

The Art Market Adjusts: The impact of the government's decreased oversight of private sale of antiquities and other artwork

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The coronavirus pandemic has disrupted “business as usual” for the federal and state governments just as it has for individuals and businesses. This disruption will likely have an immediate impact on the ability of art market participants to comply with certain laws related to the art market, and unfortunately may affect the Government’s ability to properly oversee and enforce its laws. For example, dealers who have sought guidance from the Government related to compliance with recent anti-money laundering regulations may not receive a response for weeks or months, and collectors who own items of cultural property or artifacts that contain the materials of endangered species may be delayed in disposing of their art assets while they wait for Government’s oversight or approval.

My colleagues, Kenley Stark and Georges Lederman, discuss the impact of the coronavirus on the Government’s regulation and enforcement of laws concerning the art market.

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Kenley: Over the past few weeks, many businesses and employees have been forced to rapidly adjust to new restrictions and shift their priorities. To what extent has Government regulation of the art market already changed due to the coronavirus?

Georges: We have already seen what we believe to be a decrease, albeit temporary, in law enforcement oversight of the art market. There are three basic reasons for this shift.

First, the federal and state courts have largely shut down, except for essential matters such as arraignments in the criminal courts and emergency orders. Otherwise, grand jury proceedings, hearings, oral arguments and jury trials have all been adjourned. Grand juries are an important law enforcement tool in any investigation, as they issue subpoenas for documents and other evidence essential to commencing any investigation. Without grand juries, prosecutors are limited in their ability to build a case.

Second, as economic activity slows, as is the case with the art market in general, law enforcement agencies are redirecting their resources and targeting those who seek to profit from the current health crisis by price-gouging consumers and engaging in scams that play on the fears of an already shaken populace.

Third, prosecutors and many agents are subject to the same remote working directives as the rest of us. As a result, prosecutors have been forced to deal with their existing caseloads under challenging circumstances, and it is improbable that they will embark on new investigations in the art market, at least for now.

Kenley: In the face of court closures and the reduced availability of agency officials, how would you advise clients proceed when their continued art-related transactions depend upon the Government’s regulatory guidance or judicial determination?

Georges: Thankfully, the majority of our clients are not under investigation for having allegedly committed any crime and instead are seeking guidance from the Government for the disposition of art assets. For example, dealers and collectors are eager to comply with the U.S. Department of the Treasury Office of Foreign Assets Control anti-money laundering regulations but have not been able to receive any guidance since the

health crisis began. On the flip side, foreign consignors are demanding the return of their property or monies on deposit for the purchase of other artwork, threatening lawsuits if their assets are not returned immediately. We strongly advise clients to stay the course and act only when they receive answers from counsel necessary to make an informed decision. Disgruntled consignors contemplating the initiation of any lawsuits under these circumstances would receive a very chilly reception from judges.

Kenley: Similarly, how would you advise a client who wishes to engage in self-reporting during this time? For example, what should a client do if they wish to turn over to the Government illegal items of cultural property or materials containing elements of an endangered species?

Georges: As we discussed above, it is unlikely that the agencies that regulate these matters, such as the U.S. Fish and Wildlife Service, will be able to address these concerns for the moment. Clients should continue to hold on to their property and memorialize any and all attempts to contact the Government, whether directly or through their lawyer, by phone, mail, email or otherwise. Doing so will mitigate any future claim that one failed to act in a timely manner to dispose properly of such property.

Kenley: Do you think that the coronavirus crisis will have any longer-term effects on the Government's oversight of the art market?

Georges: I do believe that the Government, faced with an economic downturn as a result of the health crisis, will refocus its efforts towards investigations and prosecutions designed to raise revenue. U.S. corporations, already suffering from a significant decline in share value, will probably not be the target of costly prosecutions; rather, the Government will fix its sights on foreign corporations which run afoul of anti-money laundering and tax regulations. The international art market is a prime target for this purpose, and it behooves art market participants to comply with these regulations in a timely fashion.

Additionally, the U.S. Department of Justice has announced the formation of a task force whose purpose is to investigate individuals and companies that have profited from the coronavirus crisis by price-gouging consumers on basic necessities, bid-rigging and hoarding supplies, thereby placing healthcare providers and first responders at considerable risk. Those who have been victimized by such activity may be able to seek legal redress against these offenders.

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