A GLANCE AT THE PRESENT STATE OF ART AUCTION SIGNS AND SYMBOLS

By Johnlee S. Curtis

Most collectors purchase art either from galleries or at art auctions, with the latter method gaining popularity in recent years. When bidding for art at an auction, lot symbols - those auction catalogue ciphers that relate to a variety of disclosures – can prove difficult to fully understand. Further complicating matters, some facts which legally should be disclosed about a particular lot are not even afforded a symbol by the auction house, rendering the undisclosed interests literally invisible to the bidding buyer.

A recent federal lawsuit filed by a prominent San Francisco art collector against Sotheby's (Minor v. Sotheby's) reveals systemic weaknesses inherent in the present auction catalogue lot symbol system. The roots of the present problem burrow back to the traditional role of auction houses as disinterested auctioneers. That is, auction houses never acted as direct stakeholders or financiers of the works they offered at auction. Rather, historically, they played the sterile role of intermediary between seller and bidder – in exchange for a commission. Recently, however, this role has become blurred as auction houses offer an ever-increasing array of services. Moreover, for the past eight years, the major auction houses have started acquiring, trading, and pre-selling stakes in art. The convergence of these uprooting factors has made the legal leaves wilt on the tree of art auction catalogue disclosures. In New York, for example, auctioneers have common law and statutory duties to disclose any interest – either direct or indirect – in every piece of art that they sell. That means if an auctioneer has an ownership interest in a piece of art, it is required to disclose that fact to bidders. The rationale for such laws is that a potential buyer deserves to know whether the auction house itself is self-interested in either selling the work at any cost or in selling the work at a predetermined minimum. Simply put, when an auction house has an interest in a work apart from a standard commission, that interest can affect the selling price ultimately obtained for the work at auction. Normally, lot symbols placed next to the catalogue descriptions of each work of art protect auction houses by covering a panoply of disclosure requirements. Buyers are currently wise to beware, however, because disclosure of economic and ownership interests in lots can be conspicuously absent. Sotheby's, for example, presently has no lot symbol to specifically disclose that a work of art is owned by the auctioneer as a result of a defaulted loan. In Minor vs. Sotheby's, a successful bidder is contending that Sotheby's should have marked the lot that was purchased with the symbol Δ, since that symbol is used by Sotheby's to indicate that it has an economic ownership interest in a lot. Sotheby's concedes that it had an interest in the work, but contends that the symbol did not precisely apply, as the work was used as security for a loan and was not a pure economic interest. This case and the debate underscore the new art auction environment in which the specific semantics of high finance, the agile arguments of attorneys, and the novel necessity of savvy advisors have crept into a once simple structure. Knowledge of financial instruments such as guarantees and loan securities must now be in every bidder's arsenal of acumen for art auction acquisitions. When an individual borrows money from an auction house, places a work or multiple works up as collateral security to support the loan, and then defaults on the loan, it is in the auction house's interest to manipulate the price of the work or works in order to recoup the loaned amount. Likewise, when an auction house promises a seller a minimum price will be obtained for a work, and the work does not fetch the promised price, the auction house must often pay the seller the difference between the promised "guarantee" and the final sales price. Both of these scenarios place the auction house in the role of a stakeholder in the sale. Disclosure of such stakes, then, is vital to the interests of bidders. In Minor vs. Sotheby's, Sotheby's is facing allegations of deceptive business practices, breach of fiduciary duty, fraud, and unjust enrichment. Sotheby's should be aware by now that such unwanted press, litigation expense, and ill will could be avoided by adding a little symbol to their future catalogues.

This case presents, and the current economic period accentuates, the need for full disclosure of financial activities surrounding works of art at auction. Additional symbols representing such interests could and should be introduced to alert bidders to the fact that an ownership stake may be sullied by the presence of a loan default or price guarantees. Bidders are wise to seek the counsel of an attorney to guide the acquisition process, in order to avoid situations in which the previously invisible ink of an auction house's financial interests in a work is revealed post-sale.

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