

WHO IS ON YOUR SIDE?

BY JUDITH L. PEARSON



RECENT NEWS HEADLINES highlight the ever increasing litigation against art dealers, galleries, and other traditional market leaders, speaking to the continued lack of transparency in the art market. A recent *New York Times* article, entitled “Gagosian Suit Offers Rare Look at Art Dealing” by Randy Kennedy, traces the account of a collector who is suing the gallery where he is a client. He claims that there was self-dealing, as well as a lack of consent from a seller.

Much like the fabled dwarf Rumpelstiltskin, some industry participants hold onto the view that the art market—from an integrity standpoint—has no problems. But the market is replete with examples of these problems.

Other, more forward-thinking stakeholders in the industry recognize the need for change. But, instead of simply reciting the standard notion of “transparency” (the traditional translation of this being about pricing), the more critical focus should be improved, more practical, and sounder transactional standards.

The fundamental problem with the art market is not opaqueness in pricing but opaqueness in the transaction. Willing buyers and willing sellers having no compulsion to actively establish the “fair market value” of works.

With the globalization of the art market, the importance of the middleman has begun to decline. Today’s collectors are often self-educated connoisseurs. The internet and the advent of commercial inventory databases and trading platforms have created channels of independent access that are diffusing the



This page: “Starry Night” by Vincent van Gogh, the painter who participated in the Impressionism movement, which ushered in the era of Modern Art. Opposite page: Judith L. Pearson, author of this piece and president of ARIS Title Insurance Corporation.

control of traditional brick-and-mortar galleries and auction houses.

Because of how the industry currently operates, it is impossible to eliminate gaps in ownership information, uncertainty over who is the current owner of the object, and be sure whether a party has the legal authority necessary to sell the work and any gaps in the overall succession of documentation. Simultaneously, the onslaught of litigation on the related issues of authenticity, valuation, and title suggests that collectors are more and more frequently demanding sound transactional practices grounded in fiduciary duty.

Simply put, smart collectors want the assurance that the art they buy is purchased for a fair value, is authentic (accurately attributed to an artist and not a fake or forgery), and is free and clear of any lien, encumbrance, or other issue that could impact the buyer's ability to assume clear and absolute legal title.

In all other industries, such as real estate and banking, advisors and intermediaries like agents and fiduciaries have an obligation to inform the client that they are representing about details like: from whom and how much the seller is to be paid, whether there are any conflicts of interest, and how any conflicts will be

resolved. Translated to the art world and driven by current litigation, art dealers, galleries, and auction houses are required to disclose which party or parties they represent and to seek explicit consent from the client or clients if the party will represent both sides—the seller and the buyer. This disclosure is integral to an agency relationship. Under most state laws—and most asset classes—an agent or fiduciary participating in an undisclosed dual-agency relationship is legally actionable because of the inherent conflict of interest.

Astute collectors should understand these growing market dynamics and consider proactive measures to ensure the integrity of their transactions. Thoughtful and proactive parties can manage their own transaction through better standards of practice and be part of the evolution in transactional standards, market-wide.

The neutral third-party lens of a title insurer should be a key ingredient for any significant art purchase, the sale of a charitable gift, or an estate plan.

In the real estate world, title insurance companies act independently and without conflict of interest to evaluate and confirm the real estate transaction through a financial guaranty. The title insurance company reviews legal title, assesses

moral hazard risk, cures easily identifiable defects, issues policy, and facilitates the close by completing the transaction in escrow. Doing so assures the accurate and complete transfer of all funds consistent with the terms of the transaction.

The same holds true in the art market through a title insurance company focusing on the unique aspects of the art and collectibles market and assuring the integrity of purchases, sales, and other transactions. This is done through a similar process of examining, confirming, and guaranteeing through a financial guaranty the fair market value of the object plus defense costs, in a confidential, insurance industry/government-regulated and independent way that manages the art market risks.

Such an approach helps market parties efficiently eliminate otherwise pervasive conflicts of interest, which are many times unintentional, when multiple agents are involved on one or both sides of a transaction. This approach helps an astute collector ensure who is *really* on his or her side as they continue to buy and sell in the market. ♦

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