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## LEAD ARTICLE

# FIX AND TELL: THE SOTHEBY'S/CHRISTINE'S ANTITRUST SCANDAL AND PROPOSED CHANGES TO ILLINOIS ART AUCTION LAW

Donald R. Simon\*

### I. INTRODUCTION

For nearly 200 years, auction houses like Sotheby's and Christie's have been the public's gauge for measuring the value of artwork.<sup>1</sup> These houses act as agents and guides, offering advice to sellers and collectors while making money by taking commissions.<sup>2</sup> Auctions are the most popular methods of buying and selling art.<sup>3</sup> Today, some form of auction comprise nearly fifty percent of transactions involving art.<sup>4</sup> Internationally, the auction industry takes in nearly \$4 billion dollars annually.<sup>5</sup> Of that amount, Sotheby's and Christie's, the largest and most influential auction houses,<sup>6</sup> control more than ninety percent of the world's auction business.<sup>7</sup> Although there are many other auction

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1. Alexandra Peers, *Secrets and Seurats*, WALL ST. J., July 3, 2001, at B1, available at 2001 WL-WSJ 2868521.

2. *Id.*

3. LEONARD D. DUBOFF, *ART LAW IN A NUTSHELL*, 54 (2d ed.1993).

4. *Id.*

5. Carol Vogel & Ralph Blumenthal, *Memos Point to Ties Between Auction Houses*, N.Y. TIMES, May 25, 2001, at A1.

6. JOHN HENRY MERRYMAN & ALBERT E. ELSER, *LAW, ETHICS AND THE VISUAL ARTS*, 761 (Kluwer Law International 1998).

7. Press Release, U.S. Department of Justice, *Sotheby's and Former Top*

houses throughout the world, the actions and practices set forth by these two houses have the greatest influence on the auction market.<sup>8</sup>

The art world seems an unlikely place to find a cartel, so when charges of criminal price-fixing came to light, it sent shockwaves all the way from the hollowed gallery halls of New York to the high society drawing rooms of London and beyond. Sotheby's and Christie's provide essentially the same services to art sellers and they compete primarily on price, undercutting each other's offers to sellers.<sup>9</sup> However, beginning at least as early as April 1993 and continuing at least until December of 1999,<sup>10</sup> the two auction houses entered into a conspiracy to eliminate competition by fixing auction commission rates charged to sellers in the United States and abroad.<sup>11</sup> As a result, sellers lost their bargaining tool.<sup>12</sup> This agreement entered into by Sotheby's and Christie's was found to be an unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the *Sherman Act* (hereinafter "Section 1").<sup>13</sup>

This Article begins with an outline of the facts surrounding the antitrust cases against Sotheby's and Christie's. Next, the Article will give a short explanation of applicable United States and

*Executive Agree to Plead Guilty to Price Fixing on Commissions Charged to Sellers at Auctions* (visited Oct. 5, 2000), <[http://www.usdoj.gov/atr/public/press\\_releases/2000/6639.htm](http://www.usdoj.gov/atr/public/press_releases/2000/6639.htm)>.

8. MERRYMAN, *supra* note 6, at 761.

9. U.S. Department of Justice, *supra* note 7. Each auction house has gained a reputation for selling different types of merchandise. Anna Rohleder, *Which Auction House Is Right For You?*, FORBES.COM (visited Nov. 14, 2001), <<http://www.forbes.com/2001/11/14/1114connguide.html>>. Sotheby's has a reputation for doing well with American furniture and photography. *Id.* Christie's is best known for selling European furniture, books, and manuscripts. *Id.* Both auction houses are known for selling jewelry. *Id.*

10. Douglas Frantz, *Secret Partners: The Unraveling of A Conspiracy*, N.Y. TIMES, (Oct. 8, 2000), <<http://www.nytimes.com/2000/10/08/business/08AUCT.html>>.

11. Department of Justice, *supra* note 7.

12. *Id.*

13. *Id.*

Illinois antitrust statutes. This Article will also analyze the *Illinois Art Auction House Act* and the *Illinois Auction License Act* and will examine some of the fiduciary and ethical considerations involved in art auction house transactions, and how antitrust allegations temper relations between the auction house and the seller. In addition, this Article will suggest certain modifications to both the *Illinois Art Auction House Act* and the *Illinois Auction License Act*, in light of the recent auction house antitrust cases, to provide specific language empowering the Illinois Attorney General to effectively litigate future auction house breaches of fiduciary duties and price-fixing conspiracies, and help prevent auction house cartels in Illinois. These modifications could provide an example to other states on how to effectively prevent and restrain similar fiduciary breaches and antitrust concerns in the art auction industry. Finally, this Article will discuss some of the after effects of the auction house price-fixing scandal..

## II. BACKGROUND

### A. Timeline

The Sotheby's/Christie's price-fixing scandal had all the elements of a cheap crime novel: fine art, high society, backroom deal making, and finally, justice. The conspiracy centered around six central players: the two auction houses and four high-ranking executives.<sup>14</sup> The four executives were: Christopher M. Davidge, former president and CEO, and Sir Anthony Tennant, chairman,<sup>15</sup>

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14. Richard Gruner, *Avoiding Fines Through Offense Monitoring, Detection, and Disclosure: The Race for Amnesty*, 1230 PLI/CORP. 77, 99 (Feb. 2001) (discussing the Department of Justice's conspirator amnesty program which Christie's took advantage of to avoid criminal prosecution).

15. Tennant has refused to come to the U.S. to face price-fixing charges. *History of a Conspiracy*, BBC News (Dec. 5, 2001), <<http://news.bbc.co.uk/1/hi/world/americas/1694100.stm>>. Tennant cannot be extradited to the United States because price-fixing in the United Kingdom is

both of Christie's, and Diana D. Brooks, and A. Alfred Taubman, Sotheby's CEO and chairman respectively.<sup>16</sup>

Beginning as early as April 1993, Davidge began to have regular, secret meetings with Brooks, his counterpart at Sotheby's.<sup>17</sup> According to Department of Justice prosecutors, at these secret meetings, the conspirators agreed to fix sellers' commissions, to publish non-negotiable sellers' commission rate schedules, and in what order each would publish its commission schedule.<sup>18</sup> The two also agreed to not make interest-free loans on consignments from sellers, or make charitable contributions as part of pricing to sellers.<sup>19</sup> This scheme was devised to impair sellers' ability to achieve the best price terms through negotiation.<sup>20</sup> "Davidge kept written notes regarding both his meetings with Brooks and his briefings of Tennant concerning these meetings."<sup>21</sup>

Davidge's illegal activities first became known in connection with his severance package negotiations.<sup>22</sup> By late 1999, Davidge was being forced out of Christie's<sup>23</sup> by Francois Pinault, the company's new owner.<sup>24</sup> Christie's and Davidge could not agree

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merely a civil and not criminal offense. Anna Rohleder, *Who's Who in the Sotheby's Price-Fixing Trial*, FORBES.COM (Nov 14, 2001), <<http://www.forbes.com/2001/11/14/1114players.html>>. However, in the wake of this price-fixing scandal, the United Kingdom has taken steps toward criminalizing antitrust violations, which would allow for such extradition. John Anthony Chavez & Harvey I. Saferstein, *International Cartels and Their Significance to Compliance Programs*, 1291 PLI/CORP. 791, 798 (Feb. 2002).

16. Rohleder, *supra* note 15.

17. *Id.*

18. U.S. Department of Justice, *supra* note 7.

19. *Id.*

20. *Id.*

21. Gruner, *supra* note 14, at 100.

22. *Id.*

23. *Id.*

24. Frantz, *supra* note 10. Pinault, a wealthy French businessman, bought Christie's for \$1.2 billion dollars. *Id.* Pinault is one of France's richest men. Anna Rohleder, *Who's Who in the Sotheby's Price-Fixing Trial*, *supra* n. 15. In addition to Christie's, Pinault heads Yves Saint Laurent, Gucci, Converse, and Samsonite. *Id.*

on the terms of his severance package.<sup>25</sup> “Davidge felt the terms of the package were not sufficiently generous.”<sup>26</sup> He had an ace up his sleeve. “Davidge stunned company officials by turning over nearly 500 pages of notes detailing his illegal contacts with Sotheby’s and his briefings of Tennant about these contacts.”<sup>27</sup> “Upon receipt of Davidge’s notes, Christie’s executives quickly recognized the serious misconduct documented” and “the potentially devastating criminal fines that might result if Christie’s were convicted based on that misconduct.”<sup>28</sup>

Under the U.S. Department of Justice’s (hereinafter “DOJ”) Corporate Leniency Program<sup>29</sup> or “fix-and-tell” policy, if a conspirator confesses before an investigation gets underway, that conspirator is afforded automatic amnesty for its illegal activities.<sup>30</sup> If an investigation is already underway, and a conspirator is the *first* to confess, amnesty or partial immunity is at the DOJ’s discretion.<sup>31</sup> Christie’s officials recognized the merits of amnesty and the need for quick action to ensure that the company was the first to confess its sins to prosecutors.<sup>32</sup> Absent amnesty, Christie’s would bear serious criminal liability because agents of Christie’s, for the company’s benefit, orchestrated the illegal activities.<sup>33</sup> “Within a few weeks of their receipt of Davidge’s detailed notes, Christie’s officials took these records to federal prosecutors seeking amnesty for the firm and for Davidge.”<sup>34</sup>

Based on their promise of cooperation in further investigations of the disclosed misconduct, prosecutors promised Christie’s and Davidge that they would be given conditional immunity.<sup>35</sup>

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25. Frantz, *supra* note 10.

26. Gruner, *supra* note 14, at 100.

27. *Id.*

28. *Id.* at 103.

29. U.S. Department of Justice, *supra* n. 7.

30. Janet Novak, *Fix and Tell*, FORBES, May 4, 1998, at 46.

31. *Id.*

32. Gruner, *supra* note 14, at 103.

33. *Id.* at 100-01.

34. *Id.* at 103.

35. Margaret Mannix, *Going, Going, Gone Away*, U.S. NEWS & WORLD REPORT, Mar. 6, 2000, at 43.

Individuals associated with Sotheby's however, did not fare so well.<sup>36</sup> In October 2000, Sotheby's pled guilty to Section 1 violations.<sup>37</sup> As part of its plea, Sotheby's agreed to pay a criminal fine of \$45 million over a five-year period.<sup>38</sup> Brooks, the first woman to run a major auction house<sup>39</sup> and once considered one of the most powerful women in the art world,<sup>40</sup> plead guilty in October 2000 to federal price-fixing conspiracy charges.<sup>41</sup> She agreed to cooperate with the DOJ and testify against Taubman to avoid a three-year prison term.<sup>42</sup> She would later become the government's star witness against her former co-worker.<sup>43</sup>

While both auction houses were dealing with criminal antitrust allegations, the civil suits were getting under way as well. After an unusual bidding process, Judge Lewis A. Kaplan of the Southern District of New York selected David Boies and Richard B. Drubel of the firm Bois, Schiller and Flexner to represent the buyers and sellers in the class-action civil suit.<sup>44</sup> This usual bidding process required law firms to submit sealed bids to the court detailing the highest settlement they would be willing to accept on behalf of their clients without deducting attorney's fees.<sup>45</sup> The firms submitted a number for a second settlement for

36. Gruner, *supra* note 14, at 103.

37. *Id.*

38. *Id.*

39. Larry Neumeister, *Sotheby's Admits Ripping Off Clients* (July 16, 2001), <<http://www.bergen.com/biz/soth06200010063.htm>>.

40. Brooks, *Sotheby's Both Plead Guilty; Christie's and Sotheby's Move to Settle Civil Suits*, MAINE ANTIQUE DIGEST, JULY 16, 2001, at <http://www.maineantiquedigest.com/articles/anti1100.htm>.

41. Neumeister, *supra* note 39.

42. *Auction House Trial Nears End*, N.Y. TIMES (Dec. 3, 2001), at <<http://www.nytimes.com/aponline/national/AP-Auction-House-Trial.html?searchpv=aponline>>.

43. See Ralph Blumenthal and Carol Vogel, *Price-Fixing at Sotheby's Is Depicted*, N.Y. TIMES, Dec. 4, 2001, at D1.

44. *In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71, 74 (S.D.N.Y. 2000) (detailing the different methods for selecting lead counsel in a class action case and the reasons behind using the auction process in this case).

45. Carol Vogel and Ralph Blumenthal, *Art Auction Houses Agree to Pay \$512 Million in Price-Fixing Case*, N.Y. TIMES, Sept. 23, 2000, at A1.

which the law firm would receive a quarter for their services and their clients the remaining portion.<sup>46</sup> According to Judge Kaplan the bidding process would maximize the recovery for client while keeping legal fees down.<sup>47</sup>

Sotheby's agreed to pay \$256 million to settle civil suits arising out of its price-fixing activities with Christie's.<sup>48</sup> Of this amount, \$156 million will come from A. Alfred Taubman.<sup>49</sup> Christie's also agreed to pay \$256 million to settle the civil suits against it.<sup>50</sup> The problems for the two embattled auction houses will most likely not end there. The European Commission announced recently that it is opening its own anti-competition investigation.<sup>51</sup> Both auction houses have asked the Commission for leniency.<sup>52</sup>

The criminal trial against Taubman began November 8, 2001.<sup>53</sup> It was the culmination of a four-year Justice Department investigation.<sup>54</sup> The two-week trial involved five witnesses called by the prosecution, including Brooks, and 14 defense witnesses.<sup>55</sup> The DOJ's case, based largely in part on the testimony of Brooks, attempted to portray Taubman as "a devious price fixer"<sup>56</sup> who

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46. *Id.*

47. *Id.* For an interesting discussion on the selection of lead counsel for class action lawsuits by auction, see Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650 (Apr. 2002).

48. Gruner, *supra* note 14, at 103.

49. *Id.*

50. *Id.*

51. *Auction Houses Accused of Cartel*, BBC NEWS, (Apr. 19, 2002), <[http://news.bbc.co.uk/1/hi/english/world/americas/newsid\\_1939000/1939248.stm](http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1939000/1939248.stm)>.

52. Peter Cunliffe, *EU 'Has Evidence' of Price Fixes at Sotheby's and Christie's*, THE EXPRESS, Apr. 20, 2002, at P99, available at 2002 WL 18994208.

53. *Art Auction Price Fixing Trial Draws to a Close*, ABCNEWS.COM (Dec. 3, 2001), <[http://www.abcnews.go.com/wire/Entertainment/reuters20011203\\_229.html](http://www.abcnews.go.com/wire/Entertainment/reuters20011203_229.html)>.

54. *Id.*

55. Blumenthal, *Price-Fixing at Sotheby's is Depicted*, *supra* note 43.

56. *Id.*



helped scam sellers out of an estimated \$400 million.<sup>57</sup> Brooks testified that Taubman told her that he and Tennant agreed to fix sellers' commissions because the two auction houses were "killing each other on the bottom line, and that it was time to do something about it."<sup>58</sup> She also testified that Taubman told her she would "look good in stripes" when investigators began closing in on their price-fixing scheme.<sup>59</sup>

The defense pounded away at Brooks' credibility<sup>60</sup> while at the same time portraying her as the true conspirator in the price-fixing scheme, and Taubman as the silent executive having little to do with the day-to-day affairs of Sotheby's.<sup>61</sup> In reference to her deal made with prosecutors, defense attorney Robert Fiske stated that she was "a walking reasonable doubt."<sup>62</sup> Michael Curl, a Sotheby's executive, claimed that Brooks told him, "Alfred Taubman doesn't run this company—I do." Other defense witnesses characterized Taubman as a man more interested in lunch menus than company facts and figures<sup>63</sup> and who would often fall asleep during company board meetings.<sup>64</sup>

It took the jury less than two days to find Taubman guilty.<sup>65</sup> During the sentencing phase, prosecutors asked for a three-year sentence<sup>66</sup> and an \$8 million fine.<sup>67</sup> Citing his failing health and substantial charitable and civic work, defense attorneys sought

57. Stevenson Swanson, *Ex-Sotheby's Chief Guilty of Bilking Auction Clients*, CHI. TRIB., Dec. 6, 2001, at 1.

58. *Id.*

59. *Art Auction Price Fixing Trial Draws to a Close*, *supra* note 53.

60. Blumenthal, *Price-Fixing at Sotheby's is Depicted*, *supra* note 43.

61. *Auction House Trial Nears End*, *supra* note 42.

62. Blumenthal, *Price-Fixing at Sotheby's is Depicted*, *supra* note 43.

63. *Id.*

64. Swanson, *supra* note 57.

65. *Id.*

66. *Ex-Sotheby's Head Gets 1-Year Sentence*, CHI. TRIB., Apr. 22, 2002, available at <http://www.chicagotribune.com/business/chi-020422auction.story?coll=chi2Dbusiness%2Dhed>.

67. Jerry Markon, *Former Sotheby's Chief Seeks Exemption From Time in Prison*, WALL ST. J., Apr. 19, 2002, at A14, available at 2002 WL 3392386.

probation.<sup>68</sup> Taubman's attorneys also filed letters from a legion of loyal supporters.<sup>69</sup> Ninety-two letters<sup>70</sup> from such distinguished names as Henry Kissinger,<sup>71</sup> Gerald Ford,<sup>72</sup> Queen Noor of Jordan,<sup>73</sup> Brian Mulroney,<sup>74</sup> and Barbara Walters<sup>75</sup> were filed in support of leniency for Taubman.<sup>76</sup> Walters wrote that Taubman "is a warm and loving friend, caring and gentle person."<sup>77</sup> The United States Probation Department also asked for leniency and that Taubman be given no prison time.<sup>78</sup>

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68. *Former Head of Sotheby's Sentenced to a Year in Prison*, N.Y. TIMES (Apr. 22, 2002), available at <http://www.nytimes.com/aponline/national/AP-Auction-Jouse-Sentencing.html>.

69. Markon, *supra* note 67.

70. Joshua Chaffin, *Boost for Sotheby's Chief*, FIN. TIMES, Apr. 19, 2002, at P7, available at 2002 WL 18767591.

71. "I consider him a man of extraordinary human decency and warmth," wrote Mr. Kissinger. Robert Gearty and Dave Goldiner, *Feds: Don't Put Art Scammer in the Slammer*, N.Y. DAILY NEWS, Apr. 19, 2002, at 6, available at 2002 WL 19317882.

72. "I trust him as a very honorable friend in every way. He is most reliable. I am honored to know him," said Gerald Ford in a letter to Judge Daniels. *Letter from Former President Gerald R. Ford*, N.Y. TIMES (Apr. 18, 2002), available at [http://www.nytimes.com/2002/04/18/arts/\\_19TAUBMAN-FORD.html](http://www.nytimes.com/2002/04/18/arts/_19TAUBMAN-FORD.html).

73. "We sincerely appreciate Alfred's humanitarian generosity and shall long treasure his friendship," wrote Queen Noor. *Letter from Queen Noor of Jordan*, N.Y. TIMES (Apr. 18, 2002), available at [http://www.nytimes.com/2002/18/arts/\\_19TAUBMANNOOR.html](http://www.nytimes.com/2002/18/arts/_19TAUBMANNOOR.html).

74. The former Prime Minister of Canada wrote that Taubman "epitomized for me two of the most remarkable qualities of Americans—a capacity to build hugely successful careers from scratch and a sense of unsurpassed generosity in ensuring that a great amount is returned to help others help themselves." *Letter from Brian Mulroney, Former Prime Minister of Canada*, N.Y. TIMES (Apr. 18, 2002), available at [http://www.nytimes.com/2002/04/18/arts/\\_19TAUBMAN-MULRONEY.html](http://www.nytimes.com/2002/04/18/arts/_19TAUBMAN-MULRONEY.html).

75. Devlin Barrett, *Surprise Leniency 'Bid': Probation Report Urges No Jail for Auction Tycoon*, N.Y. POST, Apr. 19, 2002, at 5, available at 2002 WL 19328188.

76. Chaffin, *supra* n. 70.

77. Barrett, *supra* n. 75.

78. Ralph Blumenthal & Carol Vogel, *No Prison Time is Recommended in Sotheby's Price-Fixing Case*, N.Y. TIMES, (Apr. 19, 2002), available at

U.S. District Judge George Daniels, after stating that “no one is above the law,” sentenced Taubman to a year and a day.<sup>79</sup> The extra day allowed the former Sotheby’s chairman to be eligible for time off for good behavior.<sup>80</sup> He was also fined \$7.5 million.<sup>81</sup> Taubman’s defense attorneys say they may appeal the verdict.<sup>82</sup> After the trial, defense attorney Fiske said, “[w]e’ll review our options and decide what to do next.”<sup>83</sup>

### B. U.S. Antitrust Law: A Primer

Antitrust law’s objective is to assure a competitive economy, based upon the view that through competition consumer needs will be satisfied at the lowest price with the least amount of sacrifice of scarce resources.<sup>84</sup> Promoting consumer choice is perhaps the most important role of antitrust law.<sup>85</sup> These combinations of economic resources are harmful to the public and individuals because these trusts minimize, if not eliminate competition, and generate higher prices and lower quality for consumers.<sup>86</sup> In

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<http://www.nytimes.com/2002/04/19/arts/design/19SOTH.html>.

79. *Former Sotheby’s Chairman Sentenced in Price-Fixing Case*, ABCNEWS.COM (Apr. 22, 2002), at [http://abcnews.com.go.com/wire/Entertainment/reuters20020422\\_204.html](http://abcnews.com.go.com/wire/Entertainment/reuters20020422_204.html).

80. *Id.*

81. *Id.*

82. See Swanson, *supra* note 57.

83. *Id.*

84. ERNEST GELLHORN, ANTITRUST LAW AND ECONOMICS: IN A NUTSHELL, 41 (West 1976).

85. Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 503 (2001).

86. *Id.* See also *Nat’l. Soc’y. of Prof’l Eng’r. v. U.S.*, 435 U.S. 679, 695 (1978) (discussing the role of competition in the overall quality of goods and services). It has been held that the *Sherman Act*:

reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

seeking to create or preserve a climate conducive to a competitive economy, the antitrust laws rely upon the operation of free enterprise to decide what shall be produced, how scarce resources shall be allocated among the various factors of production, and to whom the various products will be distributed.<sup>87</sup>

Free enterprise advances the belief that consumers, through their willingness, will decide what and how much shall be produced and that competition among producers, with the production of the highest quality product at the lowest price, will determine who will manufacture it.<sup>88</sup> Ensuring economic freedom for competitors and consumers has been held to be as important as the preservation of our personal freedoms.<sup>89</sup> Antitrust law has been called the “Magna Carta”<sup>90</sup> of the free enterprise system.<sup>91</sup>

### 1. *The Sherman Act*<sup>92</sup>

In 1890, Congress passed the *Sherman Antitrust Act*<sup>93</sup> to prevent trusts from creating unfair restraints on trade or commerce and reducing marketplace competition.<sup>94</sup> The *Sherman Act* was

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*Id.*

87. GELLHORN, *supra* note 84, at 41.

88. *Id.*

89. JERROLD G. VAN CISE, ET. AL., UNDERSTANDING THE ANTITRUST LAWS, 26 (Practising Law Institute 1986).

90. *See* U.S. v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (describing the importance of federal antitrust law). Below the court described the importance of federal antitrust law:

Antitrust laws in general, and the *Sherman Act* in particular, are the Magna Carta of free enterprise. They are important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

*Id.*

91. VAN CISE, *supra* note 89, at 26.

92. 15 U.S.C. § 1 (2001).

93. *Id.*

94. Legal Information Institute, *Law about Antitrust: Overview* ¶ 2, at

enacted to preserve economic liberty, and to eliminate unfair restraints on trade and economic competition.<sup>95</sup> “The [*Sherman Act*] was concrete recognition of the public’s interest in controlling monopoly power, an interest that was not dependent for its indication in the initiative of private individuals injured directly by the monopolist’s conduct.”<sup>96</sup> The *Sherman Act* is still the chief source of U.S. antitrust law today and most states have similar statutes.<sup>97</sup>

Section 1 of the *Sherman Act* (“Section 1”), reads that: “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>98</sup> With this broad language, Congress left it to the courts to determine what types of business behavior would be prohibited under Section 1.<sup>99</sup> Over the years, courts developed two categories of antitrust analysis: “per se” and “rule of reason.”<sup>100</sup> *Per se* offenses are presumed to be violations of Section 1.<sup>101</sup> Price-fixing, group boycotts, and certain “tying” arrangements are examples of “per se” antitrust violations.<sup>102</sup> There are other business activities for

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<http://www.law.cornell.edu/topics/antitrust.html> (accessed July 13, 2001).

95. *Id.*

96. David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1219 (1988).

97. Legal Information Institute, *supra* note 94, at ¶¶ 2-4.

98. 15 U.S.C. § 1 (2001). The section reads as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Id.*

99. Conrad M. Shumadine & Michael R. Katchmark, *Antitrust and the Media*, 679 PLI/PAT 7, 47 (Nov. 2001).

100. *Id.* at 47-8.

101. *Id.* at 47.

102. *Id.* at 49.

which anti-competitive behavior is not so clearly defined.<sup>103</sup> For such situations, courts use the “rule of reason” approach to ascertain whether the business behavior’s pro-competitive benefits outweigh any anti-competitive effects.<sup>104</sup>

## 2. *Price-Fixing*

Price-fixing involves the collusion between two businesses “for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate commerce. Any such conspiracy to fix prices in unreasonable per se.”<sup>105</sup> “The conspirators establish the price of a product or

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103. *Id.* at 47-8.

104. *Id.* at 48; *see also* *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918) (discussing the “rule of reason” approach). Justice Brandeis wrote: The true test of legality is whether the restraint imposed as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The instrument of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose of end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Id.* *See also* *Nat’l. Soc’y. of Prof’l. Eng’r.*, 435 U.S. at 690-92 (stating that the rule of reason approach attempts to balance the anti-competitive effects of a restraint on trade against its pro-competitive benefits to determine its impact on competition).

105. *See* *Bailey’s Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 720 (1964). The Supreme Court has said that the *Sherman Act*’s prohibition of any agreement to restrain trade prohibits only those agreements which *unreasonably* restrain trade. *See* *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988) (citing *Nat’l. Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984)); *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 59-62 (1911). However, there are certain kinds of agreements which will so often prove so harmful to competition and are so rarely justifiable that antitrust law does not require proof that an agreement of that kind is, in fact, anticompetitive. *See also* *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997);

service, rather than allowing it to be determined naturally by free market forces.”<sup>106</sup> Agreements fixing prices violate federal antitrust law.<sup>107</sup>

“Price-fixing is a serious crime, and I firmly believe that it inflicts a whole lot of harm on consumers,” says Stephen Calkins, a law professor at Wayne State University and antitrust law expert.<sup>108</sup> “Price-fixing is one of the few felonies you can commit over coffee and bagels.”<sup>109</sup> Where competitors agree to sell their goods or services at a specified price, minimum price or maximum price and they receive profits from such an agreement, they are in violation of price-fixing.<sup>110</sup> These agreements are a primary concern of Section 1.<sup>111</sup> Price-fixing is an area of antitrust law that has criminal penalties as well as civil.<sup>112</sup>

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-290 (1985). This kind of an agreement is illegal *per se*. See also United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (finding horizontal price-fixing agreement *per se* illegal).

106. *Price Fixing* <<http://www.investopedia.com/terms/p/pricefixing.asp>> (July 16, 2001).

107. RONALD A. ANDERSON, ET AL., *BUSINESS LAW*, 70 (South-Western Publishing 1992).

108. John Gallagher, *Antitrust Cases Aim at Helping Consumers*, DETROIT FREE PRESS (May 5, 2001) available at [http://www.freep.com/money/business/taub5\\_20010505.htm](http://www.freep.com/money/business/taub5_20010505.htm).

109. *Antitrust Course on Bid Rigging, Price Fixing, and Fair Competition* (July 16, 2001), at [http://www.integrity-nteractive.com/marketing/mkt\\_pg7.htm](http://www.integrity-nteractive.com/marketing/mkt_pg7.htm).

110. *What is Price Fixing?*, at [http://www.business-law.freeadvice.com/trade\\_regulation/price\\_fixing.htm](http://www.business-law.freeadvice.com/trade_regulation/price_fixing.htm) (July 16, 2001).

111. GELLHORN, *supra* note 84, at 167.

112. John Gallagher, *Antitrust Cases Aim at Helping Consumers*, DETROIT FREE PRESS (May 5, 2001) available at [http://www.freep.com/money/business/taub5\\_20010505.htm](http://www.freep.com/money/business/taub5_20010505.htm).

C. *Relevant Illinois Statutes*

1. *Illinois Antitrust Act*<sup>113</sup>

In addition to federal antitrust law, many states have similar statutes prohibiting price-fixing conspiracies and other acts protecting local free trade.<sup>114</sup> In Illinois, the State Attorney General may prosecute anyone who shall:

[m]ake any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:<sup>115</sup> for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto[.]”<sup>116</sup>

The Illinois Attorney General may bring suspected violators of the above section into Circuit Court.<sup>117</sup> The court may then, at its discretion, issue an injunction, dissolve the corporation or association, and suspend or stop out-of-state corporations from doing business within the State of Illinois.<sup>118</sup> Violations of the *Illinois Antitrust Act* are a class 4 felony with fines of no more than \$1,000,000 for a corporation, and no more than \$100,000 for an individual.<sup>119</sup> The Illinois Attorney General may not commence any antitrust action upon a defendant if that defendant is currently under federal antitrust indictment.<sup>120</sup>

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113. 740 ILL. COMP. STAT. § 10 (2001).

114. Legal Information Institute, *Antitrust*, *supra* note 94.

115. 740 ILL. COMP. STAT. § 10/3 (2001).

116. *Id.* at § 10/3 (1)(a).

117. *Id.* at § 10/7(1) (2001).

118. *Id.*

119. *Id.* at § 10/6 (2001).

120. *Id.* at § 10/6(3) (2001).



## 2. *Illinois Art Auction House Act*<sup>121</sup>

The state has enacted a statute designed specifically for auction houses that act as agents for the sale of fine art, jewelry, antiques, etc.<sup>122</sup> The *Illinois Art House Auction Act* orders all art auction houses to establish and maintain separate bank accounts for monies made on behalf of sellers for whom the auction house has acted as an agent for the sale of art, antiques, furnishings, etc.<sup>123</sup> In addition, the art auction houses and auctioneers must file affidavits with the state naming the bank in which they deposit sellers' funds from auction sales.<sup>124</sup> Violations of the *Illinois Art House Auction Act* are a class 4 felony, punishable by a fine of \$25,000 or more.<sup>125</sup>

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121. 225 ILL. COMP. STAT. § 405 (2001). The *Illinois Art House Auction Act* is as follows:

Sec. 1. As used in this Act, art auction house means any person, partnership, corporation, association or group engaged for profit primarily in the business of conducting auctions at which it acts as agent for any seller of works of art, antiques, furnishings, jewelry, gemstones, coins, stamps and rare books and manuscripts.

Sec. 2. Every art auction house shall establish and maintain a separate account in an Illinois bank or savings and loan association for customer funds and shall notify each customer of the identity of such bank or savings and loan association. Upon its receipt of proceeds from an auction, it shall segregate and deposit the proceeds due sellers into the separate account established and maintained for sellers for whom the art auction house has acted as agent until the funds are disbursed to the sellers. Funds shall be disbursed to the sellers within 30 days of their receipt.

Sec. 3. Every art auction house shall annually register and file with the Secretary of State, on forms provided by that office, a statement declaring the bank or savings and loan association in which it maintains a separate account for customer funds.

Sec. 4. Any person who knowingly violates any provision of this Act shall be guilty of a Class 4 felony, punishable by a fine of not less than \$25,000.

*Id.*

122. *Id.* at § 405/1 (2001).

123. *Id.* at § 405/2.

124. *Id.* at § 405/3.

125. *Id.* at § 405/4.

### 3. *Illinois Auction License Act*<sup>126</sup>

The *Illinois Auction License Act* regulates the obligations and

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126. 225 ILL. COMP. STAT. § 407 (2001). The *Illinois Auction License Act* is as follows:

Sec. 15-5. Representations. An auctioneer, associate auctioneer, or auction firm or the sponsored licensees, agents, or employees of an auctioneer or auction firm, conducting an auction or providing an auction service shall not:

- (1) misrepresent a fact material to a purchaser's decision to buy at or by auction;
- (2) predict specific or immediate increases in the value of any item offered for sale at auction; or
- (3) materially misrepresent the qualities or characteristics of any item offered for sale at auction.

Sec. 15-10. Auction contract. Any auctioneer, associate auctioneer, or auction firm shall not conduct an auction or provide an auction service, unless the auctioneer, associate auctioneer, or auction firm enters into a written or oral auction contract with the seller of any property at auction prior to the date of the auction. The agreement shall be signed by the auctioneer, associate auctioneer, or auction firm conducting an auction or providing an auction service and the seller or sellers, or the legal agent of the seller or sellers of the property to be offered at or by auction, and shall include, but not be limited to the following disclosures:

(1) Licensees shall disclose:

(A) the name, license number, business address, and phone number of the auctioneer, associate auctioneer, or auction firm conducting an auction or providing an auction service;

(B) the fee to be paid to the auctioneer, associate auctioneer, or auction firm for conducting an auction or providing an auction service; and

(C) an estimate of the advertising costs that shall be paid by the seller or sellers of property at auction and a disclosure that, if the actual advertising costs exceeds 120% of the estimated advertising cost, the auctioneer, associate auctioneer, or auction firm shall pay the advertising costs that exceed 120% of the estimated advertising costs or shall have the seller or sellers agree in writing to pay for the actual advertising costs in excess of 120% of the estimated advertising costs.

(2) Sellers shall disclose:

(A) the name, address, and phone number of the seller or sellers or the legal agent of the seller or sellers of property to be sold at auction; and

(B) any mortgage, lien, or encumbrance of which the seller has knowledge on any property or goods to be sold or leased at or by auction.

Sec. 15-15. Supervisory duties. The sponsoring auctioneer, auction firm, and

duties of auction houses and auctioneers towards buyers.<sup>127</sup> One who provides auction services may not misrepresent the quality or important facts behind sale items.<sup>128</sup> The *Illinois Auction License Act* also requires auction service providers to obtain a contract, either written or oral, regarding what merchandise will be sold<sup>129</sup> and what fee the auction service provider will be paid.<sup>130</sup> Finally, the *Illinois Auction License Act* restricts certain auction services to licensed auction professionals only.<sup>131</sup>

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managing auctioneer shall have the duty and responsibility to supervise, manage, and control any sponsored licensee, agent, or employee while conducting an auction or providing an auction service. Any violation of this Act by a sponsored licensee, agent, or employee of a sponsoring auctioneer, auction firm, or managing auctioneer shall be deemed to be a violation by the sponsoring auctioneer, auction firm, or managing auctioneer as well as by the sponsored licensee, agent, or employee.

Sec. 15-20. Associate auctioneer. An associate auctioneer shall not conduct an auction or provide an auction service without the proper supervision of a licensed auctioneer or receive compensation for conducting an auction other than from a licensed auctioneer or auction firm. An associate auctioneer shall not work for or receive compensation from another auctioneer or an auction firm other than his or her sponsoring auctioneer or sponsoring auction firm without the written consent of his or her sponsoring auctioneer or sponsoring auction firm. The sponsoring auctioneer or sponsoring auction firm and managing auctioneer shall be responsible for the actions of any sponsored associate auctioneer while conducting an auction or providing an auction service.

Sec. 15-25. Auction firm. No corporation, limited liability company, or partnership shall be licensed without being managed by a licensed auctioneer. The managing auctioneer of any auction firm shall be responsible for the actions of all licensed and unlicensed employees, agents, and representatives of said auction firm while the firm is conducting an auction or providing an auction service.

*Id.*

127. *See generally id.*

128. *Id.* at § 407/15-5.

129. *Id.* at § 407/15-10.

130. *Id.* at § 407/15-10(1)(B).

131. *See Id.* at §§ 407/15-15, 20, 25.

## III. ANALYSIS

A. *Proposed Changes to Illinois Auction Law*

Laws regulating auction houses and auctioneers have developed from the basic societal values of honesty, fairness, and efficiency<sup>132</sup>—attributes that all auctions and auctioneers should possess. In order to make informed business decisions, the full and complete disclosure of facts and observations is necessary between the parties.<sup>133</sup> In the art world, most deals are ratified by oral contracts and sealed with handshakes. Trust binds the art industry together, and an auctioneer or art dealer has nothing if he or she has a bad reputation. For those reasons, the art auction industry has a unique duty to uphold the interests not only of the buyers, sellers, and artists, but also of the public in order to safeguard the integrity of the art industry.

*Auction houses and auctioneers have been endowed with a “public function,”*<sup>134</sup> *that is, they should engage in business practices with an eye toward protecting the public interest. Courts have held that auction houses and auctioneers are more than just agents of buyers and sellers, but in some sense, they are also public servants.*<sup>135</sup> *To a certain extent, auction houses have accepted this public service function voluntarily by offering tours, traveling exhibits, and lectures—the primary functions of public*

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132. Jorge Contreras, *The Art Auctioneer: Duties and Assumptions*, 13 HASTINGS COMM & ENT. L.J. 717, 720 (1991).

133. *Id.* at 723.

134. *Id.* at 737.

135. *Id.* See, e.g., *Biddles, Inc. v. Enright*, 239 N.Y. 354, 365, 146 N.E. 625, 629 (1925). “The business of an auctioneer . . . has always been affected by a public interest and subject to legislative restriction.” *Id.* See also *Veazie v. Williams*, 49 U.S. 134, 154 (1850). “Any fraud by auctioneers is more dangerous than by owners themselves. The sales through the former extend to many millions annually, and are distributed through the whole country. . . .” *Id.* See also *Travis v. Washington Horse Breeders Assn.*, 759 P.2d 418, 423 (Wash. 1988) (discussing the importance of safeguarding the public interest in sales transactions).

*museums.<sup>136</sup> So, when Sotheby's and Christie's conspired to eliminate competition by fixing sellers' auction commissions<sup>137</sup> and other illegal activities, they did more than just violate federal antitrust law, cost themselves and hundreds of people millions of dollars, and lower their own reputations; these auction houses violated a sacred public trust.*

*There is little federal auction law.<sup>138</sup> However, the states, under their police powers, may regulate auctions, auction houses, and the licensing of auctioneers.<sup>139</sup> "It has been said that the business of conducting auctions is one that requires public supervision so that purchasers will not be imposed on or the owners of property sold at auction are not defrauded, and the state, in the exercise of its police power, may limit or qualify the right to be an auctioneer, or engage in the business of an auctioneer."<sup>140</sup> In addition, the states may reasonably impose restrictions on auction sales with respect to the time and place they are held and what goods may be sold.<sup>141</sup>*

*Both Sotheby's and Christie's have salesrooms and auction representatives scattered throughout the United States<sup>142</sup> and as such, each location subjects itself to the particular auction laws promulgated in each state and municipality. In light of the recent price-fixing investigations at Sotheby's and Christie's, a serious look at Illinois' auction law should be undertaken to see whether any modifications should be made to existing statutes. The following suggested modifications should be enacted for the purpose of strengthening state control of auction practices, protecting individuals on all sides of the auction transaction,*

136. Contreras, *supra* note 132, at 738.

137. Department of Justice, *supra* note 7.

138. See, e.g. *Federal Animal Welfare Act*, 7 U.S.C. §§ 2131 et seq.

139. 7 Am. Jur. 2d *Auctions and Auctioneers* § 3 (1997).

140. *Id.*

141. *Id.* at § 6.

142. See, e.g., Sotheby.Com-International Offices, at <http://search.sothebys.com/jsps/live/officeLanding.jsp> (n.d.) See also Christie's-Locations, at <http://www.christies.com/locations/regionview.asp?GlobalRegionId=1&RegionId=2>. (n.d.).

*preventing future antitrust violations, and finally, and most importantly, safeguarding the public interest. Below are suggestions aimed at achieving these goals.*

### 1. *Illinois Art Auction House Act*<sup>143</sup>

*The main thrust of the Art Auction House Act is that art auction houses and auctioneers who act as agents for the sale of “works of art, antiques, furnishings, jewelry, gemstones, coins, stamps and rare books and manuscripts”<sup>144</sup> must maintain separate bank accounts for the deposit of proceeds from art auctions.<sup>145</sup> Another section of the Illinois Art Auction House Act requires each auction house and auctioneer to file an annual statement with the state naming the financial institution in which the sellers’ funds are deposited.<sup>146</sup> Any violation of the Illinois Art Auction House Act is a Class 4 felony with a fine not less than \$25,000.<sup>147</sup>*

Art auctions involve the dispersal of culture. Auction houses like Sotheby’s and Christie’s have developed special expertise in the evaluation and sale of cultural property<sup>148</sup> and thus should be held to a higher standard than a typical auction house or auctioneer who deals mainly in farm implements or used automobiles. Accordingly, language should be added to the *Illinois Art Auction House Act* that would require auction businesses who wish to specialize in art sales to obtain a state license for that specific purpose. The *Illinois Art Auction House Act* should also impose penalties on auction houses and auctioneers who violate their fiduciary duties to sellers. The legislature could perhaps add the following language to the *Illinois Art Auction House Act*: “Any art auction house licensed and recognized as an expert in a particular area of cultural property sales shall not, in the context of an

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143. 225 ILL. COMP. STAT. § 405 (2001). For the complete proposed *Illinois Art House Auction Act*, consult *infra* Appendix 1.

144. 225 ILL. COMP. STAT. § 405/1 (2001).

145. 225 ILL. COMP. STAT. § 405/2 (2001).

146. *See Id.* at § 405/3.

147. *See Id.* at § 405/4.

148. Contreras, *supra* note 132, at 725.

*auction, misrepresent the material facts behind, the history, quality, or marketability of any type of merchandise set for in § 405/1 to any seller or buyer.”* Penalties should include the termination of the offending auction house’s or auctioneer’s business license.

Another suggested modification of the *Illinois Art House Auction Act* is directly influenced by the Sotheby’s and Christie’s antitrust scandal. The legislature should adopt language similar to the following to safeguard against illegal collusion between auction houses or between auctioneers: “*Any licensed art auction house shall not contract, conspire, or otherwise agree to fix the commission or commissions of any seller or sellers, with whom they deal, with a competing art auction house, the sum of whom make up a significant share of the art auction market.*” The *Illinois Antitrust Act*<sup>149</sup> most likely covers these types of illegal conspiracies, including those perpetrated by auction houses and auctioneers.<sup>150</sup> However, when the integrity of the art auction process is at stake, placing this additional language in the *Illinois Art House Auction Act*, as superfluous as it may be, confirms the state’s intolerance of these illegal activities and its belief in the public interest function of auction houses and auctioneers.

Finally, the *Illinois Art House Auction Act*’s penalty provision<sup>151</sup> should be modified to include possible suspension or termination of a violator’s art auction license plus applicable criminal and civil liabilities. “*Any person, auction house, or art auction house who knowingly violates any provision of this Act shall be guilty of a Class 4 felony, punishable by a fine of not less than \$25,000, and/or the suspension or termination of the Illinois art auction house license and/or the Illinois auction license, plus all applicable federal and state criminal and civil penalties.*”

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149. 740 ILL. COMP. STAT. § 10/3(1)(a) (2001).

150. *See generally id.*

151. 225 ILL. COMP. STAT. § 405/4 (2001).

## 2. *Illinois Auction License Act*<sup>152</sup>

The primary purpose of the *Illinois Auction License Act* is to regulate the duties and obligations of auction houses and auctioneers towards buyers.<sup>153</sup> In a manner similar to any typical consumer protection statute, buyers are protected from misrepresentations of the facts behind, or the current quality of, any item for sale at an auction.<sup>154</sup> As the statute now stands, the only obligations an auction house or auctioneer has toward a seller is to ensure that a contract, either written or oral, is formed detailing, among other things, what property is to be sold at the auction, the license number of the auctioneer, and the business address of the auction service.<sup>155</sup>

The most clearly defined duties of any auction house or auctioneer are the obligations owed to the seller of goods.<sup>156</sup> An auction house or auctioneer who receives items for sale at auction forms an agency relationship with the seller for all matters in relation to the auction.<sup>157</sup> This agency relationship includes the fiduciary duties of good faith, honesty, and the utmost loyalty in all matters relating to the agency.<sup>158</sup> An auction house or auctioneer has an affirmative duty to use reasonable efforts to communicate to the seller “all material facts” that he/she is aware

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152. 225 ILL. COMP. STAT. § 407 (2001). For the complete proposed *Illinois Auction License Act*, consult *infra* Appendix 2.

153. See generally 225 ILL. COMP. STAT. § 407 (2001).

154. *Id.* at § 407/15-5.

155. *Id.* at § 407/15-10.

156. Contreras, *supra* note 132, at 723.

157. *Id.*

158. 3 Am. Jur. 2d *Agency* § 210 (1986). See also *Wadsworth v. Adams*, 138 U.S. 380, 389 (1890) (stating that a principal “is entitled . . . to the benefit of diligence, zeal, and disinterested exertions of the agent in the execution of his employment. The law requires the strictest good faith upon the part of one occupying a relationship of confidence to another”). See also *Cristallina v. Christie, Manson & Woods Int’l, Inc.*, 502 N.Y.S.2d 165, 172 (1986) (stating that the agent’s duty is to “use his best efforts to promote the principal’s product”)(quoting *Griffin & Evans Cosmetic Mktg. v. Madeline Mono Ltd.*, 73 A.D. 2d 95).



of regarding the subject matter of the auction and also “all material facts” that might affect the seller’s interests.<sup>159</sup> If an auctioneer withholds information about the value of artwork from the seller, the seller may not know what price to expect for the work.<sup>160</sup> When Sotheby’s and Christie’s agreed to fix the commissions paid to sellers, it was not only a violation of federal and state antitrust law for them to do so, but an egregious breach of fiduciary duties as well.

In modifying the *Illinois Auction License Act*, the legislature should add language that reflects the unique character and nature of the auction fiduciary relationship, language that would protect not only buyers but also sellers from deliberate misrepresentations by auction houses and auctioneers. For example, in the “Representations” section of the *Illinois Auction Act*,<sup>161</sup> there should be language added that prohibits misrepresentations made by the auction house or auctioneer to the seller. Perhaps the legislature could add: “An auctioneer, associate auctioneer, or auction firm or the sponsored licensees, agents, or employees of an auctioneer or auction firm, conducting an auction or providing an auction service shall not:<sup>162</sup> (4) *misrepresent any material fact or facts regarding the subject matter of an auction and that might affect the seller’s interests.*” As mentioned earlier, when an auction house or auctioneer and a seller enter into an agreement to sell real or personal property, they enter into an agency relationship and as a result, certain fiduciary duties arise.<sup>163</sup> The above proposed language emphasizes the importance of protecting the integrity of the fiduciary relationship between the seller and the auction house or auctioneer.

Perhaps the legislature could add the following to the “Auction Contract” section<sup>164</sup> in relation to the unique nature of the art house auction: “The agreement shall be signed by the auctioneer,

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159. 3 Am. Jur. 2d *Agency* § 211 (1986).

160. Contreras, *supra* note 132, at 726.

161. 225 ILL. COMP. STAT. § 407/15-5 (2001).

162. *Id.*

163. 3 Am. Jur. 2d *Agency* § 210 (1986).

164. 225 ILL. COMP. STAT. § 407/15-10 (2001).

associate auctioneer, or auction firm conducting an auction . . . and the seller or sellers . . . shall include . . . the following disclosures:<sup>165</sup> (D) *the agreed upon amount constituting the seller's commission on the sale of merchandise by auction.*" Understanding that most art deals are secured by handshakes stills leaves open the risk of error or bad faith dealings by one or both parties. Committing auction houses, auctioneers, and sellers to an agreed upon *and documented* commission structure safeguards the economic interests of the seller or sellers and protects auction houses and auctioneers from unnecessary liability and perhaps costly damage to their reputations.

Finally, in order to give the *Illinois Auction License Act* more force and demonstrate the state's intolerance of any illegal activity perpetrated by and between auction houses and auctioneers, the legislature should consider adding a penalties provision. In similar fashion to the current penalties provision of the *Illinois Art Auction House Act*,<sup>166</sup> the legislature should consider any violation of the *Illinois Auction License Act* a felony, perhaps class 4, and make any violation punishable by a fine not less than \$25,000. The legislature should also consider allowing the Illinois Attorney General the ability to seek the suspension or termination of an auction house's or auctioneer's business license for particularly flagrant offenses.

### B. *Effect on the Art Auction World*

The bad publicity surrounding the price-fixing scandal could open doors for competitors.<sup>167</sup> People "will probably be more open to working with other auction galleries," says Kathleen Doyle, chairperson CEO of William Doyle Galleries in New York.<sup>168</sup> "Our business, we feel, will only grow."<sup>169</sup> Another auction house hoping to capitalize on Sotheby's and Christie's legal woes is

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165. *Id.*

166. 225 ILL. COMP. STAT. § 405/3 (2001).

167. Mannix, *supra* note 35.

168. *Id.*

169. *Id.*

Phillips.<sup>170</sup> Works that probably would have gone to Sotheby's or Christie's have now been coming to Phillips.<sup>171</sup> In 2001 alone, Phillips landed the sale of seven Cezannes and Van Goghs worth an estimated \$80 million, as well as four other works by Renoir, Monet, Matisse, and Modigliani.<sup>172</sup>

Recognizing the damage this scandal has had to the reputation of his corporation and the integrity of the art auction process, William F. Ruprecht, who became CEO of Sotheby's after the resignation of Diana D. Brooks, issued the following statement after Brooks's guilty plea:

On behalf of Sotheby's, I apologize to our clients for this breach of the standards of trust that they have the right to expect from us and assure them that no member of Sotheby's current management played any role whatsoever in these events or was aware at anytime that they were taking place. We are committed to ensuring that our business is conducted according to the highest principles of honesty and integrity.<sup>173</sup>

How will an industry, where most deals are sealed with smiles and handshakes, where trust is the cornerstone of the industry, ever recover from this scandal? "People have come to distrust the authority of the auction houses," says Robert Simon, former president of the Appraisers Association of America.<sup>174</sup> However, auction house insiders discount any long-term damage to the reputations of Sotheby's and Christie's.<sup>175</sup> "This is the way people have done business for centuries," says Karen Keane of Skinner, a Boston-based auction house, "the scandal might cast a shadow, but it's not going to end the auction business as we know it."<sup>176</sup> Only time will tell if this scandal will change the way buyers, sellers, auction houses and auctioneers do business. However, if one were

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170. *Bid for the Top*, THE ECONOMIST (Mar. 1, 2001), available at [http://www.economist.co.uk/world/europe/displayStory.cfm?Story\\_ID=519231](http://www.economist.co.uk/world/europe/displayStory.cfm?Story_ID=519231).

171. *Id.*

172. *Id.*

173. *Brooks, Sotheby's Both Plead Guilt*, *supra* note 40.

174. *Peers*, *supra* note 1.

175. *Mannix*, *supra* note 35.

176. *Id.*

to venture a guess, it probably will not. The art industry has been around for about as long as art itself and old customs are hard to break. Sotheby's and Christie's have been in business for a long time and weathered storms before; there is no reason to think that both will not be around for another 200 years.

#### IV. CONCLUSION

For over two centuries, Sotheby's and Christie's have been the public's gauge for measuring the value of artwork.<sup>177</sup> Trust binds the art industry together, and an auctioneer or art dealer has nothing if he or she has a bad reputation. For those reasons, the art auction industry has a unique duty to not only uphold the interests of the buyers, sellers, and artists, but also the general public, in order to uphold the integrity of the art industry. So when Sotheby's and Christie's participated in a "quiet cartel" to eliminate competition by fixing sellers' auction commissions<sup>178</sup> and other illegal activities, they did more than just violate federal and state antitrust law, cost themselves and hundreds of people millions of dollars, and lower their own reputations, these auction houses house violated a public trust.

A serious review of Illinois auction law reveals several changes that should be implemented in light of the Sotheby's and Christie's antitrust cases. Many of the suggested provisions for the *Illinois Art Auction House Act* and the *Illinois Auction License Act* may be covered by other state or federal statutes,<sup>179</sup> however, placing these provisions in the auction laws ensures that there will be no mistake as to the obligations and duties auction houses and auctioneers owe to sellers.

For the *Illinois Art House Auction Act*, the state legislature should consider adding language to the statute which penalizes an auctioneer or auction house who knowingly misrepresents the history or value of an item of cultural property. In addition, the

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177. Peers, *supra* note 1.

178. U.S. Department of Justice, *supra* note 7.

179. See, e.g., 740 ILL. COMP. STAT. § 10 (2001).

statute should reflect the state's intolerance for unfair price collusion. Another change involves adding specific language to the *Illinois Auction License Act* to protect sellers from misrepresentations that might affect the seller's interests. Other proposed changes include adding language to require documentation concerning the seller's commission and penalties for violations of the *Illinois Auction License Act* up to and including the suspension or termination of an auction house's or auctioneer's license.

The Sotheby's and Christie's antitrust cases shine light on a quiet industry. An industry that is often "a closed shop" and where deals are sealed with handshakes—just as it has been for hundreds of years. Current Illinois auction law primarily protects the rights of buyers. This is a shortcoming. State auction law should be modified to impose penalties for breaches of obligations to sellers as well. The seller is, after all, just as important to any auction transaction as the buyer.