Fakes and Forgeries: The Art (and Science) of Deception and Issues with Recovery
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I. **Introduction**

Art fraud, while perhaps not one of the world’s most pressing issues, can have a huge impact on its victims. Unfortunately, many who fall victim to it are not well equipped to defend against it in the first place. Once a person discovers he or she has purchased a fraudulent piece, the work becomes, essentially, unmarketable. This leaves the purchaser with few options, thus going after the seller is often the first move. Plaintiffs can choose to bring a state law claim, like fraud, misrepresentation, or breach of contract, or they can choose to sue under the Uniform Commercial Code (“UCC”). However, each of these options has drawbacks. To attempt to solve some of those problems, several states have enacted art-specific statutes. But are there better options? This paper will explore, first, a few common law causes of action frequently brought by plaintiffs, and then it will look at the UCC and state art law statutes in an attempt to determine how a plaintiff can be most successful. Next, it will explore several alternative options, namely contract, strict liability, and the imposition of the discovery rule with respect to the statute of limitations. Finally, it will provide some practical advice for potential art purchasers who would like to try to protect themselves before a problem arises.

II. **What is a Forgery and Why Are They Created?**

When one thinks about art crimes, excluding theft, many people will probably think of fakes or forgeries. But few people will think of those two things and realize they are different, and thus carry different legal implications. A “fake” is a work of art made to resemble an existing work.\(^1\) On the other hand, a “forgery” is a work of art passed off as an original work of a known artist.\(^2\) The process of creating a work resembling an existing work is not illegal.\(^3\) Intentionally and deceptively passing off a fake as the work of another is, however, fraud.\(^4\)

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\(^2\) *Id.*
There are many ways one can create a forgery. A few of the methods often employed include faked signatures, finishing unfinished canvases, misrepresentation, reproduction, and pastiche.\(^5\) What might motivate a person to forge may seem straight-forward, but many famous forgers had surprising motivations. The most obvious motivation is financial gain.\(^6\) However, many forgers will say their first forgery was done for some legitimate purpose, or was intended as a joke.\(^7\) Often, forgers will say the paintings were sold as copies, and blame later sellers for passing off the works as authentic.\(^8\) Still others use their artistic abilities as a form of protest.\(^9\) For example, notorious forger Hans van Meegeren forged out of a “desire to wreak revenge upon and havoc within a critical establishment in the art world that he found repulsive.”\(^10\) In a similar vein, Wolfgang Beltracchi claimed to be doing both the artist and the art world a favor by “creat[ing] an original work, an unpainted painting by the artists of the past . . . .”\(^11\) Motive and method will both vary from forger to forger, which can make detecting a forgery and catching the forger quite difficult. Luckily, there are many methods experts across all fields can utilize to try to determine whether a piece is authentic or not.

III.  **Identifying a Forgery**

When it comes to identifying a forgery, the three overarching categories relied upon are provenance, connoisseurship, and scientific testing.\(^12\) Provenance involves examining the

\(^5\) Id.

\(^6\) Id.


\(^7\) CONKLIN, supra note 1, 69.

\(^8\) Id. at 70.

\(^9\) Id. at 69.

\(^10\) Clark, supra note 6, 19.


\(^12\) PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 385 (3d ed. 2012).
history of the ownership of a work of art. Ideally, when purchasing a piece of art, you would be able to trace its history, through a chain of documents, all the way back to the artist. As wonderful as this would be, and as easy as it would make our lives, it is very unlikely to happen. Many older works don’t have any documentation at all. Further complicating things is the fact that provenance itself is often faked. Wolfgang Beltracchi and John Myatt, another well-known forger, both utilized false provenance to carry out their schemes. Thus, while provenance is a useful tool in determining authenticity, it cannot be relied upon alone.

Connoisseurship is the authentication method with which judges seem to struggle the most. The term refers to a subjective, stylistic inquiry done by an art expert. The inquiry is typically based on aesthetic criteria, such as form, function, and decoration. Because this is so subjective, it is not uncommon to see experts disagree on the authenticity, or lack thereof, of a work. Further, the cost associated with hiring an expert, and the difficulty in even finding one qualified, can prevent purchasers of less expensive works from seeking out experts. As such, connoisseurship cannot be relied upon alone either.

The final form of authentication is the use of scientific methods. One drawback to these methods is they are most often used to determine if a work is inauthentic, as opposed to authentic. This is because many methods look at materials used in the work and compare them

13 Id.
14 Id.
15 Id. at 385-86.
16 Id. at 386. See also RALPH E. LERNER & JUDITH BRESLER, ART & LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS VOLUME 1, at 262 (3d ed. 2005).
18 LERNER & BRESLER, supra note 16, 262.
19 GERSTENBLITH, supra note 12, 385.
to materials available at the time the work was said to have been created.\textsuperscript{21} Today, there are myriad examples of scientific methods available for authentication purposes. A few methods include radiocarbon dating, x-ray diffraction, infrared imaging, and scanning electron microscopy.\textsuperscript{22} Unfortunately, the cost of many of these tests can be prohibitively expensive.\textsuperscript{23}

As some of these methods are unlikely to be available to some purchasers, and other methods are too uncertain, or too easily faked themselves, no one method alone will suffice. Multiple methods should be employed to determine whether a work is what it is claimed to be. This is where the issue begins. From the start, the art market is operating based on a system that cannot easily be undercut. It is opaque, especially to those less-experienced purchasers. This makes it easier for forgeries to infiltrate the market, because so many purchasers are not able to take advantage of the methods available for authentication, never mind the fact that these methods themselves are not always one hundred percent accurate. This creates a serious need to protect purchasers, whether they discover the true identity of the piece one day after they purchase it, or twenty years later when they attempt to sell it. With all of these obstacles, what is a plaintiff art purchaser to do? How can he or she protect him or herself at the outset, and what can be done if it is too late to take those steps?

\begin{itemize}
\item \textsuperscript{21} See, e.g., Juraj Lipscher, \textit{Renaissance and Baroque (1400-1600)}, Pigments through the Ages, http://www.webexhibits.org/pigments/intro/renaissance.html (last visited Mar. 13, 2015) and Juraj Lipscher, \textit{Cobalt Blue}, Pigments through the Ages, http://www.webexhibits.org/pigments/indiv/overview/coblue.html (last visited Mar. 13, 2015). According to the former website, Rembrandt used azurite and smalt to create his blues. If, for example, a supposed Rembrandt painting was found to contain cobalt blue, which was not available until 1802, 133 years after Rembrandt’s death, we would know the painting was not an original Rembrandt, or at least not an untouched Rembrandt.
\item \textsuperscript{23} Balog, 745 F. Supp. at 1561.
\end{itemize}
IV. Common Causes of Action

In looking at a handful of cases on this subject, it becomes obvious which causes of action are most commonly alleged. Whether or not they are successful is an entirely different issue, and will be discussed later. The most common causes of action in cases read in researching this topic are laid out in Chart 1, below. As is readily apparent, the most common are fraud, breach of a UCC warranty, negligent misrepresentation, and breach of contract.

![Chart 1: Common Causes of Action in Forgery Cases](image)

a. **Fraud**

Fraud is among the most common causes of action in these cases, and it is not difficult to understand why. While the specific elements of fraud may vary from state to state, the principles are essentially the same everywhere. The most problematic of these elements are those dealing

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24 Common elements include “(1) a representation regarding a material fact; (2) a false representation; (3) the speaker’s belief that the representation was not true; (4) the speaker’s intent that the false representation be acted upon (intent is also known as scienter); (5) the plaintiff’s justifiable reliance on the representation to his or her
with the seller’s belief, the seller’s intent, and the purchaser’s justifiable reliance. Intent to deceive can be difficult to prove directly, and often requires circumstantial evidence and inferences.\textsuperscript{25} The seller’s belief has similar challenges, and reliance depends on things like the sophistication of the purchaser, all of which can be difficult to definitively prove or disprove. Given these and other challenges with fraud, some believe it “remain[s] a completely ineffective economic remedy for the buyer of a piece of art that is later deattributed.”\textsuperscript{26} In order to demonstrate some of these challenges, a few cases dealing with these issues will be studied.\textsuperscript{27}

i. \textit{Rosen v. Spanierman}

In \textit{Rosen v. Spanierman}, Frances Lipman bought a painting called “The Misses Wertheimer” from Ira Spanierman Gallery as a gift for her daughter and son-in-law, Norma and Hobart Rosen.\textsuperscript{28} The painting was purchased in 1968, and when the Rosens attempted to sell the painting at auction in 1987, Christie’s informed them it was inauthentic.\textsuperscript{29} The Rosens sued based on several causes of action, including fraud. The element challenged by the defendants was detrimental reliance, because, they argued, the Rosens were not the purchasers of the painting; Mrs. Lipman was.\textsuperscript{30} The court had no trouble stepping around this issue, saying “[i]f the representations here were true, the Rosens would now own a painting worth approximately $200,000. On these facts, to hold that the Rosens have not suffered injury would defy logic.”\textsuperscript{31} If Spanierman willfully deceived Mrs. Lipman as to the painting’s authenticity, it would be a

\begin{footnotes}
\item 27 In addition to the cases discussed, see also \textit{Fertitta v. Knoedler Gallery, LLC}, 14-CV-2259, 2015 U.S. Dist. LEXIS 10419 1 (S.D.N.Y. Jan. 29, 2015) and \textit{Kohler v. Leslie Hindman, Inc.}, 80 F.3d 1181 (7th Cir. 1996) for other examples of fraud.
\item 28 \textit{Rosen v. Spanierman}, 894 F.2d 28, 29-30 (2d Cir. 1990).
\item 29 \textit{Id.} at 30.
\item 30 \textit{Id.} at 34-35.
\item 31 \textit{Id.} at 35.
\end{footnotes}
windfall to him and his gallery “due to the mere fortuity that Lipman was the source of the funds
for the purchase.” As such, the plaintiffs in this case successfully pled a cause of action for
fraud.  

ii. Brady v. Lynes

Brady v. Lynes concerned a watercolor allegedly painted by Georgia O’Keeffe. Andrew Dierken Fine Arts purchased the work from Nick Nicolas and, in 1987, a representative of O’Keeffe’s estate informed Dierken through a letter that the work was not authentic. However, Barbara Haskell, curator at the Whitney Museum of American Art, stated in a letter to Dierken that she believed the painting was authentic. The painting was then sold to Dr. Daniel Fishkoff. Barbara Lynes, who began working for the Georgia O’Keefe Foundation in 1992, wrote a letter to Andrew Dierken in 1993. The letter said there was no record of the painting in O’Keeffe’s catalogues. Lynes sent letters to several other parties, hoping to discuss the identity and provenance of the painting. One of these letters, written to broker Ronnie Meyerson, stated Lynes “would be delighted” to be given information about the provenance of other O’Keeffes Meyerson owned, had owned, or had handled. Brady, the plaintiff and ultimate purchaser of the painting, asserts that this letter written by Lynes identifies the painting as an O’Keeffe. A similar letter was sent to Dr. and Mrs. Fishkoff, who purchased the painting

32 Id.
33 Id. at 36.
35 Id.
36 Id.
37 Id. at 4.
38 Id.
39 Id. at 4-5.
40 Brady, 2008 U.S. Dist. LEXIS 43512 at 5-6.
41 Id. at 6.
42 Id.
through Meyerson. The Fishkoffs consigned the painting to the Berry Hill Gallery in 1995. Lynes then sent a “Senior Paper Conservator” to look at the painting, after which Berry Hill was informed that “there were questions about the piece.”

At this point, the painting was sent to San Francisco for sale, allegedly, “with the actual knowledge that the painting was a forgery and, upon information and belief, at a time when they knew or should have know[n] that the gallery to which they were shipping the Watercolor was known to have sold forged works as authentic O’Keeffes in the past.” The plaintiffs in this case had been told by their art dealer, Peter Fagley, the painting would appear in O’Keeffe’s catalogue raisonné, which was authored by Lynes. However, somewhat predictably, the painting was excluded. The plaintiffs filed suit against Lynes, the O’Keeffe Foundation, and Berry Hill Galleries, among others, alleging multiple causes of action, including fraud.

In discussing the cause of action for fraud, the court treated it as fraud by concealment, noting that the defendant must have a duty to disclose any disputed information. Such a duty will arise when, for example, there is a contract specifically employing a defendant in order to render an appraisal, or a fiduciary duty. The court also stated, however, that simply because one has an expertise in the art field will not create a fiduciary duty, and neither will the fact that a particular field has adopted a code of conduct or ethics. In this case, the plaintiff had neither retained nor met any of the defendants. No defendant had ever made a representation to Brady.

43 Id. at 4, 6.
44 Id. at 8.
45 Id.
47 Id. at 10-11.
48 Id. at 11.
49 Id. at 12, 19.
50 Id. at 20.
51 Id. at 20-21.
53 Id. at 22-23.
himself.\textsuperscript{54} Simply knowing the painting may have been a forgery, without notifying the purchaser of that fact, will not give rise to liability for fraud.\textsuperscript{55}

In addition, there was a statute of limitations issue in this case.\textsuperscript{56} In New York, the statute of limitations for fraud is “the greater of six years from the date the cause of action accrues or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.”\textsuperscript{57} Because the plaintiff claimed each defendant knew about the fraud more than two years before he filed suit, his claims with respect to fraud were time-barred.\textsuperscript{58}

iii. \textit{Levin v. Gallery 63 Corp.}

This case involves the Levins, who hired Roger Harned to help with the interior design of their home in Boston.\textsuperscript{59} The Levins gave Harned express authority to purchase antiques and art on their behalf, and Harned identified several pieces at Gallery 63 for use in the Levins’ home.\textsuperscript{60} Harned picked out several statues, each of which were appraised by three appraisers, all hired by Gallery 63.\textsuperscript{61} When the Levins hired their own dealer to do an appraisal, that appraiser stated her belief that the pieces, while “magnificent” and “in pristine condition,” were very overvalued.\textsuperscript{62} Despite this opinion, the Levins proceeded with the transaction.\textsuperscript{63}

\textsuperscript{54} \textit{Id.} at 23.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 24.
\textsuperscript{57} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 5-6.
\textsuperscript{61} \textit{Id.} at 8-12.
\textsuperscript{62} \textit{Id.} at 14.
\textsuperscript{63} \textit{Id.} at 17.
A few months later, an art restorer, who saw the pieces in the Levins’ home, told them he believed the statues were fake. After a separate art advisor expressed a similar opinion, a year after purchasing the statues, the Levins had them evaluated by three appraisers. These appraisers all “questioned the quality” of the statues, and a black light revealed they had been damaged. With these competing opinions, the issue ultimately turned on the definition of “original,” and whether Gallery 63’s representation of the statues as such was fraudulent because of the, possibly not considered original, repairs.

Among the causes of action alleged by the Levins was fraud. At issue in this case was the reasonable reliance factor. The court noted that, in looking at the reasonableness of a plaintiff’s reliance, one must look to the “entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them.” However, a heightened degree of diligence will be required where the plaintiffs had hints of falsity. The transaction in this case was not complicated, and the plaintiffs had previously purchased art and antiques through Harned, whose presence also made up for any lack of sophistication or knowledge the plaintiffs may have had in this arena. Further, the court noted that the plaintiffs were never denied the right to go to Gallery 63, see the pieces for themselves, perform tests or appraisals on them, or otherwise evaluate them to determine their value. Given these facts, the court concluded that the Levins could not have

64 Id. at 18.
66 Id. at 18-19.
67 Id. at 19-21.
68 Id. at 24.
69 Id. at 25-26 (internal citation omitted).
70 Id. at 27 (internal citation omitted).
71 Levin, 2006 U.S. Dist. LEXIS 70184 at 27.
72 Id. at 28.
justifiably relied on Gallery 63’s representations.\textsuperscript{73} As such, they could not make out a cause of action for fraud.\textsuperscript{74}

b. State Law Breach of Warranty

Breach of warranty is another common cause of action, and has been popular since the late eighteenth century.\textsuperscript{75} In order to recover under such a claim, generally a purchaser must prove that a seller’s statement created an express warranty, as opposed to merely stating an opinion, and that the seller knew the statement was false when it was made.\textsuperscript{76} This warranty versus opinion issue has been the subject of many cases over the years. The first was \textit{Jendwine v. Slade}, in which two paintings, which were actually copies, were sold as originals.\textsuperscript{77} The artist’s name was in the catalogue from which the plaintiff purchased the paintings, so the court had to determine whether this constituted a warranty or simply a description and opinion on which purchasers were not meant to rely.\textsuperscript{78} The court decided that, because the artist had lived so long ago, it was not possible to determine whether the paintings were originals, and thus the catalogue was not a warranty.\textsuperscript{79}

In later decisions, \textit{Lomi v. Tucker} and \textit{De Sewhanberg v. Buchanan}, the sellers’ representations were found to be express warranties.\textsuperscript{80} The court in \textit{Lomi} allowed a jury to decide whether the purchaser believed, based on the seller’s representations, the paintings were original Poussin paintings.\textsuperscript{81} The jury decided this was the case, so the purchaser was not bound

\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 31.
\textsuperscript{76} Gerstenblith, supra note 24, 507.
\textsuperscript{77} \textit{Id.} at 506.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{81} 19 REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURTS OF COMMON LAW 696-97 (Thomas Sergeant and John C. Lowber, 1872).
by the agreed upon price. In *De Sewhanberg*, a painting purported to be a Rembrandt was sold to a purchaser. There was some debate as to whether the seller told the purchaser that the seller “warrant[ed] . . . that it [was] a true picture of Rembrandt’s,” as the testimony was conflicting in this regard. Ultimately there was a verdict for the plaintiff in this case as well. In addition to these cases, in *Power v. Barham*, a jury decided the purchaser’s evidence of a written receipt created an express warranty, even though it was not given until the conclusion of the sale. The paintings involved in this case were distinguished from those in *Jendwine* because, in *Power*, the artist had died recently, making it easier to determine the paintings’ source.

Given the *Jendwine* versus *Power* distinction, one has to wonder how today’s technology would affect this analysis. An artist may have died hundreds of years ago, but with the many scientific methods available for authentication, money aside, this may not be such a sticking point today. So, while these cases can be informative and help lay the foundation for some issues that arise with warranties, the specific reasoning utilized in both cases to determine whether a statement was an opinion or a warranty may not carry much weight now.

i. *Brady v. Lynes*

In more recent history, the court in *Brady v. Lynes*, discussed above, took up a state law breach of warranty claim as well. In New York, in order to recover under such a claim, the defendant party must be part of the “manufacturing, selling, or distributive chain.” As neither Lynes nor the O’Keeffe Foundation fell into this category, Brady could not recover against them.

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82 *Id.* at 697.
83 *24 REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURTS OF COMMON LAW* 352 (The Honourable Thomas Sergeant, 1834).
84 *Id.*
85 *Id.* at 353.
86 *Gerstenblith, supra* note 24, 507.
87 *Id.*
for breach of warranty.\textsuperscript{89} With respect to Berry Hill, the court stated that, without specific factual references in the complaint as to an oral or written warranty, there can be no breach of express warranty.\textsuperscript{90} As no such facts were alleged, the plaintiff could not recover with respect to this defendant under this cause of action either.\textsuperscript{91}

c. Breach of Contract

i. \textit{Brady v. Lynes}

Most of these cases involve a contract between the plaintiff and defendant, so breach of contract is another fairly obvious cause of action to pursue. This was yet another allegation by the plaintiff in \textit{Brady v. Lynes}.\textsuperscript{92} In that case, Brady was not a party to the contract between Lynes, the O’Keeffe Foundation, and the National Gallery, but instead sought to recover as an intended third-party beneficiary.\textsuperscript{93} In order to win, Brady had to show more than simple breach of a contract.\textsuperscript{94} The contract between the previously mentioned parties was for Lynes to author the catalogue raisonné.\textsuperscript{95} The benefit alleged by the plaintiff was that, as a member of the public, the defendants intended for him to rely upon their representations in the catalogue.\textsuperscript{96} The problem with the plaintiff’s theory was that the contract did not mention the public or any other class of individuals as being a beneficiary of the contract, and, in fact, prohibited Lynes from

\textsuperscript{89} Id.
\textsuperscript{90} Id. at 35-36.
\textsuperscript{91} Id. at 36.
\textsuperscript{92} Id. at 36-37.
\textsuperscript{93} Id.
\textsuperscript{94} Brady had to show “(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his or her benefit, and (3) that the benefit to him or her is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.” \textit{Brady}, 2008 U.S. Dist. LEXIS 43512 at 37.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
making statements or indications to anyone regarding the authenticity, authorship, or any other aspect of a work purported to be an O’Keeffe.\footnote{Id. at 37-38.} As such, there could be no breach of contract.\footnote{Id. at 38.}

\section*{ii. \textit{Fertitta v. Knoedler Gallery, LLC}}

The background of \textit{Fertitta v. Knoedler Gallery} began in the 1980s.\footnote{\textit{Fertitta}, 2015 U.S. Dist. LEXIS 10419 at 4.} An employee of the Knoedler Gallery had a friend who was creating paintings alleged to be works of Mark Rothko.\footnote{Id. at 3-6.} False provenance stories were provided for each painting, mostly related to a “Mr. X,” who had purchased the paintings directly from Rothko, and then bequeathed them to his son, “Mr. X, Jr.” upon Mr. X’s death.\footnote{Id. at 4.} Mr. X, Jr., of course, wished to remain anonymous, and transacted his business through Kraft, an attorney in Switzerland.\footnote{Id. at 5.}

Fourteen years before the transaction at hand, Freedman had been alerted to the fact that several paintings he had sold, which came from the employee and Mr. X, were forgeries.\footnote{Id. at 9.} The painting at issue in this case was entitled “Untitled (Orange, Red, and Blue).”\footnote{Fertitta, 2015 U.S. Dist. LEXIS 10419 at 9.} The employee consigned it to Freedman, the president of Knoedler, and said it came from Mr. X’s collection but was now owned by the employee herself.\footnote{Id. at 11.} The painting was marketed anonymously, and eventually purchased by the plaintiff, Fertitta.\footnote{Id.} Fertitta sold “Untitled” three years later, but agreed to repurchase it when it was revealed that the painting was probably a forgery.\footnote{Id.} Fertitta, who had agreed to contract terms with Kraft requiring him to disclose the seller’s identity if there...
were a “bona fide challenge to the ‘attribution, provenance, and description’ of the Painting,” sought to determine the seller’s identity, but Kraft refused to reveal the identity of Mr. X.108

In New York, a breach of contract claim requires a plaintiff to prove “the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach.”109 The court denied Kraft’s motion to dismiss the breach of contract claim, stating that the ability of Fertitta to sue the seller, or simply to know his identity, was Fertitta’s right under the contract.110

iii. Foxley v. Sotheby’s Inc.

This case involved Foxley, who purchased a painting, supposedly by Mary Cassatt, called “Lydia Reclining on a Divan” at Sotheby’s.111 Sotheby’s catalog guaranteed the painting’s authenticity for five years from the date of sale.112 Further, Foxley had purchased the painting because the catalog also stated the work would come with a copy of a letter “discussing” the work by Adelyn Breeskin, who was considered to be a Cassatt expert.113 Foxley never received this letter, and Sotheby’s told him it did not have the letter “in its ‘immediate possession’ at that time.”114 When Foxley attempted to consign the painting to Sotheby’s about six years after he purchased it, the auction house told him the Cassatt Committee had determined the painting may be inauthentic, and advised Foxley to remove it from the auction, prompting this suit.115

Among other causes of action, Foxley alleged Sotheby’s breached a contract for services in that Sotheby’s authenticated, evaluated, and auctioned off an inauthentic Cassatt, when the

108 Id. at 11.
109 Id. at 26.
110 Id. at 27.
112 Id.
113 Id. at 1227-28.
114 Id.
115 Id. at 1228.
price paid was for an authentic Cassatt.\textsuperscript{116} The court easily dismissed this claim based on the four-year statute of limitations in New York.\textsuperscript{117} The statute of limitations began to run when the cause of action accrued, which was when the breach occurred, “regardless of the aggrieved party’s lack of knowledge of the breach.”\textsuperscript{118} Thus, Foxley could not successfully sue Sotheby’s for breach of its contract.\textsuperscript{119}

d. **Other Common Causes of Action**

While the previously discussed causes of action are among the most common, there are many other theories upon which plaintiffs have sought to recover in this field. These include negligent misrepresentation, unjust enrichment, and conspiracy, to name a few.\textsuperscript{120} There are also suits brought against galleries directly, as in *Brady* and *Fertitta* discussed above. The Racketeer Influenced and Corrupt Organizations Act, or “RICO,” can also be alleged in certain cases against galleries.\textsuperscript{121} For brevity’s sake, these cases will not be discussed, but readers should be aware of these options.

e. **Which Common Law Cause of Action is Most Helpful?**

Of those causes of action discussed, not all of them have proved to be bad options for plaintiffs. First of all, while fraud can be a difficult cause of action to prove for many reasons, in the right circumstances, and if plead sufficiently by the plaintiff, a plaintiff can be successful. The most difficult elements to deal with have been shown to be the speaker’s belief that the

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\textsuperscript{116} *Id.* at 1233.
\textsuperscript{117} *Foxley*, 893 F. Supp. at 1233.
\textsuperscript{118} *Id.*
\textsuperscript{119} *Id.*
\textsuperscript{121} For RICO cases, see *De Sole*, 974 F. Supp. at 295-99; and *Fertitta*, 2015 U.S. Dist. LEXIS 10419 at 14-17.
\end{flushleft}
representation was not true, the speaker’s intent that the representation be acted upon, and the plaintiff’s justifiable reliance to his or her detriment. It can be difficult to prove what someone else believes, or what a person intended, as both of these things can magically change from day to day. Further, justifiable reliance can depend on the specific plaintiff, what he or she knew, and whether he or she was working with or through an expert. There are also cases demonstrating the issues with the statute of limitations.

When it comes to breach of warranty, the biggest issue is whether what was stated or indicated in a writing was an opinion or a warranty. In addition to that, some states will have additional requirements, as in *Brady v. Lynes*, where the defendant had to be part of the manufacturing, selling, or distributive chain. This can impose other difficulties with recovery, as does the statute of limitations.

Breach of contract is actually a decent option, as courts are willing to uphold contracts to which both sides have agreed. However, as discussed later, contract may be of limited assistance in some circumstances, because purchasers often do not have much of a say in contract terms. Of these options, though, if a purchaser can negotiate contract terms sufficient to protect his or her interests, breach of contract is probably a plaintiff’s best bet. It avoids the intent, opinion, and knowledge requirements, and may even help avoid conflict altogether, though there can still be statute of limitations issues. However, barring the ability to bargain for completely purchaser-friendly contract terms, if the elements are present, courts are not afraid to impose liability for fraud. A plaintiff needs to ensure all elements are spelled out so a court can see they are clearly established, because courts are also not afraid to rule for a defendant simply because one element is not entirely present. Equity does not seem to come into play much in these cases.
Lastly, the statute of limitations can and does bar recovery in many cases that are otherwise meritorious. However, the statute of limitations for these causes of action can be tolled in some cases. As explained in Krahmer v. Christie’s, tolling exceptions include “(1) fraudulent concealment, (2) inherent unknowable injury, and (3) equitable tolling.”122 The discovery rule will apply if any of these apply.123 Fraudulent concealment requires, in general, “(1) a duty to disclose material facts; (2) knowledge of material facts by a party bound to make such disclosures; (3) failure to discharge a duty to disclose; (4) scienter; (5) reliance; and (6) damages.”124 Inherent unknowable injury applies in the case of a “blamelessly ignorant plaintiff” in circumstances involving an inherently unknowable injury, as in a medical malpractice case.125 Equitable tolling applies generally in cases of fraud or misrepresentation, when such actions prevent the plaintiff from filing a timely action. While these options are available, practically speaking, they are not often used by the court to excuse a plaintiff’s late filing. Further, some, such as fraudulent concealment, discussed in Brady, require extra elements themselves. As such, they are of questionable significance when it comes to actually helping a plaintiff recover.

V. The Uniform Commercial Code

The UCC governs the sale of goods, and art has been considered to be a “good” as intended by the UCC.126 In a typical art sale transaction, a seller will give a bill of sale or invoice to the purchaser, specifically stating the piece is authentic.127 Often times, these representations become the subject of law suits when a piece is determined, or believed, to be

122 Krahmer, 903 A.2d at 778.
123 Id. at 778-79.
124 De Sole, 974 F. Supp. 2d at 314.
125 Krahmer, 903 A.2d at 779.
127 KAUFMAN, supra note 25, 836.
inauthentic. The issue is, as mentioned above in *Jendwine v. Slade*, that the seller will claim this was an opinion, while the purchaser will argue it was an express warranty.

i. **Express Warranty**

Section 2-313(1) of the UCC allows for express warranties to be created by the seller to his or her immediate buyer. Express warranties are created by “[a]ny affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain.”\(^ {128}\) Further, subsection (b) states that “[a]ny description of the goods which is made part of the basis of the bargain” will create “an express warranty that the goods shall conform to the description.”\(^ {129}\) Section 2 adds that that the seller does not have to use the words “warrant” or “guarantee” or have specific intent to make a warranty, “but an affirmation merely of the value of the goods or a statement purporting to merely be the seller’s opinion or commendation of the goods does not create a warranty.”\(^ {130}\)

Some commentators argue that these provisions cannot and will not provide the certainty to the art market they provide to other markets due to the inconclusive nature of art authenticity.\(^ {131}\) Further, the fact that an affirmation of the value of the goods or a statement constituting an opinion are explicitly excluded from the category of things that create express warranties can create problems. It is easy for a seller to say that labeling a work as a “Picasso” was simply the seller’s opinion, avoiding a warranty. Further, a high price, or an “affirmation . . . of the value of the goods,” will not indicate anything other than the seller’s opinion and thus will not create a warranty under this provision. Despite these issues, in many cases the statute of limitations prevented courts from discussing whether there was an opinion or

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\(^ {129}\) Id. at § 2-313(1)(b).

\(^ {130}\) Id. at § 2-313(2).

\(^ {131}\) ANNE-MARIE RHODES, ART LAW & TRANSACTIONS 90 (2011).
a warranty, or from deciding whether the distinction was important. Thus, a plaintiff’s bigger hurdle in these cases will be the statute of limitations.

ii. Statute of Limitations

In Balog v. Center Art Gallery-Hawaii, plaintiffs had purchased several works from 1978 to 1982, which were purported to have been made by Dali, from the defendant gallery. While this case was decided under Hawaii’s version of the UCC, the provisions are exactly the same as the provisions above. The gallery had sent a “Confidential Appraisal – Certificate of Authenticity” for each work purchased, and always insisted the works were originals. The plaintiffs learned the works were not original upon reading about the gallery in newspaper reports and hearing about it through television reports in 1988, and claim to have been unaware of the issue until then. The plaintiffs filed suit against the gallery in 1989. After discussing the UCC provisions reproduced above, the court determined the plaintiffs justifiably relied on the defendants’ expertise and knowledge, and the defendants encouraged such reliance. The court, however, did not seem to decide whether there were express warranties made, or whether they were breached. Instead, it stated that “to the extent that the evidence indicates that such representations do not possess a reasonable basis in fact, at the time those representations were made . . . the party offering those representations will have violated the express warranties provided for under H.R.S. § 490:2-313.”

The court next stated that there was still a question of whether the action was timely. The statute of limitations in these cases is generally four years, and seems to be the same in most

\[132\] Balog, 745 F. Supp. at 1558.
\[133\] Id.
\[134\] Id. at 1559.
\[135\] Id.
\[136\] Id. at 1565.
\[137\] Id. at 1566.
\[138\] Balog, 745 F. Supp. at 1566.
However, this statute of limitations also explicitly states that it “does not alter the law on the tolling of the statute of limitations,” and the doctrine of fraudulent concealment has been held to toll the four-year statute of limitations. Because the defendants in this case continued to make representations to the plaintiffs that the works were authentic, this court chose to apply the discovery rule, saying such a warranty of authenticity in art cases is an explicit warranty of future performance. Another court that came to a similar conclusion was the Civil Court of the City of New York in *Weisz v. Parke-Bernet Galleries, Inc.* ("Weisz I"). The *Weisz I* court stated that "a limitation which applied to a claim that could not realistically be known before the end of the limitation was unreasonable and invalid," and applied a six-year statute of limitations. Unfortunately, the Supreme Court of New York reversed this decision, stating that, because there was no willful intent to deceive, the purchasers assumed the risk that the works may not be authentic.

In contrast to *Balog* and the court in *Weisz I*, the court in *Rosen v. Spanierman*, discussed above, did not apply any sort of discovery exception to toll the statute of limitations with respect to the breach of warranty claim. The *Rosen* court stated that, because the warranty did not explicitly extend to future performance, the discovery rule did not apply. Relying on *Rosen*, the court in *Fertitta v. Knoedler Gallery* came to the same conclusion. In *Fertitta*, the court

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139 “A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made [except where the warranty] explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance.” *Id.* (internal citation omitted).

140 *Id.* at 1568.

141 “In the case of artwork, a warranty of authenticity given by a merchant constitutes an explicit warranty of future performance sufficient to toll the statute of limitations . . . [T]he limitations period . . . for breach of such warranty accrues at the time when the breach is discovered or reasonably should have been discovered.” *Id.* at 1572.


143 *Id.*


145 *Rosen*, 894 F.2d at 33.

146 *Id.*

said the bill of sale did not create an ongoing warranty, and thus the statute of limitations could not be tolled.\textsuperscript{148}

Also mentioned in \textit{Fertitta} was equitable tolling.\textsuperscript{149} However, a plaintiff may not rely on the act that formed the basis of the claim in order to take advantage of this provision.\textsuperscript{150} There must be a later fraudulent misrepresentation for the purpose of concealing the former tort.\textsuperscript{151} Further, a warranty can apply beyond the four years listed in the UCC if it is expressly extended.\textsuperscript{152} Lastly, self-concealing wrongs may toll the statute of limitations until discovered, but, again, a plaintiff must allege some later fraudulent misrepresentation for the purpose of concealing the former tort in order for this to apply.\textsuperscript{153} As such, these tolling provisions have not been very helpful to plaintiffs bringing causes of action under the UCC.

b. \textbf{Is the UCC More Helpful than the Common Law?}

The UCC provides a good opportunity for plaintiffs to recover in this area, as many times some sort of representation will be written down as to the authorship of a piece. This may be considered a warranty, if the plaintiff can prove it was the basis of the bargain and not simply the seller’s opinion. However, the statute of limitations is a huge issue in these cases, and in almost every case brought outside of the statute of limitations, the court declined to apply a tolling provision. The one case that did, and was not overturned, was \textit{Balog v. Center Art Gallery-Hawaii}, and that is arguably the better position to take to protect the purchaser. Many courts, nevertheless, will not choose to toll the statute of limitations. Thus, a purchaser hoping to successfully utilize the UCC in a breach of warranty case should be aware of this issue, and do

\begin{flushleft}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 20.
\textsuperscript{150} \textit{Id.} at 21.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 23.
\textsuperscript{153} \textit{Fertitta}, 2015 U.S. Dist. LEXIS 10419 at 24.
\end{flushleft}
their due diligence up front, perhaps by obtaining an independent appraisal. While the UCC does avoid issues with the intent and belief of the seller and whether a purchaser justifiably relied, it does not do away with the statute of limitations issues that plague the common law.

VI. Art-Specific Legislation

Because of the shortcomings identified under the UCC and common law, several states have enacted art-specific legislation. These states are New York, Michigan, Florida, and Iowa.\textsuperscript{154} As the New York statute is by far the most used, and is fairly representative of the other statutes, it will be the one discussed here.\textsuperscript{155} These statutes deal with many of the problems mentioned above. First, the statutes definitively establish that a certificate of authenticity or similar instrument will be considered a basis of the bargain, as opposed to a plaintiff having to prove it was, as under the UCC express warranty provision. Second, it states there will be an express warranty in these situations, so there is no debate as to whether such representations were opinion or warranty. This is, theoretically, a step up from the UCC, but it is only a true improvement if, in practice, the statutes have resulted in better outcomes for the parties they seek to protect—the purchasers.

i. Levin v. Gallery 63, Inc.

This case, explained above, looked at Section 13.01 of the New York Arts and Cultural Affairs Law. Under this provision, the statue appraisals and invoices, which attested to the authorship of the statues, were considered to be certificates of authenticity and, therefore, an express warranty.\textsuperscript{156} The court stated that if a warranty was material to the agreement, there was


\textsuperscript{155}\textit{"(1) Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it: (a) Shall be presumed to be part of the basis of the bargain; and (b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange." N.Y. ARTS & CULT. AFF. LAW} § 13.01.

\textsuperscript{156}\textit{Levin}, 2006 U.S. Dist. LEXIS 70184 at 35.
no need to prove reliance on the warranty in entering into the transaction in order to establish a breach.\textsuperscript{157} Further, the court noted that the fact that the plaintiffs potentially had knowledge of the problems with the statues from other sources did not defeat this warranty claim.\textsuperscript{158} After deciding that Harned had not held himself out to have a “knowledge or skill \textit{peculiar}” to the statues he bought, and thus could not be considered an “art merchant,” the court determined the warranty claim in this case was a proper subject of Section 13.01.\textsuperscript{159}

The court then divided the discussion into multiple issues, the first of which covered the definitions of “original” and “signed.”\textsuperscript{160} New York’s art statutes also help in determining the meanings of some of these words.\textsuperscript{161} However, even with this guidance, there was too much controversy among the parties about what the statements in the invoices and appraisals meant, so the court denied the defendants’ motion for summary judgment on this matter.\textsuperscript{162} The next issue addressed by the court was the value of the pieces, as the plaintiffs alleged a breach of express warranty with respect to the invoice and appraisals sent by the defendants.\textsuperscript{163} The court believed such a statement was likely a “material fact,” which would bring the statements under the purview of Section 13.01 and create an express warranty.\textsuperscript{164} But, as the court also considered the statements under the New York UCC, and because there was still a genuine issue of material fact

\textsuperscript{157} \textit{Id.} at 36. \\
\textsuperscript{158} \textit{Id.} at 38. \\
\textsuperscript{159} \textit{Id.} at 40, 42. (Emphasis in original). \textit{See also} N.Y. ARTS \& CULT. AFF. LAW § 13.01(1), which states that the transaction must be between an art merchant and a non-art merchant for the statute to apply. \\
\textsuperscript{160} \textit{Levin}, 2006 U.S. Dist. LEXIS 70184 at 43-50. \\
\textsuperscript{161} “Language used in a certificate of authenticity . . . stating that: (a) [t]he work is by a named author or has a named authorship, without any limiting words, means unequivocally, that the work is by such named author or has such named authorship; (b) [t]he work is ‘attributed to a named author’ means a work of the period of the author, attributed to him, but not with certainty by him; or (c) [t]he work is of the ‘school of a named author’ means a work of the period of the author, by a pupil or close follower of the author, but not by the author.” N.Y. ARTS \& CULT. AFF. LAW § 13.01(3). \\
\textsuperscript{162} \textit{Levin}, 2006 U.S. Dist. LEXIS 70184 at 50. \\
\textsuperscript{163} \textit{Id.} at 53. \\
\textsuperscript{164} \textit{Id.}
as to whether these appraisals were opinion or warranty under those provisions, the court denied the defendants’ motion for summary judgment.  

The final issue addressed under Section 13.01 dealt with a statue called “Nude with Butterfly,” which had been attributed to “A. Gearls” in the appraisals and was later determined to have actually been created by Charles Henry Geerts. Because this appraisal warranted the accuracy of the statements of fact contained within it, the defendants breached their warranty in this respect. As such, the plaintiffs succeeded on their summary judgment motion for this issue under Section 13.01.

ii. Christie’s, Inc. v. SWCA, Inc.

Christie’s v. SWCA is a case in which, in 2002, defendant SGA purchased a sculpture purported to have been a Picasso for $30,000 and offered it to SWCA. The author of the catalogue raisonné for Picasso sculptures issued a certificate of authenticity for the sculpture. Less than a month later, SWCA and Christie’s signed an agreement authorizing the sale of the sculpture. Christie’s sold the sculpture to a man named Newhouse, and agreed to rescind the sale if the sculpture was determined to be inauthentic. Two years later, after unsuccessfully offering to resell the sculpture, Christie’s, upon developing concerns with respect to authenticity, had it sent to Picasso’s son, Claude. Claude issued a certificate of authenticity, but Christie’s maintained that the sculpture was a “surmoulage,” or “a bronze cast of a second or third

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165 Id. at 53-56.
166 Id. at 56-57.
167 Id. at 58.
170 Id.
171 Id.
172 Id.
173 Id.
generation bronze.” Christie’s then rescinded the sale to Newhouse, and brought suit against SWCA in order to rescind that transaction as well.175

SWCA claimed Christie’s was acting as SWCA’s agent, and that Christie’s breached the warranty of authenticity contained in a letter agreement made with Newhouse.176 Christie’s, in turn, contended that SWCA extended the warranty of authenticity by providing to Christie’s the certificate of authenticity issued by the catalogue’s author.177 Christie’s also argued that an express warranty of authenticity was created under both the UCC and Section 13.01.178 The court stated that, because SWCA authorized Christie’s to give the certificate of authenticity to its purchaser, the transaction implicated the art statutes, and an express warranty was created under Section 13.01.179 However, the scope of the warranty is determined by looking at “whether the representations furnished by the seller with respect to the artwork can be said to have had a reasonable basis in fact at the time that the representations were made, as shown by the testimony as a whole.”180 As such, whether the warranty was breached could not be determined by this court on the basis of summary judgment.181

iii. Levin v. Dalva Bros.

In this case, the Levins, the same Levins who had issues with statues purchased from an art gallery by their interior decorator, purchased some antiques from Dalva Brothers, Inc.182 They were later informed that the pieces were not what they were originally represented to be,
and were worth about $750,000 less than what the Levins had paid for the pieces.\textsuperscript{183} With respect to one of the pieces, a clock, the Levins took issue with a jury instruction given under Section 13.01.\textsuperscript{184} After deciding the clock was “fine art,” the court next stated that, if the UCC were to apply, the court’s instruction to the jury as to opinion versus fact would have been correct.\textsuperscript{185} Such an instruction was, however, “inconsistent with the fine art statute.”\textsuperscript{186} The representations in this case dealt with the time period to which the clock was attributed, and constituted express warranties under the New York art statutes.\textsuperscript{187} Therefore, the instruction was incorrect, and the court ordered this express warranty claim be retried under Section 13.01.\textsuperscript{188}

\textbf{VII. UCC versus Art Statutes}

When it comes to comparing the UCC with the specific art statutes, which is most effective in allowing plaintiffs to recover? Because the plaintiff will bear the burden of proof in these cases, it is often very hard for them to win.\textsuperscript{189} However, the art law statutes seem to have helped alleviate some of the issues with the UCC. For instance, in \textit{Christie’s v. SWCA}, the plaintiff at least avoided summary judgment dismissal based on the opinion versus warranty issue. Similarly, the \textit{Levin v. Dalva Bros.} court ordered the opinion versus warranty issue to be retried based on the art statute. Thus, there is a decent argument to be made that these statutes have improved upon the UCC in terms of helping plaintiffs recover.

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\textsuperscript{183} Id.
\textsuperscript{184} The instruction was as follows: “An expressed warranty must be based on a statement of fact, not mere opinion. If the defendant was only expressing an opinion about the item or its value, then the defendant may only be engaging in sales talk or sales puffery. An opinion does not create an expressed warranty, but the distinction is often a difficult one to draw.” \textit{Id.} at 75, 76 n.6.
\textsuperscript{185} \textit{Id.} at 76-77.
\textsuperscript{186} \textit{Id.} at 77.
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Levin}, 459 F.3d at 78.
\end{flushleft}
VIII. Is There a Better Option?

Given that the applicability of these statutes and causes of action can be so unpredictable and, often times, tenuous, one has to wonder if there are better options out there for protecting an art purchaser. One writer has argued that, often times, when plaintiffs lose in these cases, it is not because their cases do not have merit, but because “courts may not grasp the complexities associated with authenticity in the art world.”\footnote{id:80} So how can we make this more foolproof? How can we improve the art buying experience and protect those who often do not have the knowledge or means to protect themselves?

a. Contract

One option for dealing with these issues is the obvious, but likely limited, choice of contract. Theoretically, an art purchaser could protect him or herself from the start by negotiating for terms that are friendly to the purchaser’s needs. One commentator has suggested that “[c]omprehensive contracts would be the first step to removing courts” from the difficult situation authenticity disputes present.\footnote{id:83} Contract law standards are standards with which courts are much more familiar; thus, dealing with these cases as simple breaches of contract is an attractive solution at first blush. For example, it may behoove a plaintiff to insist on a clause requiring accurate provenance. If the provenance were found to be false after the fact, the court would not have to decide on the authenticity of the work, but simply whether the defendant promised one thing and delivered another.\footnote{id:82}

While it may sometimes be possible for a purchaser to negotiate over contract terms to cover some of his or her concerns, the limitations of this method may make this option not viable. When purchasing from an art gallery or an auction house, these places will likely have a
set contract, with their own terms, in which the purchaser will have no say whatsoever. It will be a “take it or leave it” situation, because, if a purchaser refuses to sign, the gallery or auction house probably does not care. Someone else will sign it and the seller will get the money either way. The Sotheby’s Terms of Guarantee serve as a good example.

Essentially, Sotheby’s conditions of sale make it very easy for the auction house to avoid refunding the entire price paid. For example, if the description in the catalogue is “in accordance with the opinion(s) of generally accepted scholar(s),” a purchaser has no hope of recovering his or her purchase price. Further, Sotheby’s Conditions of Sale state that a prospective bidder “should inspect the property before bidding to determine its condition, size, and whether or not it has been repaired or restored.” This would allow Sotheby’s to place “blame” on the purchaser should any of these become the subject of controversy after sale. While it did not deal with an auction house, Levin v. Gallery 63 dealt with works that had been previously repaired, unbeknownst to the purchasers. Had Gallery 63 had such a condition to the sale of those statues, it is unlikely that a court would have allowed the Levins to complain about such an issue—one they, supposedly, could have determined at the outset. As such, while specific contract terms may have a place and may help purchasers in some instances, in many cases this may be of little relief to a potential purchaser.

b. Strict Liability

While this suggestion may sound extreme, it may also prove to be a decent option to drive change in the art market. When one thinks of strict liability, one typically thinks of tort cases. While “art fraud” is not a tort you will learn about in your first-year torts classes, fraud

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194 Id.
and misrepresentation both are. Further, as mentioned before, purchasers often don’t have the
ability, economically or practically, to determine a work’s authenticity. Authentication methods
can be very expensive, so a purchaser may not have the means. Additionally, a person may not
have the connections to find an expert who can help authenticate the piece. Art experts do not
advertise, they are not obviously and readily accessible. A purchaser must rely on word of
mouth or personal experience to find an art expert. Thus, it makes sense to place the duty of
authentication on the dealer, gallery, or auction house. These parties are in the business. They
know experts or, if they do not, they know how to find them. In addition, they would have the
funds to attempt to authenticate a work and better recover from loss in the event of a mistake.
The court in Weisz I seemed to rely on this kind of theory in deciding the defendant could be
held liable.196

There is an issue when it comes to auction houses, as they operate on consignment and do
not, themselves, own the works being sold. This makes it nearly impossible to impose upon the
Sotheby’s and Christie’s of the world a duty to authenticate, beyond what they already do. So
perhaps the answer with respect to auction houses is to incentivize them to raise their standards.
Get them to more tightly control and regulate what comes through their doors. But that matter
can be taken up in another paper. In general, the dealers and galleries of the world are better
cost-avoiders and cost-spreaders than their customers are or would be. As such, it makes sense
for these parties to bear the cost of determining authenticity and paying when something they
have sold is deemed inauthentic. Dealers and galleries can also purchase insurance for such
purposes, and spread those costs to their customers.197

196 Weisz, 67 Misc. 2d at 1083.
197 See Jeffrey Orenstein, Note, Show me the Monet: The Suitability of Product Disparagement to Art Experts, 13
Another positive to the imposition of strict liability is the simple notion that, perhaps, it would increase responsibility throughout the industry and promote self-policing. If a gallery owner knows he or she can be held strictly liable for the sale of a fraudulent work of art, perhaps he or she will not blindly trust his or her employee who claims to have direct access to numerous famous artists through some anonymous client who is never revealed. Remember “Mr. X” from *Fertitta v. Knoedler Gallery*? Perhaps, if the owner had known he would be subject to strict liability with respect to each of those pieces, the gallery would not have had so many unhappy customers down the road. Maybe he would have just said no to trying to sell them in the first place.

An obvious problem with this theory arises from the nature of strict liability as applied by courts in tort cases. Typically, strict liability is limited to situations with products that are “inherently defective and unreasonably dangerous.” Further, the losses in strict liability cases are typically related to personal injury or property damage. If a loss is purely economic, as a loss in the case of a sale of a fraudulent work of art would be, the law of commercial sales is applied. However, Section 552D of the Restatement (Second) of Torts, which was never adopted, applies strict liability in the case of misrepresentation in a sale of chattels. So, while this has never been applied, perhaps a court could be convinced to apply such a theory if and when presented with such a case. While this proposed section only dealt with misrepresentations, one could also argue that fraud is so similar in principle that strict liability ought to be imposed in those situations as well.

198 Gerstenblith, *supra* note 24, 560.
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.* at 561.
Some people may also be concerned about the completely innocent art dealer in these situations. As stated above, dealers and galleries can insure against non-intentional liabilities, and can also more easily spread the cost of these mistakes among their customers. In addition, it is not hard to imagine a court allowing a dealer or gallery to pursue the person from whom the piece was purchased for indemnification, much like in cases of credit card or check fraud. In those cases, it is standard practice to push the loss as far back up the chain as possible. Often the forger is already gone or is judgement-proof, but this also puts the loss back in the hands of the party who could have done his or her due diligence in the first place and prevented the problem. This method tends to lead to what most would consider to be the most equitable result.

There may also need to be limits placed on the applicability of strict liability. The art-specific statutes only apply in transactions between art merchants and non-merchants, because the idea behind the statutes is to protect the less knowledgeable purchaser. Such a limitation would be wisely imposed on this strict liability theory as well. The purpose behind the strict liability theory is the same, so it would not make sense to impose something at odds with the art-specific legislation in the state that clearly has the most legislative action in this area. Thus, while courts may initially be afraid to impose strict liability in this way, there is a good case to be made for its imposition in the art market, despite some of its downsides.

c. Statute of Limitations

Many of the cases researched for the writing of this paper consisted of meritorious claims that were ultimately denied because the statute of limitations had run. The problem with the statute of limitations is that, in most cases, a contract-type limitations period is applied, meaning it begins to run from the time the item is delivered, and the courts often do not allow for tolling. In a handful of cases, the more tort-like discovery rule has been applied, allowing for the statute
of limitations to begin running when the purchaser discovers, or reasonably should have discovered, the fraud. If the law explicitly dictated that the discovery rule was the applicable standard in these cases, not only would we have more uniform decisions in this area of the law, but the innocent purchaser would prevail where he or she truly deserved to prevail. He or she would not be left out in the cold with a perfectly good cause of action, with nothing but time to blame for the loss.

This could be a difficult change to make, as “[c]hanging the statute of limitations of contracts runs counter to centuries of steadfast law.” But these are not always pure contracts claims. As such, it is not difficult to imagine a court allowing, with respect to the tort cases of fraud and misrepresentation especially, the use of the discovery rule. The successful application of the discovery rule, in order to be truly fair, in addition to continuing to require the plaintiff to prove all elements of the cause of action alleged, would depend upon the purchaser doing his or her due diligence before or shortly after purchase.

What we do not want is an innocent purchaser to be left with no relief due only to the passage of time. While it is nearly impossible to tell a purchaser “you must do A, B, and C within X amount of time,” because of all of the previously mentioned difficulties with authentication—especially cost and availability—perhaps this is an area where a court can come in to determine whether the plaintiff’s actions were reasonable. Yes, what is “reasonable” can be difficult to determine, but if a plaintiff has done nothing, that will clearly not be considered reasonable. On the flip side, if a plaintiff has taken his or her time with the purchase, sought an outside appraisal, and done whatever can be expected of a purchaser with his or her knowledge of the art market and skill, then it can be considered reasonable.

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203 Jauregui, supra note 26, 1986.
While there are many advocates of changing the statute of limitations, some have pointed out that changing to the discovery rule would subject art sellers to the possibility of never-ending liability.\textsuperscript{204} However, art dealers would not be the only people subject to such a possibility. Doctors and products manufacturers, for example, deal with the discovery rule in many states. One could argue, though, that doctors, unlike art dealers, are licensed professionals. Doctors go through extensive training and are entrusted with peoples’ lives; why should they \textit{not} be subjected to never-ending liability, right? Well, while art experts do not have lives in their hands, they may have ones livelihood in their hands. Some of these pieces can cost a fortune—amounts with more zeroes on the end than many people will see in their bank accounts in their lives. Maybe these purchasers are in “the 1%.” But maybe they have just always wanted to own a Rembrandt, or a Picasso, or a Dali, and had been saving for years to make it happen. These art dealers, experts, and galleries do have the power to affect peoples’ lives in huge economic ways.

This begs the question, should art experts be “trained professionals” like doctors? Would that make the art market more comfortable with the imposition of a discovery rule? Would it lead to fewer forgeries entering the market altogether? Generally, in order for a person to be qualified to authenticate art, a person must have “a degree in history, museology, or art science; job experience as an art dealer, museum curator, auctioneer, or art professor; publications; membership in professional organizations; and prior authentication experience in the relevant area.”\textsuperscript{205} What if, in order to issue an authentication of art with a potential value over, say, $10,000, an art expert had to be certified by an independent organization? If this were the case, perhaps there would not be so much push-back with respect to the imposition of a discovery rule.

\textsuperscript{204} \textit{Id.}
\textsuperscript{205} KAUFMAN, \textit{supra} note 25, 841.
This would make the authenticator, whether a dealer, gallery owner, or what have you, more of a “professional” in line with a doctor.

Further, manufacturers often deal with the discovery rule as well, and these people are not licensed professionals. It is a part of the world in which they operate. These people have to accept that their products, or the manner in which they are made, may subject those in charge, or the companies, to liability at any given moment, and even to strict liability in some cases. This, arguably, influences how manufacturers work, how they make their decisions, and the way they operate. Art dealers and experts would have to come to the same realization. Like the imposition of strict liability, this may lead the art market to police itself. If a dealer knows he or she could be subject to liability at any moment for any fraudulent piece sold, perhaps he or she would do more due diligence up front and not offer for sale works of questionable authorship.

Another problem with this, and really any imposition of regulation on the art market, is that “the art world tries to avoid legal regulation, particularly concerning trade practices.”\textsuperscript{206}

Why? The art world tends to get a “nose-in-the-air” reputation, and some of that arises from the notion that they are “outside” the law. It is an idea reminiscent of the explanation given for why attorneys are self-policing when it comes to professional responsibility: because attorneys are the only ones who know the profession well enough to police it. Despite how you feel about that statement, perhaps what we need, then, is an increase in self-regulation. For example, the Grosvenor House Art & Antiques Fair and Maastricht Fair in Britain use “multinational board[s] of dealers and exhibitors” and authenticating committees, they publish their authentication and attribution guidelines, and get rid of authenticators who do not do well enough to make the

\textsuperscript{206} Jauregui, supra note 26, 2025.
Maybe this kind of higher standard would lead to self-policing and allow people to feel better about the imposition of a discovery rule.

Despite these potential drawbacks and arguments against use of the discovery rule, the policy arguments outweigh all of them. Sellers are more economically able to protect themselves from loss in the first place and spread costs in the event of liability. They have more knowledge than the average purchaser, and the ability to locate authenticators. Further, the threat of “never-ending liability” may help the industry police itself, and dealers and galleries can purchase insurance to guard against innocent mistakes in attribution. In addition, in states with art-specific statutes, this change would be relatively easy to make. The contract option may help on the front end, but strict liability and the discovery rule will help clean up the damage if it is too late for contract to be of any use. Any of these options will provide the purchaser protections, with strict liability and the statute of limitations being perhaps the most useful but also the most contested. But if the art market, or the courts, ever hope to make a dent in these issues and find a more uniform resolution, these are solid options, with few drawbacks with respect to the purchasers.

IX. What Can Purchasers Do To Protect Themselves?

No one wants to get involved in litigation, except, perhaps, for the attorneys representing the parties. So what can a purchaser do at the outset to try to protect him or herself? By reading some of the cases as well as some commentator suggestions on this subject, one can create a decent list of things to run through before purchasing a piece.

First of all, as suggested in *Brady v. Lynes*, there must be a duty owed by the seller to the purchaser in order to recover for negligent misrepresentation or fraud by concealment. 208 *Brady*

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207 *Id.* at 2027.
suggests that a “special relationship” will create this duty, and such a relationship is created through the existence of some sort of business relationship.\textsuperscript{209} If dealing directly with an appraiser or dealer, this will likely be met, because a purchaser will have met this person more than once, set up appointments to meet, and signed a contract.

Second, \textit{Levin v. Gallery 63} suggests that a purchaser should ask to see the piece in person to evaluate it before purchasing.\textsuperscript{210} On a related note, a purchaser should seek to have an independent appraisal done by someone who is not affiliated with the seller. If the artist is still alive, the artist him or herself is the best choice.\textsuperscript{211} If the artist is not an option, the artist’s dealer or art historians, museum curators, and college professors are good options.\textsuperscript{212} Auction houses and museums may also be able to recommend experts who could help.\textsuperscript{213} This appraisal should, according to \textit{Levin v. Gallery 63}, expressly warrant the accuracy of the statements contained within it.\textsuperscript{214} Finally, the International Foundation for Art Research (“IFAR”) is also an invaluable resource, as it can direct purchasers to the artist’s catalogue raisonné and provide guidance on the authentication process.\textsuperscript{215}

Third, several cases suggest that a purchaser should request descriptions of items in the bill of sale and all appraisals.\textsuperscript{216} This can help ensure that, no matter what law is used, the description becomes a “basis of the bargain” or that there was a “representation of a material fact.” Fourth, if dealing with a gallery or dealer that will allow negotiation of contract terms, a purchaser should insist on a clause requiring repurchase if the piece cannot be authenticated.\textsuperscript{217}

\textsuperscript{209} Id.
\textsuperscript{210} \textit{Levin}, 2006 U.S. Dist. LEXIS 70184 at 28.
\textsuperscript{211} \textit{KAUFMAN}, supra note 25, 842-43.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 847.
\textsuperscript{214} \textit{Levin}, 2006 U.S. Dist. LEXIS 70184 at 58.
\textsuperscript{215} \textit{KAUFMAN}, supra note 25, 847.
\textsuperscript{216} Gerstenblith, supra note 24, 510.
\textsuperscript{217} \textit{See Fertitta}, 2015 U.S. Dist. LEXIS 10419 at 7.
If there is a contract between two other parties which is intended to benefit a purchaser, the purchaser should ensure he or she is mentioned in the contract as an intended third-party beneficiary.\textsuperscript{218} Purchasers should also seek to have any warranty explicitly extended to future performance.\textsuperscript{219} Lastly, with respect to contract terms, a clause insisting on accurate provenance could make recovery easier, because a court will not have to determine whether or not a piece is authentic, the court will simply have to look at whether the contract was breached.\textsuperscript{220}

As for some practical, step-by-step advice, John Cahill suggests the following. First, a purchaser should research provenance, using a professional researcher if necessary.\textsuperscript{221} Next, carefully examine any original documentation and seek to verify provenance.\textsuperscript{222} Third, consult a catalogue raisonné or reach out to an authenticating committee or board.\textsuperscript{223} Then identify and consult with scholars, dealers, and other experts, having them document their opinions in writing.\textsuperscript{224} Conservators may also be hired to look at the condition of the work.\textsuperscript{225} One should also consider hiring forensic or other scientific experts to make sure all materials used were available during the correct time periods.\textsuperscript{226} Probably most importantly, a purchaser should get detailed representations and warranties in a signed writing, including, but not limited to, that the work is “by” a particular artist, all documents have been provided, there are no known doubts about the work’s authenticity, whether any restoration has been done, any exhibitions it has been in, and any publications about the work.\textsuperscript{227} That signed writing should also include the rights to cancel and rescind the sale if the work is found to be inauthentic, recover costs, including

\textsuperscript{218} See Brady, 2008 U.S. Dist. LEXIS 43512 at 37-38.
\textsuperscript{219} See Fertitta, 2015 U.S. Dist. LEXIS 10419 at 7.
\textsuperscript{220} See Butt, supra note 191, 13.
\textsuperscript{221} Cahill, supra note 11, 367.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Cahill, supra note 11, 367.
attorneys’ fees, if there are any legal actions, and indemnification. While all of these things can be helpful in ensuring a purchaser is protected from fraud, of course none of them is foolproof. This is why the law needs to step in to help where it can.

X. Conclusion

With the great disparity in application of common law causes of action as well as courts’ decisions to toll statutes of limitations, a plaintiff who thinks his or her case is a home run because of the amount of damage done may, in reality, come up with only a triple. A triple is fantastic, but it is one base short of a run. If you cannot get all the way home, at the end of the day, it does not matter. So, while common law causes of action may, when correctly pleaded, allow a plaintiff to recover, there are still issues, particularly with respect to the statute of limitations. The same issue arises under the UCC, and even the art statutes. While the art-specific statutes do solve several problems associated with the UCC, and contract terms may be helpful in some instances, if we want a true solution to these problems, the imposition of strict liability or a mandated discovery rule are highly recommended.

While both suggestions have downsides, the policy reasons for both outweigh those drawbacks. These solutions can help an innocent purchaser, who may not have the expertise to tell the difference between authentic and inauthentic works, and who may not have the means or know-how to hire experts. While it would be nice if the market would truly police itself to keep these problems at bay, the many years this has been a problem suggest that is not likely to happen. As such, the law can and should step in where possible to protect those who cannot protect themselves.

A mandated discovery rule is arguably the best, most fair option. It will allow an innocent plaintiff, who can also satisfy all elements of whatever cause of action is brought, to

\footnote{id}
recover when he or she *ought* to recover. The requirement to satisfy all elements of the cause of action would prevent a plaintiff who had not done his or her due diligence, or who relied when it was not proper to do so, from recovering. So much of the motivation in these instances is monetary, whether you are talking about the forger or the gallery owner seller. The best way to combat problems like this is to take away that motive. Strict liability and a discovery rule statute of limitations would do just that. They would take away any financial incentive these defendants previously thought they had, would place the liability on the party most easily able to deal with all costs, and would allow a higher number of deserving plaintiffs to be made whole.