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Florida's Art Consignment Statute: A Trap For The Unwary Artist?

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Abstract

On October 1, 1986, Section 686.501-506 Florida Statutes, became effective, making Florida one of the twenty-six states with an Art Consignment statute.

Florida's Art Consignment Statute: A Trap For The Unwary Artist?

Cathryn Mitchell Heise*

I. Introduction

On October 1, 1986, Section 686.501-506 Florida Statutes, became effective, making Florida one of the twenty-six states with an Art Consignment statute. This article will explore the statute itself, as well as its sparse legislative history. It will also consider the principles of law which governed consignment relationships prior to the enactment of the statute, and will present some unanswered questions about the way in which Florida courts are likely to apply the statute to relationships which, until recently, have been governed by a smile and a handshake. The primary significance, however, of Florida's new art consignment statute lies in not only its effect on legal relationships between artists, galleries, and consumers. This recognition was a response, in part, to the fact that Florida is quickly becoming a haven for artists and art connoisseurs of all kinds. As this article points out, however, the statute's effect on these relationships is uncertain and perhaps likely to be contrary to legislative intent.

II. Background—Legal Protection For Art as a Product of the Mind

Webster's Third New International Unabridged Dictionary gives eight separate definitions for the word "art."¹ The noun "art" is defined as "the disposition and modification of things by human skill, to answer the purpose intended." In this sense, Webster's continues, "art stands opposed to nature."² This seemingly common word is further defined as "creative work generally, or its principles; the making or doing of things that have form and beauty: art includes painting, sculpture, ar-

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1. WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY 122 (3d ed. 1976).

2. *Id.*

chitecture, music, literature, drama and dance."³ Although Webster includes many different definitions of the word, they all have one thing in common: they are creative expressions of the human mind.

The law has historically protected creations and products of the mind, while always clearly rejecting any legal protection for mere abstract ideas or mental conceptions. It has long been settled that, even independent of copyright or other similar legislative protection, a creation or product of the mind which has been put into tangible form is the subject of property.⁴ Thus, there may be property rights in particular combinations of ideas or in the form in which the ideas are embodied.⁵ Copyright protection, which is the protection most often sought for works of art, provides the holder of such protection with the right to reproduce, distribute, and display the work.⁶

III. Relationships Between Artists and the Outside World: The Need for Legal Protection

Because creations and products of the human mind have long been recognized as property worthy of protection, various legal relationships have evolved over the years to provide predictability and certainty to persons involved in transactions involving works of art.

Many artists and gallery owners believe that the relationship between an artist and the gallery in which the artist chooses to display and promote her work is somehow different from the ordinary business transaction, and thus too "special" or "unique" to require a written formalization of the parties' understanding.⁷ Although it defies ordinary custom and usage to suggest that the artist-art dealer relationship be memorialized in some way, many commentators who have studied

3. *Id.*

4. 17 U.S.C. § 102(a) (1982) states that copyright protection is extended to "original works of authorship fixed in any tangible medium of expression."

5. *See, e.g.,* *Schonwald v. F. Burkhart Mfg. Co.*, 356 Mo. 435, 202 S.W.2d 7 (1947); *Fendler v. Morosco*, 253 N.Y. 281, 171 N.E. 56, *reh. den.*, 254 N.Y. 563, 173 N.E. 867 (1930).

6. In order to be entitled to copyright protection, however, a work of art must embody some "creative authorship" in its delineation or form. *See*, *Pictorial, graphic, and sculptural works*, 37 C.F.R. § 202.10(a) (1989). This requirement exists because without creativity, there can be no work of art. *See, e.g.,* *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776 (S.D.N.Y. 1968).

7. *See, generally,* F. FELDMAN, S. WEIL & S. DUKE BIEDERMAN, *ART LAW* § 3.1 (1986) [hereinafter *ART LAW*].

the dynamics of these relationships strongly recommend that the parties negotiate an agreement that establishes the parameters of the relationship. These authorities suggest that such documentation of the intent of the parties offers the parties an opportunity to confront in advance many of the issues and potential problems that may arise during the course of the association.⁸ Memorializing the parties' understanding offers them an opportunity to anticipate many of the difficulties that surface as a result of these relationships, and may prevent potential future disagreements which may destroy a profitable and successful relationship. A clear understanding at the inception of such a relationship may also prevent costly litigation to determine the parties' intent at the time they entered into the agreement.⁹

An informal survey of gallery owners, however, would likely reveal that most have never, and would never, formalize such agreements with the artists whose works they display and promote.¹⁰ Many artists are opposed to such agreements as well. According to one artist, "a written contract indicates a strange relationship—a lack of trust."¹¹ This reac-

8. *Id.* at § 3.1.1, at 342.

9. The New York case of *O'Keeffe v. Bry*, 456 F. Supp. 822 (S.D.N.Y. 1978) stands as a monument for the need to memorialize agreements between artists and galleries, and other agents acting on the artist's behalf. In *O'Keeffe*, a disagreement ensued between Georgia O'Keeffe and Doris Bry, O'Keeffe's commissioned sales agent, who was authorized to sell both O'Keeffe's artwork, and her late husband Alfred Steiglitz's photographic works. Following the disagreement with Bry, O'Keeffe demanded that Bry return of all of her works. When Bry refused to return the works, O'Keeffe sued her for their return. Bry counterclaimed for breach of contract and recovery of the works (after a preliminary injunction had required their removal to a safe place pending the outcome of the case), and O'Keeffe moved to dismiss the counterclaim pursuant to the statute of frauds. The court held that because no "core document evidencing a promise" was present, and thus the contract alleged in Bry's first counterclaim was not evidenced by a writing signed by O'Keeffe, its enforcement was barred by New York's statute of frauds. *See also* ART LAW, *supra* note 7, § 3.1.3, at 350 (commenting on the importance of written agreements in view of the statute of frauds provisions).

10. In a seminar held on March 23, 1989, that was sponsored by the Florida Bar Entertainment, Arts and Sports Law Section, five prominent Miami gallery owners were questioned about their relationships with artists. Surprisingly, none of these panelists used contracts to memorialize their agreements with the artists, and cited as reasons the fact that the relationship was one of "love" and "trust," much like mother and child, and that no such agreements were required because "they would never want to require an artist to stay with their gallery if the artist did not want to."

11. *See*, ART LAW, *supra* note 7, § 3.1.1, at 342 (citing to Art Letter, Feb. 1977, at 2) (providing summary of arguments espoused for and against written agreements between galleries and artists)).

tion is similar to that which one might encounter when suggesting that two persons planning to marry execute a pre-nuptial agreement. The mere mention of the necessity for such agreement suggests that a lack of trust exists between the parties, and many persons believe that the marital relationship is, like that between the artist and gallery, too unique to be governed by a written contract. These agreements can, however, guard against one party's subsequent loss of memory, or confusion as to details, accident, illness or death.¹² Thus, because the relationship between an artist and gallery is essentially a business association entered into for the benefit of both parties, a contract that defines its parameters appears to make good business sense.¹³

IV. Artist/Gallery Consignment Relationships

A. *In General*

Although artists and galleries may be involved in a variety of different transactions, the consignment relationship is the one which appears to be the most prevalent in the United States.¹⁴ A consignment arrangement allows both the artist and the gallery flexibility, because if the work has not been permanently sold, the artist, subject to the agreement between the parties, has the opportunity to remove the work from the gallery if not completely satisfied with the gallery. Furthermore, under a consignment relationship, the gallery is not required to make a tremendous initial investment in the work. This arrangement can also benefit the little-known artist, by giving the gallery the opportunity to "test-market" the work without taking a tremendous financial risk that the work will not be popular among the art-purchasing

12. *Id.*

13. In F. CONNER, P. KARLEN, J. PERWIN, & D. SPATT, *THE ARTIST'S FRIENDLY LEGAL GUIDE*, 57-60 (1988), Jean S. Perwin, Esq., discusses the advantages of contracts as "business tools" to "prevent the hearer and the speaker from attaching different meanings to the same words." In answering the hypothetical question of "when do you [the artist] need something in writing," Ms. Perwin answers, "always." Ms. Perwin also suggests that the following contract terms should be "red flags" to any artist: manner of payment, copyright rights, reproduction rights, termination and cancellation, artistic control, insurance and delivery costs, expenses, independent contractor status, and a "time is of the essence" clause.

14. ART LAW, *supra* note 7, § 3.1.1, at 342. (The outright sale to a gallery of a unique work of art has traditionally occurred more often in Europe than in the United States).

public.¹⁵

B. Common Law Governing Artist/Gallery Consignment Relationships

1. The Principal-Agent Relationship

Prior to Florida adopting the provisions of the Uniform Commercial Code, the consignment of goods did not create the relation of seller and buyer between the consignor and consignee, but rather that of principal and agent.¹⁶ Thus, under general principles of agency law, "the agent steps into the shoes of [the] principal and acts for him pursuant to the grant of authority vested in him by the principal."¹⁷ Thus, the general rule was that a "sales agent was authorized to do whatever [was] necessary and usual to carry out the purpose of the agency" (the sale).¹⁸ In the absence of any express limitation to the contrary, the usages and customs of the business in which the sales agent is employed furnished the rules by which the authority was measured.¹⁹

15. In ART LAW, *supra* note 7, § 3.1.1, 343-48, the authors provide a comprehensive checklist of principles which should, depending upon the specific factual circumstances involved in the particular instance, be considered regarding the agreement between the artist and gallery. These principles include duration of consignment, scope of consignment, shipping, storage, insurance, artistic control, gallery exhibitions, other forms of promotion, reproduction rights, damage or destruction of consigned works, selling prices, compensation of the gallery, and advances to the artist.

16. See, *Edwards v. Baldwin Piano Co.*, 79 Fla. 143, 83 So. 915 (Fla. 1920). In *Edwards*, the defendant was a piano dealer. The parties executed a contract which provided that all pianos ordered or received by the defendant were to be "held on consignment for sale," and that title to the instruments, and the proceeds when paid, were to remain with the plaintiff. The issue in the case was whether the pianos in question were consigned to the defendant for sale, or whether the defendant was a purchaser of the pianos which would render him liable to levy and execution. According to the court, after ascertaining the intent of the parties from the language of the contract, the parties intended a consignment relationship, which did not create a relationship of vendor and purchaser, but of principal and agent. See also *Lee v. Smith*, 198 So. 197, 199 (Fla. 1940) (consignment agreement indicated no passage of title to goods, and thus plaintiff, a merchant, was merely an agent of the manufacturing company).

17. *King v. Young*, 107 So. 2d 751 (Fla. 2d Dist. Ct. App. 1958) (citing 2 AM. JR. 2D Agency § 2, at 13 (1962)).

18. See, e.g., *Myers v. Stephens*, 233 Cal. App. 2d 104, 43 Cal. Rptr. 420 (1965).

19. See, e.g., *Cornell Computer Corp. v. Damion*, 530 So. 2d 497, 499 (Fla. 3d Dist. Ct. App. 1988); cf. *Southern Crane Rentals, Inc. v. City of Gainesville*, 429 So.

2. *The Uniform Commercial Code—Section 672.326, Florida Statutes*

Florida has substantially adopted Article 2 of the Uniform Commercial Code (UCC) in §§ 671.201-724 of the Florida Statutes. Under the UCC, many transactions that might have been regarded as consignments creating a principal-agent relationship under pre-Code law are regarded as sales, at least in instances where claims by creditors of the consignee are at issue, or as "sale or return" transactions. Section 672.326 of the Florida Statutes distinguishes two somewhat similar situations, "sale on approval" and "sale or return." Each of these transactions allows the buyer to return the subject goods to the seller without breaching the contract.²⁰ The Code distinguishes between these two transactions based upon whether the goods at issue are to be used or resold by the purchaser.²¹

2d 771, 773 (Fla. 1st Dist. Ct. App. 1983); *National Merchandise Co., Inc. v. United Service Auto. Assoc.*, 400 So. 2d 526 (Fla. 1st Dist. Ct. App. 1981).

20. See, Official Comment 1 to U.C.C., § 2-326.

21. FLA. STAT. § 672.326(1) (1989) provides the following:

Sale on approval and sale or return; consignment sales and right of creditors

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

(a) A "sale on approval" if the goods are delivered primarily for use, and

(b) A "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery:

(a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(b) Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

Consignments of goods are regarded as "sales" under the code because of a code provision which states that where goods are delivered to a person for sale and he maintains a place of business where he deals in goods of the kind involved, under a name other than that of the person making delivery, the goods are considered a "sale or return" transaction; and such goods are subject to the claims of the buyer's creditors while in the buyer's possession.²² This principle allows persons who deal with the person who is in possession of the goods to assume that the goods are unencumbered unless public records or their own knowledge suggests the contrary. This rule applies even if an agreement states that it reserves title in the person who makes delivery until the goods are paid for or resold, or expressly provides that the goods are being delivered "on consignment."

A person who delivers goods under such a "sale or return" transaction may, however, take certain steps to protect her rights. According to § 672.326(3), the person making delivery does not relinquish priority to the goods in favor of the buyer's creditors where the person making delivery evidences his interest in the goods by a sign, establishes that the buyer is generally known by his creditors to be substantially engaged in selling the goods of others, or complies with the filing provisions for secured transactions in Chapter 679, Florida Statutes.²³

(c) Complies with the filing provisions of the chapter on secured transactions (chapter 679).

(4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this chapter (§ 672.2-201) and as contradicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (§ 672.2-202).

22. FLA. STAT. § 672.326(3) (1989).

23. *Id.* Many Florida cases have discussed the application of this section, primarily in the bankruptcy context. *See*, Walter E. Heller & Co. S.E. v. Riviana Foods, Inc., 648 F.2d 1059, 1060-61 (5th Cir. 1981); Georgia-Pacific Corp. v. Walter E. Heller & Co. S.E., Inc., 440 So. 2d 666, 669 (Fla. 1st DCA 1983); Bakst v. Wheeler Oil Co., Inc. (*In re* The Denmark Co.), 73 Bankr. 325, 327 (S.D. Fla. 1987); Gennet v. Oriental Rug Agency (*In re* Florida Consumer's Furniture Warehouse, Inc.) 9 Bankr. 7, 9 (S.D. Fla. 1981); *In re* New York Diamond and Jewelry Exchange, Inc., 26 B.R. 32, 33-34 (S.D. Fla. 1982). For an interesting case decided under Texas law, *see* Leverett Co. v. Arthur A. Everts Co. (*In re* Arthur A. Everts Co.), 35 Bankr. 706, 707-708 (N.D. Tex. 1984).

V. Art Consignment Statutes in General

In addition to the various contractual or other relationships that may exist between artists and art dealers, many states have enacted statutes specifically governing the consignment relationship. These statutes, often referred to as artist-art dealer consignment statutes, have been enacted in twenty-six states as of the date of publication of this article.²⁴

New York was the first state to enact an artist-art dealer consignment statute.²⁵ Significantly, this statute, enacted in 1966, for the first

24. These statutes can be found at the following citations: ARIZ. REV. STAT. § 44-1771 - 1778 (Supp. 1984); ARK. STAT. §§ 68-1806 - 1811 (Supp. 1983); CAL. CIV. CODE §§ 1738 and §§ 1738.5 - 9 (Deering 1981 & Supp. 1990); COLO. REV. STAT. §§ 6-15-101 - 104 (Supp. 1984); CONN. GEN. STAT. §§ 42-116K - 116M (West Supp. 1985); FLA. STAT. §§ 686.501 - 1506 (1988); GA. CODE ANN. § 8-5.7 (1985); IOWA CODE ANN. §§ 556D.1-5 (West 1988); ILL. REV. STAT. Ch. 121 ½ §§ 1401 - 08 (Supp. 1987); KY. REV. STAT. §§ 365.850 - 990 (Bobbs-Merrill Supp. 1986); MD. COM. LAW CODE ANN. §§ 11-8A-01 - 04 (1983) & § 11-8A-03 (Supp. 1984); MASS. ANN. LAWS ch. 104A, §§ 1 - 6 (Law. Co-op. Supp. 1985); MICH. COMP. LAWS § 442.311 - 315 (West Supp. 1985); MINN. STAT. ANN. §§ 324.01 -.05 (West Supp. 1987); MO. REV. STAT. §§ 407.900 - 910 (Vernon Supp. 1985); MONT. CODE tit. 22 §§ 2-501 - 2-505 (1985); N. M. STAT. §§ 56-11-1 - 3 (Supp. 1984); N. Y. ARTS & CULTURAL AFFAIRS LAW §§ 12.01 - 03 (McKinney Supp. 1990); N. C. GEN. STAT. §§ 25C-1 - 5 (Supp. 1983); OHIO REV. CODE ANN. §§ 1339.71 - 78 (Anderson Supp. 1984); OR. REV. STAT. §§ 359.200 - 240 (1983); PA. STAT. tit. 73 §§ 2121 - 30 (Purdon Supp. 1987); TENN. CODE §§ 47-25-1001 - 1007 (1984); TEX. BUS. & COM. CODE ANN. art. 9018 (Vernon Supp. 1985); WASH. REV. CODE §§ 18.010.010 - 905 (Supp. 1985); WIS. STAT. ANN. §§ 129.01 - .08 (West Supp. 1984).

25. New York's art consignment statute provides the following:

§ 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, his heirs or personal representatives, delivers or causes to be delivered a work of fine art, craft or a print of his 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 craftsperson 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

time established a consignor-consignee relationship between the artist and art merchant, notwithstanding the existence of any custom, practice, or provision of the Uniform Commercial Code governing transactions involving goods other than works of art.²⁶ The statute also expressly created a principal-agent relationship between the consignor and consignee, and made the art merchant a fiduciary for the artist, such that the work of art is trust property while in the hands of the merchant, and any proceeds from the sale of the work are held in trust for the benefit of the artist.²⁷ Significantly, contrary to the Uniform Commercial Code § 2-326, the provision previously governing works of art as well as sales of other goods, the work would not, under any circumstances, be subject or subordinate to any claims, liens or security

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) no such trust property or trust funds shall be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever.

(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.

2. 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.

N.Y. ARTS & CULT. AFF. LAW §§ 12.01 - .03 (McKinney Supp. 1990).

26. N.Y. ARTS & CULT. AFF. LAW §§ 12.01(a) (McKinney Supp. 1990).

27. *Id.*

interest of any kind, and the statute is specific in stating that any waiver by the artist of the protections of the statute may not inure to the benefit of the art merchant's creditors in any way that would be contrary to the rights of the artist under the statute.²⁸

In an attempt to clarify the effect of the New York statute, the New York legislature amended the statute in 1969 to expressly provide that the proceeds from the sale of works of art were entitled to the same protection as the works themselves.²⁹ In a memorandum of the Attorney General of New York regarding the fiduciary obligation of the art dealer created by the statute, the Attorney General specifically states that the dealer is not relieved of his fiduciary obligations regarding the work until the transaction is completed, and the proceeds from the sale of the work have been delivered to the artist or other consignor.³⁰ The Attorney General rendered this opinion in response to complaints that had been made against art dealers for the alleged wrongful withholding or appropriation of proceeds from the sale of works of art. While New York prosecutors had recognized that similar conduct regarding the actual works of art constituted larceny under the statute, they had been reluctant to entertain such complaints where the proceeds of the sale of the work were at issue.³¹ Thus, the Attorney General's opinion clarified the legislative intent that the statute requires the art dealer to handle the proceeds of the sale of works of art as a fiduciary as well.³²

VI. Florida's Art Consignment Statute

On May 13, 1986, the Florida legislature followed New York's lead and enacted § 686.501-06—the Florida Art Consignment statute. Section 686.502, Florida Statutes, provides the following:

28. *Id.* at § 12.01 (1)(b)(iii).

29. ART LAW, *supra* note 7, § 3.2.2, at 366.

30. *Id.* at 367 (reprinting Memorandum of the Attorney General of New York concerning Article 12). The memorandum indicates that the New York Attorney General relied on *Britton v. Ferrin*, 171 N. Y. 235, 244 (1902) for support regarding this principle.

31. ART LAW, *supra* note 7, § 3.2.2, at 367.

32. For an application of the New York statute, see *Becque v. Egan* (In re Matter of Wilhemina Friedman), 407 N.Y.S.2d 999, 64 A.D.2d 70 (1978), where the Court held that, in light of the New York art consignment statute, an agreement which provided that an art dealer was to put forth his best efforts to sell the works and pay the widow one-half of the sales price was properly treated as a consignment.

686.502. Consignment relationship; notice; proceeds of sales held in trust; contract requirements.—

(1) Whenever a consignor delivers, or causes to be delivered, a work of art to a consignee for the purpose of sale, or exhibition and sale, to the public on a commission, fee, or other basis of compensation, the delivery to and acceptance thereof by the art dealer is deemed to be "on consignment"; and, with respect to the work of art, such consignee shall thereafter be deemed to be the agent of such consignor.

(2) Whenever a consignor delivers or causes to be delivered a work of art to a consignee; such consignor shall give notice to the public by affixing to such work of art a sign or tag which states that such work of art is being sold subject to a contract of consignment, or such consignee shall post a clear and conspicuous sign in the consignee's place of business giving notice that some works of art are being sold subject to a contract of employment.

(3) The proceeds of sale of such a work of art shall be held in trust by the consignee for the benefit of the consignor. Such proceeds shall be applied first in payment of any amount due to the consignor.

(4) Any provision of a contract or agreement whereby the consignor waives any of the provisions of this section is void.

The only legislative history regarding the purpose and intent of this statute is the Senate Staff Analysis and Economic Impact Statement.³³ This Senate staff analysis first recognized that, although Chapter 672, Florida Statutes, covered sales generally, Florida had no statutory law that specifically regulated the sale of art by consignment.³⁴ This report further recognized that Section 672.326, Florida Statutes, does provide generally that goods held "on consignment" are subject to claims of creditors while in the buyer's (consignee's) possession.³⁵ Although the scant legislative history did little more than restate the provisions of the statute, it specifically referred to the most significant provision of the statute—namely, that *the statute includes provisions creating a priority in favor of the artist over the claims, liens or security interest of the creditors of the art dealers to whom the art is consigned.*³⁶ The Senate report is unequivocal that their new statute supercedes § 672.326 and gives the consignor (artist) priority over the art

33. Florida State Archives, Department of State, Series 18, Carton 1557.

34. *Id.*

35. *Id.*

36. *Id.*

dealer's creditors.³⁷

Although the history of the development of the New York art consignment statute unambiguously reflects a legislative intention that the statute circumvent previously applicable Uniform Commercial Code provisions,³⁸ it is exactly this issue that is currently at the heart of Florida's first case interpreting this recently enacted statute.³⁹ In that case, the plaintiff artist consigned sixteen of his paintings to John Guggenheim, an individual who allegedly misled the plaintiff into believing that he was a member of the Guggenheim family of New York City, nationally renowned patrons of the arts. The plaintiff consigned these paintings to Guggenheim for display and sale at Mr. Guggenheim's "gallery." The plaintiff transferred possession of these paintings to Mr. Guggenheim in November 1986, July 1987 and August 1987. The only "consignment agreement" entered into between Messrs. Shuttie and Guggenheim was an undated and unsigned document on stationery of the Guggenheim Gallery that listed over thirty "works on consignment by Zois Shuttie" with the corresponding prices for the various works. This document was the exclusive written memorial for the consignment agreement, although the parties agreed that all other terms of the consignment relationship were governed by oral agreements or the custom and practice of the art industry.

The plaintiff testified that neither he nor, to his knowledge, Mr. Guggenheim, affixed any sign or tag to the consigned works to notify third persons that the displayed works were being sold subject to a contract for consignment. In November 1987, Mr. Guggenheim approached Robert Inglesias, the owner of the Festa Restaurant in Miami, and suggested that plaintiff's sixteen paintings be displayed at

37. *Id.*

38. Interestingly, a New York state Senator anticipated that the U.C.C. would act as such a "foil" in as early as 1975, and clearly enunciated the New York legislature's intent. In the MEMORANDUM OF NEW YORK STATE SENATOR ROY GOODMAN CONCERNING ARTICLE 12, N. Y. 1975 Legis. Ann. 96, reprinted in ART LAW, *supra* note 7, § 3.2.4, at 369, Senator Goodman introduced a bill to clarify that the New York art consignment statute is the exclusive governing statute regarding the consignment relationship between artists and art — dealers, and creditors of art dealers may not, in light of the statute, avail themselves of the rights under U.C.C. § 2.326 or any other provision of the U.C.C. to assert claims against consigned works of art or the trust funds resulting from the sale of such works.

39. *Zois Shuttie v. Festa Restaurant, Inc.*, No. 88-43158 (03), 11th Judicial Circuit, Dade County, Florida (July 27, 1989) (general master decision); *Zois Shuttie v. Festa Restaurant, Inc.*, No. 88-43158 (03), 11th Judicial Circuit, Dade County, Florida (Dec. 13, 1989) (final judgment).

the restaurant.⁴⁰ The transfer of the paintings from Guggenheim to Festa was evidenced by a two-page document on the stationery of "The Guggenheim Collection" listing sixteen paintings by Zois Shuttie and a price for each. As security for these paintings, Festa loaned Guggenheim \$25,000. When he learned of the transfer of the paintings to Festa, the plaintiff unsuccessfully sought the return of their possession. Therefore, the plaintiff filed a replevin action seeking the return of the paintings that had been transferred in violation of his consignment agreement, and became the first person to seek the protection of Florida's Art Consignment statute.

The circuit court, however, affirmed the Report of the Special Master which stated that, under the circumstances, Mr. Shuttie was not entitled to the protections afforded by the statute because of his failure to comply with the statutory provisions regarding the posting of a sign or tag on consigned works to provide notice to third persons of the artist's interest in the work.⁴¹ Therefore, the court denied plaintiff's replevin claim, and allowed Festa Restaurant to maintain possession of the paintings as security for the loan to Mr. Guggenheim.⁴² The plaintiff then appealed this finding to the Third District Court of Appeal of Florida where the case is currently pending.⁴³

Although minimal legislative history exists regarding Florida's Art Consignment statute, it is unlikely that the legislature envisioned such a result. Instead, the Florida legislature, like the New York legislature, intended that this statute provide increased protection for artists, and did not intend that the statute be interposed as an additional procedural hurdle for an artist to overcome to ensure that the artist's interest in the work is maintained. Advocates of artists' rights, however, will have to hope that the appellate court either reverses the holding of the circuit court, or that the legislature amends the statute to ensure that protection of the artist—the primary purpose of the statute—remains the focus of the judiciary in interpreting the statute.

40. The terms of the transfer were the following: 1) possession of the paintings would be transferred to the restaurant without cost except for maintenance and insurance of the paintings, 2) persons interested in purchasing the paintings would be referred to Mr. Guggenheim, and, 3) in the event a sale was consummated, the restaurant would receive a commission of twenty percent of the selling price of the work.

41. *Zois Shuttie v. Festa Restaurant, Inc.*, No. 88-43158 (103), 11th Judicial Circuit, Dade County, Florida, Final Judgment (Dec. 13, 1989).

42. John Guggenheim was never made a party to the lawsuit because he disappeared from Dade County.

43. Case. No. 90-85.

VII. Conclusion

Although artists should be encouraged by the growing number of states that have enacted art consignment statutes in an effort to protect the rights of artists and their work, the artistic community should be aware of the requirements of such statutes. As Mr. Shuttie learned, these statutes, while intended to increase the protection previously afforded the artist under the Uniform Commercial Code, contain their own procedural quagmires, and the failure to comply with them can prove disastrous to an artist seeking the protection of the statute. As a result, these statutes may be simply a "trap for the unwary artist."