

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

# NEW YORK CITY BAR

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## **REPORT BY THE ART LAW COMMITTEE RECOMMENDING AMENDMENTS TO ARTICLES 11 AND 12 OF NEW YORK ARTS AND CULTURAL AFFAIRS LAW**

This report is respectfully submitted by the Art Law Committee of the New York City Bar Association.<sup>1</sup> The Association is an organization of over 23,000 lawyers and judges dedicated to improving the administration of justice. The members of the Art Law Committee address legal issues relating to works of art.

The Committee submits this report and proposes amendments to address certain deficiencies in provisions of the New York Arts and Cultural Affairs Law (“NYACAL”) that are applicable to consignments of works of art to art merchants by artists, their heirs and their personal representatives. In creating this proposal, the Committee evaluated similar laws from other states and related New York laws. (Attached is a list of other laws in the United States that address issues similar to those addressed in Article 12 of NYACAL.) The Committee’s review also was informed by the facts and developments in the various lawsuits and bankruptcy proceedings concerning Salander O’Reilly Galleries LLC, which is discussed in further detail below. The Committee’s proposed amendments are attached hereto.

### **Background**

Artists rely on sales of their work to earn a living. Art galleries are an important outlet for such sales. Galleries are compensated for selling artists’ works usually by taking a percentage of the sales proceeds as a commission. Commissions usually range from 10% to 50% and it is not uncommon for galleries to receive 40% to 50% for works consigned by artists. Compensation may instead be in the form of a fixed fee or any amount the gallery receives for a work of art above a specified price agreed to by the artist and the gallery for the sale of a particular work of art.

Many galleries do not segregate the portion of the sales proceeds that belong to the artist from the portion of the sales proceeds that is owed to the gallery. Instead, many galleries place the total sales proceeds in a single account that is also used to pay for the gallery’s regular operating expenses.

When galleries that comingle funds encounter financial difficulties, they at times are unable to pay artists the sales proceeds they are owed because the galleries used those proceeds to pay the gallery’s operating expenses. As a matter of law, the sales proceeds are property of

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<sup>1</sup> This report has been reviewed and approved by the Association’s Committee on Trusts, Estates and Surrogate’s Courts and Committee on Lesbian, Gay, Bisexual and Transgender Rights.

the artist and galleries do not have discretion to use those proceeds for their own purposes. The existing provisions of Article 12 of NYACAL recognize this principle by providing that sales proceeds “are trust funds in the hands of the consignee for the benefit of the consignor.” The existing NYACAL provisions, however, do not include any measures to enforce the trust funds principle and do not include penalties for galleries’ failure to treat sales proceeds as trust funds. The lack of such measures and penalties enables galleries to continue using consignors’ sales proceeds to pay the galleries’ own operating expenses. When these galleries fail financially, the artists lose the money to which they alone are entitled.

The collapse of the Salander O’Reilly Galleries (“SOG”) illustrates this problem. Prior to filing for bankruptcy protection in 2007, SOG operated as a gallery for more than 20 years. By 2005, it was a high profile gallery located in a five-floor townhouse off 5th Avenue on 71st Street, often exhibiting four separate shows on each of its four exhibition floors. The gallery had relationships with many artists, artists’ heirs and artists’ estates. It comingled the sales proceeds that belonged to the artists, artists’ heirs and artists’ estates with the gallery’s own funds. In 2005, SOG had difficulty paying consignors the portion of sales proceeds owed to them, and by late 2007, SOG ceased paying its consignors entirely. In October, an involuntary bankruptcy petition was filed, and within a few weeks the gallery converted it to a voluntary bankruptcy petition under chapter 11 of the U.S. Bankruptcy Laws. SOG’s principal, Lawrence Salander was indicted and plead guilty on March 18, 2010, to numerous fraud charges. No charges were brought for comingling funds or SOG’s misuse of funds belonging to artists, their heirs, or estates.

Millions of dollars belonging to consignors, including artists, artists’ heirs and artists’ estates were never paid by the SOG to those artists, artists’ heirs and artists’ estates. The sales proceeds that SOG was required to keep as “trust funds . . . for the benefit of the consignor” under the existing NYACAL provisions were gone, having been spent by SOG for its own operating expenses. In addition, the gallery had possession or control of hundreds of works of art consigned by artists, their heirs and their estates. However, because SOG’s debts far exceeded its minimal remaining assets, creditors attempted to claim the consigned works of art in the gallery’s possession or control as assets of the estate. With greater financial resources to fund the positions they took in the legal proceedings, creditors such as SOG’s principal bank relied on creative legal arguments to tie up works consigned by artists’ heirs. A common argument was to challenge whether the children of artists qualified as heirs under NYACAL. The contention was that, if an artist died and left works of art to his or her spouse, the children of the artist and spouse would not qualify as “heirs” because they did not receive the works of art directly from the artist. Section 2-1.1 of New York’s Estates, Powers and Trusts Law (“EPTL”), however, provides that whenever the term “heirs” is used in a statute or instrument, it means the distributees, as defined in Section 1-2.5. EPTL Section 1-2.5 provides: “A distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution.” Thus, under EPTL Section 1-2.5, the issue of an artist will qualify as a distributee of the artist (and therefore an heir of the artist) regardless of whether the artist first leaves works of art to his or her spouse. Unable to pay legal fees to challenge such creative legal arguments, however, the artists’ sons and daughters in many cases had to pay the estate to buy back their art.

The Committee’s proposed amendments to Articles 11 and 12 of NYACAL (the “Amendments”) are designed to add teeth to the existing law and clarify certain provisions to prevent unintended interpretations from interfering with the purpose of these Articles.

## **Proposed Amendments**

### *Article 11 of NYACAL*

To ensure that children of an artist in circumstances like those present in the Salander O'Reilly Gallery case qualify for the protections of Article 12 of NYACAL governing consignments, the Committee has proposed amending Article 11 ("Definitions") to include a definition of "heir" that cross references the applicable definition in the EPTL.

Similarly, the Amendments include a definition of the term "personal representative," which, like the newly added definition of "heir," cross references the applicable definition in the EPTL. This change is necessary to prevent uncertainty regarding the meaning of these terms because they were not previously defined in the statute and arguments inconsistent with these definitions were causing consignors either to forgo their rights or to incur significant unnecessary expense to oppose legal arguments to the contrary.<sup>2</sup>

### *Article 12 of NYACAL*

The Amendments specify, in subsection (v) of Article 12.01.1(a), that trust property and trust funds, which are referenced in Section 12.01.1(a)(ii) and (iii), shall be considered property held in statutory trust as defined and contemplated by 11 U.S.C. section 541 and other relevant bankruptcy law. This provision followed an amendment made to a similar law in Massachusetts<sup>3</sup> to make explicit that works of art consigned by artists, craftspeople, their heirs and personal representatives to art merchants are not, and shall not become, the property of the art merchant, or the art merchant's bankruptcy estate.

The Amendments also add a clause specifying that the trust property and trust funds referred to in Section 12.01.1(a)(ii) and (iii) shall not be subordinate to any claims, liens or security interests "of the consignee's creditors." This last clause was added to clarify the terms immediately preceding it (i.e., "claims, liens or security interests").

As currently written, the statute allows a consignor to waive the provisions of Section 12.01(a)(iii) so long as the waiver is clear, conspicuous, in writing and signed by the consignor, with certain exceptions. This permits waiver of the provision establishing that sales proceeds constitute trusts funds. The Amendments delete this exception to the "no waiver" clause in its entirety. Continuing to permit a waiver of the trust fund provisions would enable galleries to insist on the waiver, given their stronger bargaining power, and thereby undermine the purpose of the trust fund law and these Amendments.

The Amendments add a new section 2 to Section 12.01. It provides that if the consignee fails to treat the trust funds and trust property identified in Section 1 in accordance with the

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<sup>2</sup> The Art Law Committee notes that there is significant interest within the New York City Bar Association in studying the definition of "heir" and "personal representative" under New York law with regard to whether those statutes discriminate against same-sex partners and with regard to appropriate legislative action to amend those laws. However, the Amendments address revisions to existing New York consignment law that the Committee believes to be desirable, regardless.

<sup>3</sup> Section 1 of Chapter 104A of the Massachusetts General Law.

requirements of fiduciaries in Section 11-1.6 of the EPTL, then such failure shall constitute a violation of NYACAL Article 12 and Section 11-1.6 of the EPTL. This amendment makes explicit the fiduciary obligations of the consignee with respect to trust property and trust funds in the consignee's possession and control. Among other things, the cross-referenced EPTL section specifies that property received as a fiduciary must be kept separate from the fiduciary's own property. It also illustrates that the fiduciary generally cannot treat the trust property or trust funds as if it were the fiduciary's own property or funds.

In addition, the existing statute does not specify the consequences in the event the fiduciary breaches his obligations. The lawsuits and claims arising out of events related to the Salander O'Reilly Gallery demonstrate a need for making such consequences explicit. The Amendments cross-reference EPTL Section 11-1.6 and thereby make clear that a breach of such obligations include the penalties for committing a misdemeanor, as is already specified in EPTL Section 11-1.6.

Finally, the Amendments create a new Section 3 that further specifies consequences for breach of the fiduciary duties created by Article 12's statutory trust provisions. The Amendments makes explicit a private right of action under the Article and specify that a consignor may recover reasonable attorneys' fees if and to the extent such consignor is successful in such action. As one Court has noted, that absence of an attorneys' fee provision "appears to be a gap in the protections afforded to artists under section 12.01." In Koeniges v. Woodward, 183 Misc.2d 347, 358, 702 N.Y.S.2d 781,789 (NY Civ Ct. 2000), the Court explained:

While the court has denied plaintiff's claims for attorneys' fees and punitive damages, the court is sympathetic to plaintiff's argument that a violation of section 12.01 occurred, and the return of the photographs after institution of a lawsuit and almost two years later does not fully remedy the wrong. While not necessarily implicated here, there appears to be a gap in the protections afforded to artists under section 12.01. Perhaps, should the Legislature choose to amend the Arts and Cultural Affairs Law, the Legislature may deem it appropriate to address this issue. Id.

The new Section 3 added by the Amendments also specifies that if a consignor in a private action establishes a *prima facie* case of delivery of a work of art to a consignee and the consignor's demand for return of the work of art or sales proceeds from the consignee, the consignee has the burden of proving its defenses to the consignor's claims.

### Conclusion

The Committee's proposed amendments will add teeth to the existing trust property and trust fund provisions of Articles 11 and 12 of NYACAL. In addition, the proposed amendments will provide clarity to prevent unintended interpretations of certain provisions from interfering with the intended application of these provisions.

**STATE OF NEW YORK**

**2009-2010**

**IN ASSEMBLY / SENATE**

\_\_\_\_\_, 2010

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Introduced by \_\_\_\_\_

AN ACT to amend the arts and cultural affairs law, in relation to consignments of works of art to art merchants by artists, their heirs and their personal representatives.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 11.01. Definitions. As used in this title:

1. “Artist” means the creator of a work of fine art or, in the case of multiples, the person who conceived or created the image which is contained in or which constitutes the master from which the individual print was made.

2. “Art merchant” means a person who is in the business of dealing, exclusively or non-exclusively, in works of fine art or multiples, or a person who by his occupation holds himself out as having knowledge or skill peculiar to such works, or to whom such knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having such knowledge or skill. The term “art merchant” includes an auctioneer who sells such works at public auction, and except in the case of multiples, includes persons, not otherwise defined or treated as art merchants herein, who are consignors or principals of auctioneers.

3. “Author” or “authorship” refers to the creator of a work of fine art or multiple or to the period, culture, source or origin, as the case may be, with which the creation of such work is identified in the description of the work.

4. “Creditors” means “creditor” as defined in subdivision twelve of section 1-201 of the uniform commercial code.

5. “Counterfeit” means a work of fine art or multiple made, altered or copied, with or without intent to deceive, in such manner that it appears or is claimed to have an authorship which it does not in fact possess.

6. “Certificate of authenticity” means a written statement by an art merchant confirming, approving or attesting to the authorship of a work of fine art or multiple, which is capable of being used to the advantage or disadvantage of some person.

7. “Conservation” means acts taken to correct deterioration and alteration and acts taken to prevent, stop or retard deterioration.

8. “Craft” means a functional or non-functional work individually designed, and crafted by hand, in any medium including but not limited to textile, tile, paper, clay, glass, fiber, wood, metal or plastic; provided, however, that if produced in multiples, craft shall not include works mass produced or produced in other than a limited edition.

9. “Fine art” means a painting, sculpture, drawing, or work of graphic art, and print, but not multiples.

10. “Heir” shall have the meaning provided in the Estates, Powers and Trust Law.

11. “Limited edition” means works of art produced from a master, all of which are the same image and bear numbers or other markings to denote the limited production thereof to a stated maximum number of multiples, or are otherwise held out as limited to a maximum number of multiples.

12. “Master” when used alone is used in lieu of and means the same as such things as printing plate, stone, block, screen, photographic negative or other like material which contains an image used to produce visual art objects in multiples, or in the case of sculptures, a mold, model, cast, form or other prototype, other than from glass, which additional multiples of sculpture are produced, fabricated or carved.

13. “On consignment” means that no title to, estate in, or right to possession of, the work of fine art or multiple that is superior to that of the consignor vests in the consignee, notwithstanding the consignee’s power or authority to transfer or convey all the right, title and interest of the consignor, in and to such work, to a third person.

14. “Person” means an individual, partnership, corporation, association or other group, however organized.

15. “Personal representative” shall have the meaning provided in the Estates, Powers and Trust Law.

16. “Print” in addition to meaning a multiple produced by, but not limited to, such processes as engraving, etching, woodcutting, lithography and serigraphy, also means multiples produced or developed from photographic negatives, or any combination thereof.

17. \_\_\_\_\_ “Proofs” means multiples which are the same as, and which are produced from the same masters as, the multiples in a limited edition, but which, whether so designated or not, are set aside from and are in addition to the limited edition to which they relate.

18. \_\_\_\_\_ “Reproduction” means a copy, in any medium, of a work of fine art, that is displayed or published under circumstances that, reasonably construed, evinces an intent that it be taken as a representation of a work of fine art as created by the artist.

19. \_\_\_\_\_ “Reproduction right” means a right to reproduce, prepare derivative works of, distribute copies of, publicly perform or publicly display a work of fine art.

20. \_\_\_\_\_ “Sculpture” means a three-dimensional fine art object produced, fabricated or carved in multiple from a mold, model, cast, form or other prototype, other than from glass, sold, offered for sale or consigned in, into or from this state for an amount in excess of fifteen hundred dollars.

21. \_\_\_\_\_ “Signed” means autographed by the artist's own hand, and not by mechanical means of reproduction, after the multiple was produced, whether or not the master was signed or unsigned.

22. \_\_\_\_\_ “Visual art multiples” or “multiples” means prints, photographs, positive or negative, sculpture and similar art objects produced in more than one copy and sold, offered for sale or consigned in, into or from this state for an amount in excess of one hundred dollars exclusive of any frame or in the case of sculpture, an amount in excess of fifteen hundred dollars. Pages or sheets taken from books and magazines and offered for sale or sold as visual art objects shall be included, but books and magazines are excluded.

23. \_\_\_\_\_ “Written instrument” means a written or printed agreement, bill of sale, invoice, certificate of authenticity, catalogue or any other written or printed note or memorandum or label describing the work of fine art or multiple which is to be sold, exchanged or consigned by an art merchant.

#### § 12.01. Artist-art merchant relationships.

1. Notwithstanding any custom, practice or usage of the trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary:

(a) Whenever an artist or craftsperson, or the [his] heirs or personal representatives of such artist or craftsperson, delivers or causes to be delivered a work of fine art, craft or a print of [his] such artist's or craftsperson's own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a

consignor/consignee relationship as between such artist or craftsman, or the heirs or personal representatives of such artist or craftsman, and such art merchant with respect to the said work, and:

- (i) such consignee shall thereafter be deemed to be the agent of such consignor with respect to the said work;
- (ii) such work is trust property in the hands of the consignee for the benefit of the consignor;
- (iii) any proceeds from the sale of such work are trust funds in the hands of the consignee for the benefit of the consignor;
- (iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor; provided that, if such work is resold to a bona fide third party before the consignor has been paid in full, the resale proceeds are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full; and
- (v) such trust property and trust funds shall be considered property held in statutory trust as defined and contemplated by 11 U.S.C. section 541 and other relevant bankruptcy law, and no such trust property or trust funds shall become the property of the consignee or be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever of the consignee's creditors.

(b) ~~Waiver of any provision of this section is absolutely void. [except that a consignor may lawfully waive the provisions of clause (iii) of paragraph (a) of this subdivision, if such waiver is clear, conspicuous, in writing and subscribed by the consignor, provided:~~

- ~~(i) no such waiver shall be valid with respect to the first two thousand five hundred dollars of gross proceeds of sales received in any twelve month period commencing with the date of the execution of such waiver;~~
- ~~(ii) no such waiver shall be valid with respect to the proceeds of a work initially received on consignment but subsequently purchased by the consignee directly or indirectly for his own account; and~~
- ~~(iii) no such waiver shall inure to the benefit of the consignee's creditors in any manner which might be inconsistent with the consignor's rights under this subdivision.]~~

(c) [~~proceeds~~] Proceeds from the sale of consigned works covered by this section shall be deemed to be revenue from the sale of tangible goods and not revenue from the provision of services to the consignor or others, except that the provisions of this paragraph shall not apply to proceeds from the sale of consigned works sold at public auction.

2. If a consignee fails to treat the trust property or trust funds identified in Section 1(a) above in accordance with the requirements of fiduciaries in Section 11-1.6 of the Estates, Powers and Trusts Law, such failure shall constitute a violation of this Article and of Section 11-1.6 of the Estates, Powers and Trusts Law and shall be subject to the penalties provided therein.

3. Any person who has been injured by reason of a violation of this article may bring an action in his or her own name to enjoin such unlawful act, to recover his or her actual damages, or both. The court may award reasonable attorneys' fees, costs and expenses to a prevailing plaintiff in any such action. Upon a consignor's establishing in any such action a prima facie case that the consignor delivered or caused to be delivered such work of fine art, craft or print to a consignee as described in Section 1(a) of this Article and made a demand for return of the work or sale proceeds, the consignee shall have the burden of proving its defenses to the consignor's claimed right to return of such work or sale proceeds therefrom.

4. Nothing in this section shall be construed to have any effect upon any written or oral contract or arrangement in existence prior to September first, nineteen hundred sixty-nine or to any extensions or renewals thereof except by the mutual written consent of the parties thereto.

§ 12.03. Exemption from seizure. No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.

## APPENDIX

### ART CONSIGNMENT STATUTES THROUGHOUT THE UNITED STATES

**Alaska** § 45.02.326

**Arizona** § 44-1772; § 44-1773

**Arkansas** § 4-73-207

**California** *Cal. Civ. Code* § 1738.6

**Colorado** § 6-15-102

**Connecticut** § 42-116l

**Florida** § 686.503

**Georgia** § 10-1-520 through §10-1-529. *Shorthand Name: Georgia Consignment of Art Act*

**Idaho** § 28-11-102

**Illinois** § 815 ILCS 320/2

**Iowa** *I.C.A.* § 556D.2

**Kentucky** §365.855 through §365.860

**Louisiana** § 51:2151 through § 51:2156. *Shorthand Name: Artists' Authorship Rights Act*

**Maryland** § 11-8A-01 through § 11-8A-04

**Massachusetts** 104a §1-6

**Michigan** § 442.311 through § 442.315

**Minnesota** § 324.01 through § 324.10

**Missouri** § 407.900 through § 407.910

**Montana** § 22-2-501 through § 22-2-503

**New Hampshire** § 352:3 through §352:12

**New Jersey** § 12A:2-329 through § 12A:2-336. *Shorthand Name: Artworks Consignment Act*

**New Mexico** § 56-11-1 through § 56-11-03. *Shorthand Name: Artists' Consignment Act*

**New York** Arts and Cultural Affairs Law, Article 12

**North Carolina** § 25C-1 through § 25C-4, 25C-12

**Ohio** § 1339.71 through § 1339.78 *\*NOTE: Statute Repealed\**

**Oregon** §359.200 through § 359.255

**Pennsylvania** 73 § 2121 through 73 § 2130. *Shorthand Name: Artworks Consignment Act*

**Tennessee** § 47-25-1001 through § 47-25-1006. *Shorthand Name: Tennessee Consignment of Art Act*

**Texas**, § 2101.001 through § 2101.003. *Shorthand Name: Artists' Consignment Act*

**Washington** § 18.110.010 through § 18.110.030

**Wisconsin** § 129.01 through § 129.08