



“It Wasn’t Like This When I Brought It In”

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for **Fine Art Registry™**

The owner was gazing aghast at the back of the stunning, large abstract painting he had just retrieved from the gallery where he had placed it for eighteen months on consignment. “It wasn’t like this when I brought it in there,” he said, pointing along one of the shorter edges of the piece. The canvas had clearly been standing in water. The edge folded around the stretcher was grey, the canvas edges tattered back to the staples, and in a few places even beyond them, while on the other three edges of the work the cut edge of the canvas was crisp and stiff. At the two corners, the canvas was rotted right away down to the stretcher. A water stain wicked it’s way up the verso, mildew patches sprouting randomly on the fabric. “When I went to pick it up, he had it stored in a bathroom,” the owner says.

But the water damage was not the most egregious change in the painting that occurred at the gallery. Part way along one of the short stretchers, the undulating canvas edge took an uncharacteristic jag: the gallery owner had taken a knife blade to the work, and cut out a rectangle of painted canvas, apparently with the intention of sending it out for paint chemistry testing as part of the authentication process. “I never authorized that,” the owner says with great restraint.

This was no small-time, flea-market type gallery. It is a top-name, upscale, big-American-city place handling magnificent works of art. You would recognize its name from its regular advertising and mentions

in articles in the glossy art magazines. But, as many a person who has taken their dry cleaning to the most reputable outfit in town can attest, even a great reputation is no guarantee that something you place into someone else’s hands is going to be returned to you in the same condition you turned it over in. Things happen out there.

WHO’S GOING TO PAY FOR THIS MESS?

Granted, things happen at home, too. Many an art owner inadvertently knocks a picture off a wall, breaks their own Ming vase or piece of ancient pottery, or spills coffee on their mid-19th century watercolor. I knocked over my husband’s display shelf of pre-Columbian South American carvings not all that long ago trying to plug something in to an outlet behind it. Fortunately, they bounced. Well, most of them, anyway. And they make some great adhesives these days. But the point is, when you break something at home, you’ve got no one but yourself (or your spouse, kid, cocker spaniel, or cleaning person) to blame, and your own homeowner’s insurance or special collections insurance will cover the damage. And if not, the loss is simply your own.

But when something valuable to you is damaged in someone else’s hands, you have a very clear sense that a wrong has been done to you. The question is, who is responsible, legally, for that wrong? Who

will repair the damage or, if that is not possible, pay for the loss of the piece? Our natural sense of indignity when harm occurs on someone else's watch would suggest that the gallery is obviously responsible for damage that occurs to pieces in their custody and control.

The law is not quite as clear on that point as you might expect. The provisions of laws like the Uniform Commercial Code, which apply to the sale and storage of fungible – mass produced, interchangeable – consumer goods don't apply to sales of individual artworks. Galleries have the same kinds of general, basic legal duties of care – to not impose deliberate harm, and to take modestly reasonable precautions to avoid negligent harm – that all of us have in any given situation. But beyond those general ordinary legal obligations we all have for one another, the extent of any liability for harm done to your painting in a gallery's care will depend on the particular agreement which you entered into with the gallery.

RECEIPTS AND CONTRACTS

Of course, this raises the first critical point – be sure to HAVE an agreement with the gallery. This starts with, at an absolute bare minimum, a written receipt for your work. Believe it or not, many people drop off an artwork and walk away without so much as a piece of paper in their hands to prove the work was left at the gallery. What if an unscrupulous employee never logs the piece in, but makes off with it? Or what if the place is flooded or burns down? You will need, at the least, a receipt that names and/or, preferably, describes the piece, and acknowledges the date of its placement in the gallery's hands, in order to demonstrate to your insurer or to law enforcement officials that the piece was there and is now gone.

One step better than a simple receipt would be a written contract. A contract sets out the obligations and liabilities of BOTH parties – the gallery and the art owner who is consigning the work. The contract

terms might include representations about the legal status of ownership, assertions of authenticity (if any), length of time the work will remain with the gallery, whether or not it must remain on display throughout that time period, minimum sale price and the gallery's percentage fee for sales as well as any additional costs for storage, advertising, restoration, and so on.

From the art owner's perspective, however, the most critical provisions will be those that specify any authorizations to have the work tested or examined by others outside the gallery, and the insurance and limitation of liability provisions. As to the first, the work's owner should require advance notification, and opportunity to approve or disapprove, of any and all shipping of the work to another location, as well as any testing – particularly that which could be destructive, even of a tiny portion of a work. Such testing may very well be necessary, or at least helpful, in establishing authenticity, and thus in boosting a work's resale value. But depending on what is being done, testing may well also damage at least a portion of a work – and depending on the work's provenance or potential value, may be wholly unnecessary. Regardless of the gallery owner's opinion about the necessity of testing on any particular work, the decision to do so must be retained by the owner. In the absence of specific agreement allowing destructive testing, removing a portion of a work – such as slicing a rectangle out of the back of a canvas supposedly for materials testing, as was done in our sad example, is not only unconscionable but illegal, constituting both a civil and criminal destruction of someone else's property without right to do so.

INSURANCE AND LIABILITY LIMITATIONS

As to insurance and liability for damage, different galleries enter into very different arrangements with their clients. The important thing for an art owner is to know ahead of time what the liability terms are at

any given gallery, and then the art owner can make up his or her mind as to whether to utilize that gallery – and make any necessary adjustments in their own insurance coverage – accordingly.

The Andenken Gallery in Denver, Colorado, publishes its very simple, easily understandable gallery placement contract on its website, www.andeken.com. While an art owner – or the gallery – might want to insert specific modifications for any particular piece (such as a work requiring specific display requirements to support a fragile surface or flexible sculptural undercarriage), this contract hits the main points that should be addressed between the gallery and a person selling art through the gallery. The liability provision includes the statement that “Andenken will take all precautions to protect art work. ... All artwork is insured from drop off dates through pick up date and not extending beyond that period.” By the terms of this provision, an art owner knows that he or she must provide his or her own insurance for transit to and from the gallery, but that Andenken will insure the work while it’s on premises.

Andenken should also be commended for making the representation that they will appropriately protect art in their custody. Many art owners simply assume that a gallery will treasure the artwork and attend to it with capable hands – but the ordinary duty of care imposed by the law falls far short of what most art owners expect from a gallery. Here, Andenken assures its clientele in writing that they will in fact exercise the care that art owners expect. It seems strange that this should be so rare a provision in art gallery contracts that it warrants special positive mention, but that seems to be the case.

The ProArts Gallery of Oakland, California, by the terms of their consignment placement policy, (www.proartsgallery.org) seeks to strictly limit its own liability for damage done to works while placed on consignment. In this case, however, that’s not necessarily

the bad thing that it might at first appear: ProArts is effectively an artist’s collective, providing valuable, well-placed gallery space to artists who might not otherwise be able to effectively market their works. Most other artist’s-collective or membership cooperative galleries include a similar provision in the terms of their membership. The price of maintaining a low-cost, artist-led gallery space is that the artists placing their work there must pick up the tab of insuring their works against damage, and must be willing to let go of any claims for harm that inadvertently occurs while the works are being displayed. Some artists might choose not to place their work in this gallery because of these terms – but because ProArts publishes their terms, artists will be able to knowingly choose whether the risk, or cost of providing their own coverage, is worth the valuable exposure to be gained through working with this gallery. By having the terms in writing, those decisions can be knowledgeably made ahead of time – and not come as a sudden shock when the phone call comes to explain that a water pipe has burst over your papier mâché sculpture.

Many other commercial galleries attempt to fully divest themselves of any liability whatsoever. Art owners should think long and hard before placing their work in a gallery which earnestly tries to distance itself from reasonable obligations of care, protection, and liability for works in their custody. Even an air-tight liability limitation provision, however, would not protect a gallery against liability for deliberate acts of damage such as cutting a piece out of a canvas. And depending on the weight of the evidence, a liability waiver might not fully insulate a gallery against liability for things like water damage, but this would depend on whether the damage was inflicted by pure, nearly unforeseeable accident (a fully inspected, previously secure pipe bursting due to a large truck accident a block away), or whether the gallery had reason to know the damage was likely to occur (storing the work sitting on the floor in a frequently wet basement bathroom).

PHOTOGRAPH AND REGISTER YOUR ART WORK

The best protection of all for the art owner would be to attach a much more detailed description of the work, including photographs, to the written contract. You could simply take photos at your home or office before delivering the piece, but dated photos taken at the gallery itself— perhaps with an instant camera like a Polaroid so they can be signed, dated, and stapled right to the receipt or contract. Be sure to photograph the back, front, corners, and any significant features like a signature, date, prior gallery or shipment stickers, and Fine Art Registry™ (FAR®) registration sticker. You are not only looking to ensure that you get the same piece back, but also to document precisely what condition the work was in when you delivered it. If there is already damage to the work, this will also help protect the gallery owner from any improper claims of responsibility. The work should be photographed once again when it is either sold or when the owner picks it back up if it doesn't get sold. That way any damage to the work which occurred in the gallery's hands can be fully memorialized in photographs before it leaves the gallery. Again, this helps protect both the owner – who then has a solid basis on which to seek the costs of repairing the damages from

the gallery – and the gallery, who is then protected from the art owner leaving the piece where the front lawn sprinkler hits it through the front window and then blaming the gallery. When the actual condition is documented, both sides can work from the same page. FAR members have an added layer of protection, as they can easily note the transfer of their artwork from their possession to the gallery, and post digital photos documenting the condition of the work at the time the work is submitted to the gallery.

While some surprises in life are fun, being surprised at the condition of your artwork when you retrieve it from a gallery is not one of them. Document the condition of your artwork before delivering it to a gallery as well as when you pick it up, and be sure to get the terms of testing, insurance, and liability – as well as all the general business terms regarding the placement and sale – in writing before you relinquish control over the work. Don't hesitate to withhold a work from a gallery if you don't like the terms that are offered; there are plenty of other galleries out there who can handle your artwork, and a rapidly increasing number of other art market resources such as on-line galleries as well. Just be careful not to knock your painting off the wall at home while vacuuming down cobwebs while you look for another gallery. 📷

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