. 49 (1878); Pennington v. Howland, 41 A. 891 (R.I. 1898).

87 *Zaleski*, 44 Conn. at 219 (buyer's dissatisfaction with a plaster bust of her deceased husband because the work did not accurately portray the living expression of her dearly departed held reasonable); *Gibson*, 39 Mich. at 49-50 (reasonable for a buyer to not specifically state what was dissatisfactory about a portrait of his deceased daughter where the contract expressly stated the buyer need not accept the portrait if it "was not perfectly satisfactory to [him]"); *Pennington*, 41 A. at 893 (buyer's dissatisfaction reasonable even though it was based on the style of dress his wife was wearing in the portrait).

88 *E.g.*, Reed v. Randall, 29 N.Y. 358 (1864) (buyer not allowed to complain about the quality of tobacco the seller delivered because the buyer failed to offer to return the tobacco to the seller and because the buyer failed to notify the seller until some 17 months after the delivery).

89 WILLISTON, *supra* note 23, § 489(a), at 56.

90 *Id.* at 58. In addition, courts distinguish between executory contracts and executed contracts, and express and implied warranties, to determine whether or not the buyer may sue for breach of warranty. For example, if the contract is executory, some courts have held that once the buyer accepts the goods, the buyer waives the right to sue on an *implied* warranty theory, because acceptance is a tacit admission that the goods satisfy the seller's representations about them. WILLISTON, *supra* note 23, § 489(a), at 57.

91 *See, e.g.*, Burr v. Atlanta Paper Co., 58 S.E. 373 (Ga. 1907) (buyer held to have right to sue even after he conducted an inspection of inferior box board because the seller had

With an implied warranty in the context of a sale of a work of art, this rule does not diminish the protections that the common law affords the buyer, because most buyers are not able to distinguish a fake from an authentic work, even if they are given an opportunity to inspect the work. In the context of an express warranty, the common law rule is equitable in that if a buyer actually discovers a defect and proceeds with the sale notwithstanding the discovery, the buyer should not be permitted to claim that the seller breached an express warranty relating to the work.[92]

H. *Remedies*

If the buyer pleads a proper cause of action, either in contract or in tort, several forms of relief are available. Remedies include: rescission of the tainted contract,[93] consequential damages, expectation damages,[94] enforcement of any liquidated damages provision,[95] and, in certain circumstances, specific performance. If the

---

expressly authorized the buyer to use the board notwithstanding its defects, the seller had admitted that the board did not satisfy the warranty, and the seller accepted payment on the board).

92 Further exceptions to the general warranty preclusion rule include: (i) cases in which the seller expressly intends that the warranty survive the buyer's acceptance of the goods because the buyer adequately compensated the seller for that express purpose; and, (ii) cases in which the defect is difficult for the buyer to discover because the buyer is relying on another's judgment. *See e.g.*, Grisinger v. Hubbard, 122 P. 853 (Idaho 1912) (buyer of fruit trees held not to be precluded from asserting an implied warranty of merchantability as to defects in the trees because he did not have a reasonable opportunity to determine definitely if the trees would grow if he gave them proper care); Schopp v. Taft, 76 N.W. 843 (Ia. 1898) (buyer's acceptance of decayed strawberries held to waive any right to complain about the quality of the fruit since the buyer did not give the seller any additional consideration to account for the buyer's acceptance of the tainted fruit).

93 This remedy even includes the right of the buyer to rescind the contract for nonfraudulent misrepresentations. *See, e.g.*, Redgrave v. Hurd, 20 Ch. D. 1 (1881). If the contract is executory, the buyer can refuse to perform after discovering the seller's misrepresentations and plead as a defense the seller's breach of the seller's warranty or misrepresentations. WILLISTON, *supra* note 23, § 646, at 481.

The void-voidable distinction is also important. If the contract is void, title to the goods may not pass to the buyer or any third party that subsequently purchases them. Therefore, in that situation, the third party would be required to return the goods to the seller. *See, e.g.*, Cundy v. Lindsay, 3 App. Cas. 459 (1878). If the contract is merely voidable, however, the seller loses the right to retrieve the property from a third person who is a bona fide purchaser. *Id.*

94 Expectation damages are a relatively modern jurisprudential concept; they were unknown in eighteenth century cases for the most part. *See* Flureau v. Thornhill, 96 Eng. Rep. 635 (1776) (limiting the buyer's, and not the seller's, expectation damages). *See also* Dutch v. Warren, 93 Eng. Rep. 598 (1760).

For a discussion of the rise of expectation damages in the United States, see also Sands v. Taylor, 5 Johns. 395 (N.Y. 1810) (holding that a seller could recover the difference between the contract price and the market value of the wheat). *See generally* Morton H. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974) (tracing the development of contract law during the rise of the American market economy and the judicial and public evaluation of contracts not in terms of their intrinsic fairness, but by the substance of the parties' agreement).

95 Liquidated damage clauses first appeared, albeit embryonically, in the eighteenth

buyer sues in tort for the consequential injury suffered at the hands of the seller, then the buyer will be barred from suing on the breach of warranty claim, and vice versa; however, the buyer may always plead alternative claims in the same suit.[96]

1. Expectation Damages

De Sewhanberg v. Buchanan[97] illustrates the remedy of expectation damages in the context of an art sale. In *De Sewhanberg*, the defendant attributed a painting to Rembrandt, when in fact Rembrandt had not painted it. The buyer sued in assumpsit,[98] claiming that the seller had so warranted the painting. At the time of the sale, the defendant had stated, "I warrant you that it is a true picture of Rembrandt; I am an *ancien militaire*, and would not deceive you."[99] The court instructed the jury that if they thought the seller had warranted the painting through this statement, they could award the buyer the market value of the painting as represented.[100]

---

century in the form of dual independent bonds in contracts relating to large commercial transactions. Horwitz, *supra* note 94, at 928 (citing Thompson v. Musser, 1 Dall. 458 (Pa. 1789); Cummings v. Lynn, 1 Dall. 444 (Pa. 1789); and Wharton v. Morris, 1 Dall. 124 (Pa. 1785)). The English courts had likewise begun to recognize such provisions. *See, e.g.*, Lowe v. Peers, 98 Eng. Rep. 160 (1768). However, liquidated damage clauses fell into disfavor during the rise of the American market economy when parties realized that they were inadequate in accurately predicting the volatile losses and gains in the market. In their place, parties began to enter into executory agreements. Horwitz, *supra* note 94, at 932.

96 *See, e.g.*, Williams v. Barnes, 63 F.2d 722 (5th Cir. 1933). *But see* Russell v. Wilber, 134 N.Y.S. 463 (N.Y. App. Div. 1912) (holding that the election of remedies will not be conclusive where the buyer, after electing to sue on the contract, discovered the seller had made fraudulent misrepresentations).

97 172 Eng. Rep. 1004 (1832).

98 By the late seventeenth and early eighteenth centuries, the common law courts had disposed of the traditional, rigid rules they previously had required of plaintiffs when they pled a warranty case. *E.g.*, Crosse v. Gardner, 90 Eng. Rep. 393 (1689); Medina v. Stoughten, 90 Eng. Rep. 1014 (1700). In the landmark case of Stuart v. Wilkins, 99 Eng. Rep. 15 (1778), it was finally held that it was the substance of the cause of action that mattered, not the form in which it was pled. *See* Slade's Case, 76 Eng. Rep. 1072 (1602) (holding that there are many different types of actions for the same injury). *But see* Parkinson v. Lee, 102 Eng. Rep. 389 (1802) (holding that a warranty action will only lie in tort and not in assumpsit). *See also* SQUILLANTE & FONESCA, *supra* note 6, § 15-2, at 329.

Under the new rules, all the plaintiff had to plead was that the seller affirmed some fact about the goods' quality, and not that the seller had a conscious motive to deceive him. *See id.* In order for the seller's affirmations to rise to the level of a warranty, the seller merely needed to have induced the buyer to purchase the goods. *Id.* at 330. *See generally* Samuel Williston, *What Constitutes an Express Warranty in the Law of Sales*, 21 HARV. L. REV. 555 (1908). *But see, e.g.*, Fauntleroy v. Wilcox, 80 Ill. 477 (1875) (holding that the buyer is unjustified in relying on the seller's representations if the seller expressly refuses to warrant the goods).

99 172 Eng. Rep. at 1004.

100 *Id.* at 1005.

E. *Specific Performance*

Specific performance is particularly suited to the art context, because by its very nature, art is unique. In *Lang v. Thatcher*[101] the court decreed that a seller must specifically perform a contract and deliver pen and pencil sketches which he had already completed and which he had pledged as collateral for a loan.[102] Therefore, a buyer most likely will have an action for specific performance against a seller of an art work. On the other hand, if a replacement for the work is readily available on the open market (e.g., with multiple copies of lithographs), the buyer may not have an action for specific performance, although other remedies may be available.

III. Analysis

A. *The Deficiencies of the Art Buyer's Common Law Protections*

The *fact* versus *opinion* dichotomy that the courts have fashioned does not promote sufficient certainty in the daily commercial transactions of art buyers. If a seller confides to a buyer in the course of the negotiations, "I believe that the painting you are considering purchasing is a Picasso," the buyer most likely will not know whether the seller has made a factual statement and expressly warranted the painting, or has merely stated a personal opinion. A buyer's protection in an action for fraud is equally uncertain, because if the seller truly believes the misrepresentation, the seller is not liable for fraud; however, the buyer can rescind the contract in such a situation.

Such uncertainty dissuades potential buyers from purchasing goods. That is, when buyers do not know the extent of the sellers' obligations, buyers must proceed at their own peril as buyers did when the doctrine of *caveat emptor* governed commercial transactions. Such a policy is injurious to commerce.

Arguments that buyers may protect themselves by contracting for an express, fact-affirming warranty from sellers are not sufficient. Such a guarantee would require additional consideration because of the enhanced potential for liability. This too discourages buyers from purchasing goods because it imposes an additional cost on such purchases.[103]

---

101 62 N.Y.S. 956 (1900).

102 *See id.*

103 *See* Alexandra Peers, *Sotheby's Art Auction Flop Raises Question Whether Japanese Collectors Are Cutting Back*, Wall St. J., Apr. 5, 1990, at C2 (the selling price of stock in Sotheby's Holdings, Inc. decreased drastically because the Japanese, who had previously been prolific buyers of artworks at seemingly inflated prices, had scaled back their frequent art

While it is true that art purchases comprise a small percentage of commerical sales, the average selling price of artwork is certainly greater than the average selling price of a non-artwork item.[104] If the common law were more certain and protective of art buyers, perhaps more art purchases would be made. Such purchases would stimulate the economy, subsidize the artistic community's efforts, and tacitly affirm the value of art in and of itself.

B. *Filling in the Gaps: Solutions to the Common Law's Insufficient Purchaser Protections*

1. Express Warranties

A common problem of warranting a work's authenticity, when establishing such authenticity is difficult, can be addressed by an express warranty. For example, in an instance when the artist has died several years before date of the sale, the seller will most likely deny liability based on an inability to determine who created the work. This argument places the risk of attribution upon the art purchaser.

However, precisely because the auction house proprietor is an expert in valuing and selling works of art, and is publicly known as such, the law should hold auction houses to a higher standard of care than that to which non-art merchants are held. This notion is viable even though the artist is dead since the auction house has other methods by which it may approximate the authenticity of the work. These include carbon dating, x-ray analysis, and various other scientific analyses available and familiar to the auction house's daily operations.[105] The average bidder, on the other hand, does not have these sophisticated methods available.[106] Therefore, it is reasonable to hold the auction house to an en-

purchases due to a recent fall in the Japanese stock market, all of which resulted in reduced sales at Sotheby's auctions).

104 *See supra* note 1 and accompanying text (discussing the prevailing trend of artworks selling for large sums of money). The annual sales of artwork generate an estimated 300 to 400 million dollars in commercial transactions. *See* Note, *supra* note 4, at 409.

105 Leonard D. DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 988 (1976) (describing several methods of authentication available including radiocarbon age determination, thermoluminescent analysis, obsidian hydration, fission tracks, comparative analysis, analytical reconstruction of manufacturing technologies, microscopic techniques, x-ray and related methods, x-ray diffraction, and autoradiography).

106 One commentator suggested an analysis based on agency law, under which the auction house's duty to the buyer would depend on the relative sophistication and reliance of the buyer, whether a first time buyer or an art dealer. If the buyer is naive, then the buyer most likely relied heavily on the auction house's stated expertise; while if more sophisticated, the buyer most likely did not rely so heavily. In the latter situation, the auction house would not be held to as high a standard as in the former. This would of course require a factual finding by the trier of fact. Gerstenblith, *supra* note 3, at 558-59.

hanced standard of care when it attributes a work to a particular artist.

Furthermore, an auction house, if uncertain about the authenticity of the work, is not required to attribute the work to a particular artist. Of course, this would reduce the price at which the work would sell at the auction. Such disparity in market value would motivate the auction house to require proper certification from the original seller. It may also motivate the auction house to perform physical tests on the work to determine that the work is authentic.

2. Implied Warranties[107]

Implied warranties also offer a means of protection to buyers. For the implied warranties of merchantability and fitness for a particular purpose to apply, the seller must be a merchant of the kind of goods sold to the present buyer.[108] In the art context, "art merchants" are those who buy art work for resale and not for their own aesthetic pleasure.[109] Auction houses are therefore considered to be art merchants because they are in the business of artwork resale.

a. Implied Warranty of Merchantability

There are two competing arguments pertaining to an implied warranty of merchantability as it applies to works of art: (1) the

---

[107] The second kind of warranty that buyers can plead is an implied warranty of quality. The early common law did not recognize implied warranties because sellers were not liable for the quality of the goods sold unless they subjectively knew their quality at the time they sold them to the buyers. The Monte Allegre, 22 U.S. (9 Wheat.) 616 (1824); Dean v. Mason, 4 Conn. 428 (1822); Bradford v. Manly, 13 Mass. 139 (1816); Parkinson v. Lee, 102 Eng. Rep. 389 (1802) (stating that a latent defect causing the goods to become unfit for the purpose for which they were normally used did not give rise to an implied warranty); Stuart v. Wilkins, 99 Eng. Rep. 15 (1778) (stating that the sound price doctrine allowed an action to lie in assumpsit for *express* warranties, but not for *implied* warranties of quality).

Some courts have held that the presence of express warranties excludes implied warranties. *E.g.*, Int'l Harvester Co. v. Smith, 54 S.E. 859 (Va. 1906) (there is no implied warranty, except as to title, where an express warranty is present). These courts reason that the implied warranties intrinsically contradict the express warranty, and the court will not read them into the contract because that would violate the parties' expressed intentions to the contrary. *See, e.g.*, Vandiver v. B.B. Wilson & Co., 51 S.W.2d 899 (Ky. 1932).

[108] A buyer must prove that the seller was either a merchant or a manufacturer. The rationale behind an implied warranty of merchantability being present in a sale by a merchant or a manufacturer of a certain type of goods is that such persons are knowledgeable about the goods' construction, performance abilities, and general quality. *E.g.*, Rogiers v. Gilchrist Co., 45 N.E.2d 744 (Mass. 1942) (holding that an implied warranty of merchantability was proper when a dress shop sold the plaintiff a dress which later caused her to get toxic dermatitis when she wore it). *See, e.g.*, Fruit Dispatch Co. v. C.C. Taft Co., 197 N.W. 302 (Ia. 1924) (holding that no implied warranty of merchantability arises when the seller sells unsound bananas at a price below that which sound bananas would garner).

[109] Gerstenblith, *supra* note 3, at 563 n.294.

argument of aesthetics and (2) the argument of financial investment.

Generally, the implied warranty of merchantability states that a good is reasonably fit for the general purpose to which persons usually put the good.[110] In the art context, one could argue that the general purpose of art is aesthetics. One study in particular has shown that even art experts could not distinguish between a fake and the genuine work.[111] If the only difference between a genuine painting and a fake is who actually created and signed the work, then the painting certainly could fulfill the warranty of merchantability because aesthetically the two are identical.

This inability to distinguish a fake from a genuine artwork limits the effectiveness of the buyer's protection. If buyers cannot distinguish between a fake and a genuine work, then regardless of whether they have had the opportunity to inspect the work, the law gives them no added protection because of their inability to distinguish between the items. Thus, the common law abandons buyers, leaving them to fend for themselves in the sometimes hostile environment of art dealers and auction houses.

On the other hand, art patrons buy paintings not just for aesthetics, but also for financial investments. Accordingly, the implied warranty of merchantability would not be satisfied if a painting is later discovered to be a fake, because the economic worth of the work would be drastically less than if it had been an original.

b. Implied Warranty of Fitness for a Particular Purpose

As to the warranty of fitness for a particular purpose, a different scenario presents itself. Here, a buyer specifically informs the seller of a unique purpose for purchasing the art. Thus, the buyer necessarily relies on the seller's judgment in selecting a particular work.[112] For example, a buyer may say to the seller, "I am looking

---

110 The force of the market practice of speculation and the development of a market-driven society prodded the courts to change the law of warranties to reflect this new mode of commerce. The first common law decision to raise the revolutionary idea of merchantability was Gardiner v. Gray, 171 Eng. Rep. 46 (1815). *See also* Bond Bros. Cash & Delivery Grocery, Inc. v. Claussen's Bakeries, Inc., 191 S.E. 717 (S.C. 1937) (holding that the sound price doctrine is implicit in every sale, even where the seller is neither a manufacturer nor a dealer).

111 *See* Skolnik, *supra* note 31, at 317. In 1962, Harvard University's Fogg Museum intentionally displayed fake copies alongside the original works of art. The Museum invited art experts to attempt to distinguish between the two, and determine which painting was the fake and which was the original. Several of the so-called experts selected the forgeries as the originals. *Id.* (citing Koestler, *The Aesthetics of Snobbery*, HORIZON, Winter 1965, at 50, 51).

112 The rationale behind this warranty is that the buyer would not have selected this particular product for this particular purpose were it not for the seller's purported exper-

for a Picasso because I understand that it will appreciate greatly, and I desire the economic investment that such a painting would provide."[113] If the seller then sells a copy as an original Picasso, then the seller most likely has breached the implied warranty of fitness for a particular purpose because the fake would not be worth as much, for investment purposes, as an original.

3. Fraud

Similar to the contractual areas, the protections the common law of torts provides art purchasers are woefully inadequate. One commentator wrote, in understated fashion, "[T]he nature of the duty owed by the seller of art works to a buyer [under the general area of tort law] has not yet been fully developed by existing case law . . . ."[114] However, as the court held in *Plimpton v. Friedberg*,[115] sellers are held to have falsely represented a fact if they make representations without knowledge of the statements' truth and if they implicitly affirm that the representations are true in fact.

The law of fraud relating to art purchases thereby places a heavy, although not unjustified, burden on art merchants who represent the authenticity of works they sell to buyers. Art merchants cannot simply affirm the authenticity of a work of art and then claim that they did not definitely know that their affirmations were untrue. The merchants must have reasonable bases for their affirmations. This burden is not onerous for auction houses because they have the resources to investigate the authenticity of art works.

IV. Conclusion

The protections the common law affords the art purchaser as to warranties of quality are a double-edged sword. On the one hand, the buyer has a right to sue on the warranty or for fraud if the seller knowingly misrepresents an affirmation of fact regarding the work a buyer is considering. On the other hand, the seller is not liable for expressing an opinion regarding the work. This is particularly precarious when applied to the highly subjective art market, because the seller's representations may be only opinion. The seller may opine not just as to the aesthetics of a work of art,

---

tise in the area. As an expert, the seller should be held liable for assurances that the good would be fit for the buyer's specific purpose. *E.g.*, Williston, *supra* note 23, § 240, at 632.

113 If, on the other hand, the buyer tells the seller that the buyer wants to buy a Picasso because Picasso painted the most beautiful paintings in the world, then the buyer may encounter some difficulty because of the above discussed inability of even art experts to be able to distinguish between an original and a fake. *See* Skolnik, *supra* note 31, at 317.

114 Gerstenblith, *supra* note 3, at 533.

115 *See supra* notes 43-52 and accompanying text.

but as to the authenticity of the work, since many of the artists have died many years (even centuries) before the sale takes place. Even though the buyer has the opportunity to inspect the works under consideration, a usual lack of expertise in the area of art authentication makes illusory the protections afforded by the common law. Thus, the burden should fall on the sellers, particularly auction houses, because of their greater access to sophisticated authenticating technology and their actual and publicly-stated expertise in authenticating works of art.