

# Art and cultural assets news – autumn: Expert opinions and liabilities

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**CATEGORY:**

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**CLIENT TYPES:**

ART AND CULTURAL INSTITUTIONS

It is hardly news that fakes, forgeries and works of doubtful provenance, including World War II plunder, continue to proliferate in the United States art market. In addition, a number of antiquities and other artifacts, amid evolving judicial interpretation of the National Stolen Property Act, have been repatriated in recent years in the glare of the media. Accordingly, expert opinions become a crucial instrument in serving to rid the market of unwanted material. Moreover the art expert does not render an opinion about the value or authorship of art without risk: art experts have been sued, over the years, in disparagement, defamation, negligence, negligent misrepresentation and on various theories of fraud. As seen in the following case, however, fraud's legal requisites generally defeat the litigious plaintiff. Collectors, stand warned.

In the 2007 decision of *Krahmer v. Christie's*, Jay Cantor, head of Christie's American paintings division, received on consignment from the Detroit Club in 1986 a work entitled *Interior*, purportedly by Frank Weston Benson, depicting a young woman in the half light standing beside a table. In researching its provenance, Cantor had learned that the Club had acquired the painting directly from Benson in 1914 and that it had been independently appraised as a Benson piece at least three times between 1925 and 1985.

When *Interior* arrived at Christie's, its specialists examined both the painting and its frame. Satisfied that the work was by Benson, Christie's, in May of 1986, offered it for sale at auction, where it failed to sell. Christie's then, at the Club's behest, reoffered it in December 1986 with a lower reserve and estimates, at which time it was purchased by the plaintiffs Johannes and Betty Krahmer. The Krahmers' auction catalogue conspicuously stated that a six-year warranty of authenticity applied to the sale of *Interior* and later received a nameplate that the painting belonged to the Detroit Club.

After the sale, Cantor congratulated the Krahmers and provided an insurance appraisal of *Interior*: he listed the Krahmers' purchase price at \$38,500 as the valuation. In 1990, Cantor visited the Krahmers' home and raised the appraised value of *Interior* to \$85,000. In 1999, while attempting to authenticate the painting, the Krahmers applied to the Catalogue Raisonné Committee for F. W. Benson at the Vose Galleries in Boston. While the application was pending, the Krahmers learned of a painting strikingly similar to *Interior* that was housed at the New Britain (Connecticut) Art Museum. When the Krahmers brought this to the Committee's attention, they were told that Benson might have painted two works depicting the same scene.

In 2002, the Krahmers attempted to sell the painting through Sotheby's. Sotheby's declined to accept the painting believing that it might be a forgery. The Krahmers now sought to have the Committee determine whether *Interior* was in fact a forgery. The Committee concluded that *Interior* was not Benson's work and noted that the painting in the New Britain Museum was more consistent with Benson's style.

The Committee theorized that the original painting was sold to the Detroit Club and then somehow removed from its frame and replaced by the forgery that the Krahmers eventually purchased – and that the original Benson, after being removed from its frame at the Detroit Club, came into the hands of an art dealer who, in turn, sold it to the New Britain Museum.

Upon receiving the Committee's report, the Krahmers asked Christie's to rescind the 1986 sale. Christie's refused, reasoning that the six-year warranty of authenticity on the painting had expired years earlier. In July 2004, the Krahmers brought suit for rescission on a theory of fraud, and Christie's moved for dismissal on summary judgment.

To support their claim, the Krahmers alleged that Christie's fraudulently induced them to believe that the painting they had purchased in December 1986 was an authentic Benson. This was done by intentionally misrepresenting the painting's authenticity and subsequently appraising the painting at more than twice the amount of the Krahmers' purchase price. According to the Krahmers, Christie's knowingly and recklessly disregarded flaws of *Interior*'s provenance while guaranteeing its authenticity in a contrived effort to lure them into a false sense of security with regard to the purchase. The Krahmers additionally argued that Christie's conveyance of the nameplate and the auction house's subsequent appraisals of the work served to fraudulently conceal *Interior*'s lack of authenticity thereby tolling, that is, suspending the three-year statute of limitations. (The parties agreed that New York's six-year statute of limitations applied to the breach of warranty claim and Delaware's three-year statute of limitations applied to the claim of fraudulent concealment. Under fraudulent concealment, if established, the statute of limitations governing a cause of action can be suspended to enable an otherwise time-barred action to proceed, as the defendant would have knowingly acted to prevent the plaintiff from discovering his rights.)

Christie's argued that the Krahmers' claim was mere conjecture in that it lacked an evidentiary basis for their theory of fraud. Christie's also noted the due diligence it had performed on the painting prior to the auction, which uncovered nothing to question its authenticity. Therefore, Christie's asserted, it lacked the necessary scienter (that is, guilty knowledge of an earlier state of facts) required to establish fraud. Further, Christie's

asserted that the Krahmers could not support a theory of suspending the statute of limitations based on fraudulent concealment as the Krahmers were on notice as far back as 1999 that the painting might not be an original Benson.

The Delaware court, holding for Christie's, dismissed the case on summary judgment for two reasons. First, even if the painting were a forgery, the Krahmers failed to provide evidence from which the court might reasonably infer scienter on Christie's part. Second, the Krahmers could not prevail on a theory of fraudulent concealment thereby suspending the statute of limitations, as they were on notice by at least 1999 that their painting might be a forgery.